LIBERTY

LIBERTY'S BRIEFING ON THE JUDICIAL REVIEW AND COURTS BILL FOR SECOND READING IN THE HOUSE OF COMMONS

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ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. Liberty approaches the Judicial Review and Courts Bill with the benefit of 87 years of experience of providing legal advice and supporting landmark cases. Our legal team provides services to claimants involved in judicial review cases as well as bringing public interest challenges in the areas of human rights and equality law. This history means we are well placed to comment on the operation of judicial review as well as the critical role it plays in upholding justice and accountability within the UK's constitutional settlement. It is within this context that we express our concern about the Judicial Review and Courts Bill and the deleterious effects it stands to have upon claimants, Government decision-making, judicial discretion, and the rule of law. This briefing deals only with the first two clauses of the Bill – those dealing with judicial review. For analysis of the courts aspects, see submissions from Public Law Project, Inquest and others.

2. Clause 1 of the Bill stands to weaken the effectiveness of remedies available to courts. The Government claims that it is giving extra tools to judges, but by imposing a presumption in favour of their use, it is in fact restraining the freedom of the courts to rule as they see fit. By introducing prospective-only remedies, it is making another concerted effort to insulate itself from accountability at the cost of those who have been let down by a public body and anyone who may be in the future. Clause 2 intends to remove a vital safeguard against life-altering decisions being forced upon people due to mistakes. Based on faulty statistical reasoning, the reversal of *Cart* will lead to people who would otherwise have won their cases being deported or made homeless, entirely due to this Bill.

3. The point of judicial review is to ensure good decision-making by public bodies. It is concerned not with the result in itself, but that the right procedures are followed and the body is operating within the law. Within the separation of powers that forms our political system it is an important check from one branch upon another, acting in the interest of the public. This Bill does nothing to improve the decision-making of public bodies. In many ways it will have the opposite effect. Making challenges harder to bring and remedies less effective may make things easier for Government, but it is at the cost of the general public.

4. The Judicial Review and Courts Bill constitutes just one part of a broader programme of constitutional reform pursued by this Government, with an independent review of the Human Rights Act 1998 currently under way, a review of the Constitutional Reform Act 2005 on the horizon, and a succession of relevant pieces of legislation such as the

Elections Bill, the Police, Crime, Sentencing and Courts Bill and the Nationality and Borders Bill currently in front of Parliament. Each of these pieces should be seen as part of a whole: a concerted attempt to shut down potential routes of accountability and exert the power of the executive over Parliament, the courts and the public.

CLAUSE ONE: REMEDIES

5. Clause 1 amends the Senior Courts Act 1981 (SCA) to make provision for quashing orders either to not take effect until a specified date, or to come into force without any retrospective effect. In usual practice, a quashing order would come into force immediately and operate as if the decision that had been ruled unlawful had always been null and void. Remedies in judicial review are discretionary and will often result in a declaration that the act was unlawful, with remedial action left to the public body. But when a court does decide to issue a quashing order, it is right that the unlawful decision should stand no longer and those affected should have proper redress.

SUSPENDED QUASHING ORDERS

6. New clause 29A(1)(a) SCA allows for the use of suspended quashing orders, which would delay the imposition of a quashing order until a specified date. Up until this date was reached, the unlawful decision or policy would be treated as if it were valid. There are some exceptional cases where it may make sense to suspend the effect of a quashing order, when neither immediate quashing nor a declaration of unlawful action seems appropriate. In *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* for example, the court found that the Secretary of State had breached his public sector equality duties in making regulations allowing tuition fees of up to £9,000 without properly assessing the policy's potential discriminatory impact, but declined to quash the regulations due to expected logistical difficulties. Instead, the court just issued a declaration. The report of the Independent Review of Administrative Law (IRAL), which was established to feed into the Bill, says of the case:

> *"As a remedy, a suspended quashing order would have had more teeth. Such an order would have indicated that that the Regulations would be quashed within a couple of months of the Court's judgment unless the Secretary of State in the meantime properly performed his "public sector equality duties" and considered in the light of that exercise whether the Regulations needed to be revised. Such a remedy would have ensured that the Secretary of State was not left free to*

disregard his statutory duties in regard to the Regulations"[1]

7. While we acknowledge that this may be a legitimate use of this power, Liberty disagrees with IRAL that the possibility of making such an order was "ruled out by the UK Supreme Court in *Ahmed v HM Treasury (No 2)".*[2] In that case, the court readily concluded that it has the discretion to "suspend the effect of any order that it makes".[3] The difficulty was that the court had already made a concrete decision which held that the provisions were void and did not want to undermine this decision. We contend that the making of these orders remains at the court's discretion,[4] although they have usually declined to do so on the basis that it will often conflict with fundamental principles of administrative law.[5] We recognise however that there is debate on this point, and so clarifying that suspended quashing orders are available is not an illegitimate aim.

8. Liberty is however entirely opposed to any presumption in favour of suspending a quashing order. New clause 29A(9) SCA states that if it appears to the court that a suspended quashing order would "as a matter of substance, offer adequate redress in relation to the relevant defect", the court must make one, "unless it sees good reason not to do so", based on a number of factors. This is not what was recommended by IRAL, who suggested just to "give courts the option" of making such an order.[6] The imposition of this presumption constitutes a clear fettering of judicial discretion, in contrast to the Ministry of Justice press release accompanying the Bill, which hailed it as handing "additional tools to judges".[7] Imposing a presumption is not handing judges additional tools, rather it has the potential to hinder them from making use of the rest of their toolkit, even when it may be more appropriate to do so.

9. The imposition of a list of factors to which the court must have regard at new clause 29A(8) likewise serves to hinder flexibility and discretion still further. It should be noted that while IRAL did not suggest a presumption, a list of factors also goes against the panel's report, which said "it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would

[1] Independent Review of Administrative Law, March 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf, §3.54.
[2] IRAL, §3.57.
[3] [2010] UKSC 5, [4] (Ahmed no.2)
[4] M. Elliot, 'Judicial review reform I: Nullity, remedies and constitutional gaslighting', Public Law for Everyone (6th April 2021) https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting.
[5] [2010] UKSC 5, [4] (Ahmed no.2).
[6] IRAL, §3.49.
[7] Ministry of Justice, New Bill hands additional tools to judges, 21 July 2021, https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges.

be awarded".[8]

10. While undermining the "flexibility" that the Ministry of Justice has held up as a justification for this measure, suspended quashing orders also have the potential to introduce greater complexity and uncertainty into the currently simple system of quashing orders, and they are likely to give rise to satellite litigation. If the Government is determined to legislate to clarify that courts may suspend the effects of a quashing order, Liberty is of the strong opinion that there must not be any presumption in favour of their use.

PROSPECTIVE-ONLY REMEDIES

11. New clause 29A(1)(b) SCA allows for quashing orders to be made including provision "removing or limiting any retrospective effect of the quashing" – in other words, a prospective-only remedy. In Liberty's view prospective-only remedies have the potential to create opportunities for injustice in individual cases, weaken the rule of law, and introduce unnecessary layers of complexity into an already functioning system. We believe they could have a chilling effect on potential claimants and hinder their access to justice. IRAL made no recommendation for their introduction. They should be excised from the Bill entirely.

12. The imposition of a prospective-only remedy would result in halting only the future effect of an unlawful decision or secondary legislative provision, with its previous effect being treated as if it had been valid. This creates a situation in which two otherwise identical cases are treated entirely differently depending on whether they were affected before or after a court judgment. Those who were impacted by the unlawful decision before the judgment would have been just as wronged as those impacted after, but would not have recourse to any remedy. This means that an individual claimant bringing a case may help to overturn an unjust decision, but not improve their own situation. An obvious example would be a challenge to the eligibility for welfare benefits – a successful challenge followed by the imposition of a prospective-only remedy could see a claimant acknowledged as having been treated unfairly, but still coming out without the benefit the court recognised they were owed.

13. To take an important real-world example, it is worth considering the impact that prospective-only remedies would have had on the individuals affected by the *UNISON* case, which concerned fees to access employment tribunals.[9] Having found that

[8] IRAL, §3.69.
[9] R (UNISON) v Lord Chancellor [2017] UKSC 51

Parliament could never have intended a clear derogation from the right of access to justice, the Supreme Court quashed the order which required individuals to pay to use the employment tribunal. The remedial consequence of the quashing order was that the Government was required to retrospectively refund the claimants who had been charged fees. A prospective-only remedy in this scenario would have denied them this refund and therefore would have been a serious injustice to the claimants whose fundamental rights to access to justice had been found to have been violated.

14. All this is concerning for a number of reasons. The arbitrariness and clear prospect for injustice in individual cases undermines the rule of law. What is more, the policy appears to risk breaching the Article 6(1) ECHR right to a fair trial, which requires an effective judicial remedy.[10] It is hard to see how a prospective-only remedy would provide a just outcome to an individual claimant. Looking at the position in other jurisdictions, it is notable that courts are usually only prepared to hand down a prospective ruling in either cases of constitutional importance[11] or cases which would have serious economic repercussions on a large number of good faith relationships.[12] In practice this happens extremely rarely, and these are very limited categories which have been carefully contained on the basis of subtle judicial reasoning and incremental developments. The European Court of Human Rights has also held in a very clear judgment that certain remedies which have prospective-only effect cannot be regarded as effective and therefore would be a violation of Article 13 ECHR.[13]

15. With this in mind, it appears likely that the introduction of prospective-only remedies would have a chilling effect upon future potential claimants. With their use not only allowed but encouraged, this sends a strong signal to an individual who has been wronged by a public body that their actions are not worth challenging, as even if they win their situation may not improve. Even if that prospective claimant does still decide to go ahead, they could find greater barriers in their path to progressing. Applications for legal aid include a requirement to demonstrate a tangible benefit to the claimant were their case to be successful. With prospective-only remedies encouraged, the likelihood of a tangible benefit to a claimant is reduced to such a degree as to call this into question. With no legal aid and little prospect of benefiting even if successful, there is seemingly very little incentive for someone who has been negatively affected by the

[10] Běleš and Others v Czech Republic, App No. 47273/99, 12 November 2002, §49.
[11] Canada – Smith, "Canada: The Rise of Judgements with Suspended Effect", Ch.11 in E. Steiner, Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions, p.11.
[12] ECJ - Case C-209/03, §69.
[13] Ramirez Sanchez v. France [GC], 2006 §165-166.

unlawful action of a public body to bring a case.

16. Even when a case has been brought and a decision found unlawful, the Bill stands to threaten the ability of people to bring collateral challenges. New clause 29A(5) states that when a prospective-only or suspended quashing order has been made, the unlawful act "is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect", either retrospectively or until the quashing comes into effect. This situation in which the court pretends an unlawful decision was valid for a period of time would appear to inhibit the ability of a person to rely on its unlawfulness in other proceedings. In other words, a person could be arrested under a regulation ruled unlawful by a court but would not be able to use this in their defence. The IRAL report quotes Professor David Feldman on the "intuitive revulsion" felt against this state of affairs, and concludes, "we readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible".[14]

17. As well as depriving individual claimants and others who may have been wronged by unlawful decisions of proper redress, prospective-only remedies also have the potential to cause more general harm. Prospective-only remedies weaken the rule of law because they allow the Government and public authorities to act without fear of meaningful repercussions. The Government is effectively encouraged to take risks and act unlawfully, and the only consequence is that the decision will eventually be reversed should it be successfully challenged in future. Good decision-making is the foundation of effective administration, and, as was acknowledged by a significant number of the public bodies which made submissions to IRAL, the potential of being challenged via a claim for judicial review leads to better decision-making.[15] Limiting the consequences for public bodies of making unlawful decisions will only lead to poorer decision-making.

18. Alongside the harm that prospective-only remedies stand to do to individual claimants, the public more broadly, and the Government and public authorities, their introduction also stands to have a deleterious effect on the courts. While the previous Lord Chancellor, who introduced this Bill, repeatedly spoke of his "duty to prevent the judiciary being dragged into politics", prospective-only remedies stand to have the opposite effect and force courts to create new law.[16] There is a significant risk that the

[14] IRAL, §3.66.
[15] *Inter alia,* the responses of the Crown Prosecution Service, the Victims Commissioner, North Norfolk District Council and Arun District Council.
[16] Edward Malnick, Robert Buckland: Judges have become more restrained since ruling against prorogation of Parliament, The Telegraph, 17 July 2021, https://www.telegraph.co.uk/politics/2021/07/17/robert-buckland-judges-have-become-restrained-since-ruling-againstprorogation.

use of prospective-only rulings could unravel the carefully constructed constitutional balance between the judiciary and Parliament. As Lord Nicholls pointed out in the *Spectrum* case, "the essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function."[17] It lies outside these constitutional limits because, as Tom Hickman QC has pointed out, prospective-only remedies "would permit courts to exercise a quasi-legislative power including to override primary legislation".[18] In making a quashing order that has only prospective effect, the judge is essentially ruling that the decision had been lawful up until that point, even if it had conflicted with the will of Parliament:

> *"This would allow Judges permanently to cancel the invalidity of unlawful decisions or instruments insofar as they pre-date the court's ruling. Again, it is not proposed that such a power would be limited to procedural or technical defects in the impugned act: it could be used even where the decision, act or instrument is found to be contrary to the express words of a statute."*[19]

19. This would, in effect, confer upon the courts "a power to legislate to change Acts of Parliament and alter private rights".[20] Taken together, the situation that arises from the introduction of prospective-only remedies is one of uncertainty and complexity in its practical application, concern in its constitutional implications, weakening of Government accountability, and great potential injustice for people wronged by the decisions of public bodies. On clause one, Liberty believes there must be no presumption in favour of these remedies, collateral challenges must be expressly preserved, and the power to make prospective-only remedies must be removed from the Bill.

CLAUSE TWO: CART JUDICIAL REVIEWS

20. Clause 2 of the Bill would amend the Tribunals, Courts and Enforcement Act 2007 to reverse the effect of the Supreme Court decision in *R (Cart & Ors) v The Upper Tribunal*, which would exclude from judicial review Upper Tribunal decisions to refuse permission to appeal decisions of the First-tier Tribunal. What this would do in practice

[17] [2005] UKHL 41, §28.
[18] Tom Hickman QC, Quashing Orders and the Judicial Review and Courts Act, UK Constitutional Law Association, 26 July 2021, https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act.
[19] Ibid.
[20] Ibid.

is remove a vital safeguard in cases of the highest importance for very little benefit. Liberty recommends that clause 2 should be removed from the Judicial Review and Courts Bill.

21. Unlike introducing prospective-only remedies or a presumption in favour of suspended quashing orders, reversing *Cart* was an IRAL recommendation.[21] However, it was based upon statistics that the Government now admits were wrong. The IRAL recommendation was based upon a success rate of just 0.22% for *Cart* judicial reviews – an incorrect statistic arrived at by counting all cases without data available on the outcome as failures.[22] The Office for Statistics Regulation investigated the statistic,[23] and the Government now suggests that the actual rate of success is 3.4%. Despite this new figure being 15 times higher than that which the recommendation was based on, the Government's position remains that *Cart* judicial reviews are a "disproportionate use of valuable judicial resource", and so the decision in Cart should be overturned.[24]

22. What is more, this new number is based upon a very particular method of defining success in *Cart* judicial reviews: not only the overturning of the refusal of permission to appeal by the Upper Tribunal, but also permission to appeal being granted and the appeal against the First-tier Tribunal's decision being allowed. These subsequent steps go beyond what would be regarded as success in a *Cart* judicial review, and their addition dismisses the important benefit that *Cart* judicial reviews have in correcting errors of law, even if the eventual appeal is not successful. Public Law Project's analysis suggests that the true number of success in *Cart* judicial reviews is more like 5.7%, or over one in 20.[25] Working from the Government's average of around 750 *Cart* JR cases annually, this amounts to more than 40 people a year who would be incorrectly denied their permission to appeal were *Cart* to be reversed.[26]

23. While it is remarkable that the Government is persisting with this policy despite its statistical basis in its own telling being out by a factor of 15 (or if applying a more usual definition of success, by a factor of 25), it is not the number of cases but the nature of

[21] IRAL, §3.46.
[22] Joe Tomlinson and Alison Pickup, Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews, UK Constitutional Law Association, 29 March 2021, https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews.
[23] Public Law Project, Government judicial review numbers are wrong: Stats regulator concurs, 11 June 2021, https://publiclawproject.org.uk/latest/the-governments-judicial-review-numbers-are-wrong-stats-regulator-agrees.
[24] Ministry of Justice, Judicial Review Reform Consultation: The Government Response, July 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf §36.
[25] Public Law Project, Judicial Review and Courts Bill briefing for House of Commons Second Reading, §19 (Not yet online).
[26] Ministry of Justice, Judicial Review and Courts Bill: Impact assessment, 21 July 2021, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/JRImpactAssessmentFinal.pdf §32.

them that is most concerning. Most *Cart* judicial reviews relate to immigration and asylum cases. Many of the remainder concern access to benefits for disabled people and others facing destitution. The result of these appeals may decide whether someone may have the means to live and be housed, and whether someone may be deported, separated from their family and face potential mistreatment. The Government is not unaware of this. The Bill's impact assessment states that "the majority of *Cart* cases relate to Immigration and Asylum, therefore those who lose out are more likely to have particular protected characteristics, for example in respect of race and/or religion or belief".[27] This is seen as acceptable, as it will "reduce the number of High Court Judge and Upper Tribunal Judge sitting days required, so saving judicial time and allowing Judges to focus on other matters".[28]

24. In their response to the Government consultation, the Immigration Law Practitioners' Association (ILPA) provided an illustration of what the Government intends to jettison to free up time for "other matters". ILPA listed 57 case studies of successful *Cart* JRs omitted from IRAL's report, including that of a Ugandan lesbian whose initial appeal had been sabotaged by a false letter to the court from a homophobic acquaintance,[29] and a victim of trafficking who had originally been deemed to have voluntarily come to work despite having been trafficked into the country as a child.[30] The cases, ILPA wrote, demonstrate how removing *Cart* would have "extremely serious consequences for the people affected":

> *"These are all cases where a person's fundamental rights were engaged, many of them asylum claims, and where the Upper Tribunal made the wrong decision in refusing to grant permission to appeal. These examples demonstrate a significant risk if changes are made to Cart JRs which mean that challenges to unlawful decisions are not permitted to proceed beyond Upper Tribunal stage".*[31]

25. The Government proposes to achieve the reversal of *Cart* through the use of an ouster clause. IRAL was not asked to consider ouster clauses and made no recommendations in relation to them, although the subsequent Government consultation did solicit views on their use. The press release announcing the Bill stated that the Bill "will not address ouster clauses in the way set out in the consultation. Instead, it is expected that the

[27] Impact assessment, §34.
[28] Impact assessment, §36.
[29] Immigration Law Practitioners' Association, ILPA's response to the government's consultation on Judicial Review Reform, 28 April 2021, case study 17, https://ilpa.org.uk/wp-content/uploads/2021/04/28.04.21-ILPAs-GRAL-response-1.pdf.
[30] ILPA response, case study 48.
[31] ILPA response, p3.

legal text that removes the *Cart* judgment will serve as a framework that can be replicated in other legislation".[32] The Government has also indicated that it intends to "carry out an internal follow-up exercise to identify and review (with a view to potentially updating where necessary) the other ouster clauses currently on the statute book, including the ouster clause in *Privacy International*".[33] As with the manifesto commitment relating to the Human Rights Act, it is concerning to consider what "updating" means in this context.

26. The main problem however remains with the ouster of *Cart*. *Cart* JRs constitute a vital last line of defence and this would be true no matter the success rate. Indeed, as a matter of principle, this is a view that the Government has some sympathy with, albeit in a slightly different context. In their response to the Ministry of Justice's follow up consultation, the Government wrote in relation to wider judicial review considerations:

> *"Respondents argued that, at most, there are a handful of court decisions that were arguably incorrect and that, therefore, there isn't a wider problem to address. This reasoning is predicated on the view that a problem is not a problem unless it happens often. The Government is not persuaded by that argument, since even a single case can have wide ramifications."*[34]

27. Liberty suggests that the Government takes its own reasoning to heart. A problem is still a problem when it happens one time in 20, especially when the ramifications can be so catastrophic for the people involved. Clause 2 should be removed from the Bill entirely.

CONCLUSION

28. When the Bill was published, much of the commentary on it centred around its provisions being less extreme than had been feared. While there is truth in this, it is a manufactured situation. The Government commissioned a panel of experts, went vastly beyond their suggestions in its follow-up consultation, had those comprehensively rejected, and has now returned to a point between the two. While closer to IRAL than a Bill based upon the Government's consultation document would have been, it is worth remembering that IRAL did not recommend prospective-only remedies, did not recommend a presumption for suspended quashing orders, did not recommend

[32] MoJ, New Bill hands additional tools to judges
[33] MoJ, Judicial Review Reform Consultation: Government Response, §55.
[34] MoJ, Judicial Review Reform Consultation: Government Response, §16.

imposing on the courts a list of factors to determine their use, did not recommend ouster clauses, and based their recommendation on *Cart* on statistics now shown to be wrong by a multiple of at least 15. We have been left with a Bill that is bad for claimants bringing cases, disincentivises others who have been wronged bringing their own, fetters judicial discretion while dragging courts into matters of policy, and jettisons a vital safeguard for very little gain. There is nothing in this Bill to help improve the quality of decision-making: it just risks making it worse. The judicial review aspects only make up a very small amount of the Judicial Review and Courts Bill and this briefing does not touch on the rest of it, but of the relevant clauses there is very little worth salvaging. Liberty urges MPs to remove clause 2, prospective-only remedies, and any presumption in favour of using suspended quashing orders from the Bill.

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