House of Commons Library

Research Briefing

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The Government's judicial review reforms and the Judicial Review and Courts Bill

Summary

Contents

Summary

The Judicial Review and Courts Bill 2021-22 is currently progressing through Parliament. Among other things, it would implement recommendations of the Independent Review of Administrative Law (IRAL), commissioned by the (then) Lord Chancellor Robert Buckland in 2020 and chaired by the former Justice Minister, Lord Faulks.

In some respects, the Bill as originally passed by the House of Commons would have gone further than IRAL had recommended in early 2021. For example, the Government's proposals included "prospective-only" quashing orders and a "presumption" in favour of special quashing order powers being used.

The House of Lords has amended the Bill (PDF). These amendments will be considered by the House of Commons on Tuesday 26 April 2022.

It will be useful to read this briefing alongside the Library's paper:

- Judicial Review and Courts Bill: Lords Stages and Amendments

That paper provides a high-level overview of all the changes the House of Lords made to the Bill, including the non-judicial-review provisions.

This paper provides a more detailed look at the debate on **Part 1 of the Bill**, concerned with judicial review. It explains what the key amendments made by the House of Lords would do, the debates that took place on them, and how they fit into the Government's wider policy proposals to reform judicial review.

Lords Amendments

The House of Lords has made substantial amendments to **clause 1** and completely replaced **clause 2** of the Bill. Specifically, it proposes:

- to remove "prospective-only" quashing orders from **clause 1**;
- to remove "the presumption" in favour of making suspended or limited quashing orders from **clause 1**; and
- to retain Cart/Eba judicial reviews, but to restrict the availability of onward appeals in an **alternative clause 2**.

The Government has previously indicated that it intends to go further on judicial review reform, perhaps through further legislation, in the next parliamentary session.

1 Special quashing order powers

1.1 What are quashing orders?

Quashing orders are a type of remedy granted by courts and tribunals. A "declaration" (another type of remedy) simply states that something unlawful has happened. A quashing order is more prescriptive: it sets out explicitly the consequences of that unlawful act or omission. As the Lords Constitution Committee put it in their recent report:

> A quashing order is an order that nullifies or invalidates decisions of inferior courts, tribunals, public authorities and any other body or person that is susceptible to judicial review.

A quashing order might, for example, say that a provision in secondary legislation was unlawful and therefore void and of no effect.

1.2 What are suspended quashing orders?

Normally, if a court makes a quashing order it takes effect immediately. A "suspended" quashing order comes into effect on some future date, for example, if certain conditions are or are not met by that point.

A suspended quashing order might plausibly be used in some situations to allow Parliament, or a devolved legislature, to legislate to remedy an unanticipated legal defect.[1]

The public interest might better be served by delaying a "quashing" if not delaying would cause considerable administrative inconvenience or negatively impact third parties who have relied on the presumed legality of administrative action.

1.3 What are prospective-only quashing orders?

By default, a quashing order has retrospective effect. This means, for example, that if regulations are found to be invalid, they are treated as

[1] Suspended and prospective-only quashing orders are specifically recognised as powers of a court in the context of devolved competence and the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006.

having been invalid from the point that they were purportedly made, rather than from the point that the judge found them to have been invalid.

This ensures that public authorities cannot avoid the consequences of having acted illegally, and ensures that wronged parties can be restored to the position they would have been in but for an illegal act.

The retrospective effects of a normal quashing order might detrimentally affect third parties, and cause either unfairness or administrative uncertainty.

A "prospective-only" quashing order is one that departs from the default position. It treats some or all things done before a court's decision as though they were lawfully done and valid, even though they were not.

1.4 Why does the Government want to reform this?

Independent Review of Administrative Law

The Independent Review of Administrative Law (IRAL) recommended in its report that the Government should legislate to confirm the availability of suspended quashing orders for courts and tribunals.[2] There has been some uncertainty in case law about the extent to which suspended remedies are already available, and the circumstances in which it is appropriate for courts and tribunals to use them.[3]

IRAL did not recommend for or against prospective-only quashing orders. It only noted that some respondents to its call for evidence proposed them.[4]

Government consultation

The Government consulted on going further, to legislate not just for suspended quashing orders but also for prospective-only quashing orders.[5] It also consulted on whether suspended and/or prospective-only quashing orders should presumptively or mandatorily be favoured over conventional quashing orders in certain cases.[6]

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2 The Independent Review of Administrative Law (PDF) (IRAL), CP 407, March 2021, paras 3.49 and 3.68.

3 IRAL para 3.50-3.59; Lewis Graham, Suspended and prospective quashing orders: the current picture, UK Constitutional Law Association, 7 June 2021; Joshua Rozenberg, Pulling the plug on void decisions, A Lawyer Writes, 1 August 2021, Gabriel Tan, Recent developments on declaratory relief in public law, UK Constitutional Law Association, 6 April 2022.

4 IRAL para C20.

5 Ministry of Justice, Judicial Review Reform: The Government Response to the Independent Review of Administrative Law (PDF), CP 408, March 2021, paras 60-68.

6 ibid. paras 69-84.

1.5 What has the Government proposed?

Following their consultation, the Government introduced the Judicial Review and Courts Bill 2021-22. **Clause 1** of that Bill adds a **new section 29A** to the **Senior Courts Act 1981** and new measures into **section 17** of the **Tribunals, Courts and Enforcement Act 2007**.

The cumulative effect of these changes is to:

- clarify that courts and tribunals can make both suspended and prospective-only quashing orders;
- create a rebuttable presumption that courts and tribunals will make these kinds of quashing order, rather than a conventional one, when something is found to have been done unlawfully; and
- stipulate the factors a court or tribunal must take into account when deciding whether to make these kinds of quashing order.

The presumption

The Bill as introduced provided (emphasis added):

> If the court is to make a quashing order, and it appears to the court that an order including provision [suspending or limiting or removing the retrospective effects] would, **as a matter of substance, offer adequate redress** in relation to the relevant defect the court **must** exercise the powers in that subsection accordingly **unless it sees good reason not to do so**.[7]

This would function as a rebuttable presumption in favour of making a suspended quashing order and/or a quashing order whose retrospective effects are limited. The presumption could be rebutted if:

- it appeared to the court that a limited or suspended remedy would not provide "adequate redress"; or
- the court otherwise saw "good reason" not to suspend or otherwise limit its order.

The Government argues that this is a very weak statutory presumption that leaves open a wide degree of judicial discretion. It says that it serves simply to "nudge" judges: reminding them of the availability of the special remedies and encouraging them routinely to consider whether to use them.[8]

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7 Under proposed new subsection 29A(9) of the Senior Courts Act 1981.

8 HL Deb 31 March 2022 c1727.

Factors to be taken into account

The Bill also set out a range of factors that a court or tribunal must take into account when deciding whether to make a suspended or prospective-only quashing order. Any court or tribunal must have regard to:

- the nature and circumstances of the relevant defect;
- any detriment to good administration that would result from exercising or failing to exercise the power;
- the interests or expectations of persons who would benefit from the quashing of the impugned act;
- the interests or expectations of persons who have relied on the impugned act;
- so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
- any other matter that appears to the court to be relevant.[9]

1.6 Responses to the proposals

There have been, broadly speaking, four main criticisms made about **clause 1**:

- that either or both special types of quashing order undermine the effectiveness of judicial remedies;
- that prospective-only quashing orders are constitutionally objectionable because they effectively enable a court to decide that unlawful acts should be treated as if they are lawful;[10]
- that "the presumption" is contrary to the stated goal of providing remedial flexibility to courts; and
- that the factors to be taken into account when weighing up whether to suspend or retrospectively limit a quashing order should be broader and/or strike a different balance.

[9] Under proposed new subsection 29A(8) of the Senior Courts Act 1981.

[10] Tom Hickman, Quashing Orders and the Judicial Review and Courts Act, UK Constitutional Law Association, 26 July 2021.

Joint Committee on Human Rights

The Joint Committee on Human Rights made two recommendations about the Bill in its report of December 2021 (PDF).[11] Specifically it recommended:

- removing "the presumption" from the Bill; and
- adding to the factors to be taken into account the need for an "effective remedy" under Article 13 of the European Convention on Human Rights.

Lords Constitution Committee

The Lords Constitution Committee, in its report on the Bill of February 2022, encouraged the House of Lords to reflect on:

> whether clause 1 achieves the correct balance between providing courts with discretion and placing a presumption on how they should act.[12]

Echoing the Joint Committee on Human Rights, it also emphasised the importance of ensuring that claimants have an "effective remedy":

> the House may wish to explore the relationship between clause 1 and Article 13 of the European Convention on Human Rights.[13]

Other organisations

Several organisations, in their Parliamentary briefing materials, called for both the prospective-only quashing orders and "the presumption" to be removed from the Bill. Those organisations include the Law Society for England and Wales, Public Law Project (PDF), Liberty (PDF), JUSTICE and the Bingham Centre for the Rule of Law.[14]

The Bar Council for England and Wales also expressed its opposition to a "presumption" in its response to the Government consultation that preceded the Bill's introduction.[15]

Professor Richard Ekins of Policy Exchange's Judicial Power Project welcomed clause 1 as a "carefully considered, limited response" to the *Ahmed (No. 2)* Supreme Court judgment. He described the presumption as "helping courts

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11 Joint Committee on Human Rights, Legislative Scrutiny: Judicial Review and Courts Bill (PDF), HC 884 HL Paper 120, 1 December 2021.

12 Constitution Committee, Judicial Review and Courts Bill (PDF), HL Paper 160, 18 February 2022, para 14.

13 ibid.

14 Law Society, Parliamentary Briefing: Judicial Review and Courts Bill – House of Commons second reading, 29 October 2021; Public Law Project, Judicial Review and Courts Bill Briefing for House of Commons Second Reading (PDF), September 2021; Liberty, Judicial Review and Court Bill Briefing for Second Reading in the House of Commons, October 2021; Justice, Judicial Review and Courts Bill House of Lords Committee Stage Supported Amendments (PDF), February 2022; Bingham Centre, Judicial Review and Courts Bill: A Rule of Law analysis (PDF), 26 October 2021.

15 Bar Council, Response to Government consultation on Judicial Review Reform (PDF), 30 April 2021.

to] avoid needless uncertainty or disruption, while still recognising and quashing unlawful action".[16]

1.7 Debate in the House of Lords

Views in the House of Lords varied as to the desirability of **clause 1** as drafted.

The objection to prospective-only quashing orders

Some Peers were critical of Parliament taking steps to recognise in statute prospective-only quashing orders.

Lord Ponsonby of Shulbrede (Official Opposition)

At Lords Second Reading, Lord Ponsonby called for the complete removal of **Part 1** (including **clause 1**) from the Bill:

> "We would support removing [Part 1 of the Bill] entirely. We believe that the Ministry of Justice is trying to fix something that is not broken…
>
> The Government's reforms go beyond what was recommended by their own expert panel, with no evidence to back up this overreach. The Independent Review of Administrative Law… did not recommend prospective-only remedies, a presumption for suspended quashing orders, [or] imposing on the courts a list of factors to determine their use.[17]

The impact of this new remedies framework, Lord Ponsonby said, would be to:

> remove the current simplicity of quashing orders and make it more difficult, and costly, to bring a judicial review claim.[18]

He later said that:

> We believe that overall, the Government's changes to the judicial review process will have a chilling effect on justice, deterring members of the public from bringing claims against public bodies and leaving many other victims of unlawful actions without redress. These are proposals that will make it harder for individuals to hold this Government to account. As a result, unlawful decisions made by this Government, or by any government or public body, will go unchallenged.[19]

Subsequent contributions from the Official Opposition focused on clarifying and narrowing the impact of the clause, rather than pressing for its outright removal. For example, several Opposition amendments were debated at Lords Committee stage that sought to modify or add to the list of factors to be taken into account when deciding whether to make a suspended or

16 Ministry of Justice, Press Release: New bill hands additional tools to judges, 21 July 2021.
17 HL Deb 7 February 2022 c1347.
18 HL Deb 7 February 2022 c1348.
19 HL Deb 21 February 2022 c65.

prospective-only quashing order. On prospective-only remedies, the Official Opposition supported proposals to remove them from the Bill.

Lord Pannick (Crossbench)

The barrister and Crossbencher Lord Pannick said in Committee that what was "objectionable" about **clause 1** was "the power of judges to wave a judicial wand and to say that what they have found to be unlawful shall be treated as if it were lawful". The problem with a prospective-only quashing order was that it:

> requires the judge to assess the merits of competing policy factors that it is entirely inappropriate for the judiciary to assess.[20]

This was why, he argued, UK judges had not resorted to prospective-only remedies despite the common law imposing no explicit bar on them. He suggested that in cases where remedial discretion would help, it was more constitutionally appropriate for a court to make a suspended quashing order instead. That way, it would be for the Government and/or Parliament to "assess the merits of competing policy factors" arising from a finding of illegality.[21]

Lord Falconer of Thoroton (Labour)

A similar sentiment was expressed by Lord Falconer:

> Do not give the judges the power to say everything going backwards is fine. That is for the legislature or the Executive to sort out, not the judges. Give the legislature or the Executive the time to sort it out by a suspended quashing order, but do not give the judges the power to set the law to one side for the past. That is not their role. Their role is to determine whether or not the Executive have acted in accordance with the law. Their job is to hold them to the law, not to free them from the law.[22]

Lord Marks of Henley-upon-Thames (Liberal Democrat)

When arguing for amendments to remove prospective-only quashing orders from the Bill on Report, Lord Marks expressed substantially the same sentiment:

> hard cases may be addressed either by administrative action, where unlawful activity before the law was clarified would go unpunished, or by a suspended quashing order… giving Parliament the chance to correct any possible injustice, if necessary retrospectively… it is for Parliament to change the law… not for judges to decide to overlook a failure by government to comply with the law's requirements.[23]

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20 HL Deb 7 February 2022 c1369.

21 HL Deb 21 February 2022 cc71-72.

22 HL Deb 21 February 2022 c61.

23 HL Deb 31 March 2022 c1718.

The defence of prospective-only quashing orders

Some Peers were broadly supportive of, or agnostic towards, the availability of prospective-only quashing orders.

Government position

The Government has argued that the fears regarding the use of prospective-only quashing orders are misplaced in light of the statutory safeguards included in **clause 1** and how they would operate in practice. Lord Wolfson understood prospective-only orders as a distinct "tool" in a judge's "toolbox":

> there are plainly circumstances where a prospective-only quashing order is, and will be, in the best interests of justice and good administration. That is particularly relevant for individuals, businesses and families who may in good faith have taken actions based on regulations which are to be quashed.[24]

For example:

> People might have signed contracts on the basis of a regulation which turns out to be unlawful. They may have spent money or set up businesses. To undo all that could give rise to far more injustice than making sure that present and future situations are rectified.[25]

In particular, the Government resisted the suggestion that prospective-only quashing orders would lead to unrecoverability of taxes unlawfully levied or risked the prosecution of individuals for conduct unlawfully criminalised. Lord Wolfson said such situations would be "almost incomprehensible" given the courts would decline to make a prospective-only quashing order where there is "good reason" not to make one. He also emphasised that, under the proposed clause, judges must take into account the interests of those of who have been negatively impacted by an impugned act.[26]

In specific response to Lord Pannick's argument that judges were being asked to grapple with policy questions, Lord Wolfson said:

> We are simply not doing that. We are asking the courts to do what in many ways they do already, which is to assess the possible effects of their judgment on the parties and the public interest.[27]

Lord Wolfson also questioned whether there was a "principled distinction" between suspended quashing orders and prospective-only quashing orders:

> I suggest that the matter comes down to this: you are either in favour of remedial flexibility or you are not. Both proposed new remedies seek to give the courts remedial flexibility… there are strong conceptual links between the suspended order and the prospective-only order.[28]

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24 HL Deb 21 February 2022 c70.

25 HL Deb 21 February 2022 c68.

26 HL Deb 21 February 2022 cc68-69.

27 HL Deb 21 February 2022 cc69-70.

28 HL Deb 31 March 2022 c1726.

Lord Brown of Eaton-under-Heywood (Crossbench)

Lord Brown, a Crossbencher and former UK Supreme Court justice, praised **clause 1** for giving "flexibility and greater discretion in the courts' supervisory jurisdiction". He argued that prospective-only orders addressed a longstanding conceptual problem whereby the courts, in general, would treat "purported" acts as void rather than voidable.[29]

Lord Anderson of Ipswich (Crossbench)

Similarly, Lord Anderson was unconcerned by the potential impact of recognising prospective-only quashing orders in statute. Similar remedies were exceptionally used in other jurisdictions, he said, and without great difficulty.[30] Temporal remedial discretion already existed at common law, albeit it was very rarely exercised. Moreover, he said, there was nothing inherently objectionable about putting in statute the factors that should be taken into account when considering how to exercise that judicial discretion.[31]

Lord Hope (Crossbench)

At Second Reading, Lord Hope said he was "inclined to agree with" the proposal to recognise and regulate prospective-only remedies. He alluded to *HM Treasury v Ahmed (No. 2)* in which he had dissented from the other six justices.[32] His conclusion in that case had been that the UK Supreme Court both could and should have made a suspended quashing order.

That his judgment was a solitary dissent, he indicated, was evidence that the courts would not develop remedial flexibility on their own, and that it was therefore desirable for Parliament to do so instead.[33]

The objection to "the presumption"

Those Peers who spoke against prospective-only quashing orders uniformly also spoke against "the presumption". Some Peers, who were supportive of or agnostic towards the prospective-only orders, also raised concerns about it. Three distinct criticisms were made, namely that:

- IRAL had not advocated for a presumption;
- the presumption unjustifiably restricted judicial discretion; and
- the presumption skewed the balance of interests too strongly in favour of Government (and other public bodies) and away from those wronged by unlawful acts.

29 HL Deb 7 February 2022 c1358
30 HL Deb 7 February 2022 c1351.
31 ibid.
32 *HM Treasury v Ahmed (No. 2)* [2010] UKSC 5.
33 HL Deb 7 February 2022 c1367.

Lord Anderson of Ipswich (Crossbench)

Having (favourably) drawn attention to the European Court of Justice's use of prospective remedies, Lord Anderson pointed out that the EU treaties do not direct the courts as to when they should and should not grant suspended or prospective-only remedies.

His objections to the presumption were, relatedly, two-fold. Firstly it:

> look[ed] very like an attempt to tilt the playing field against those who seek to hold public authorities to account for their unlawful actions. The judges can and should be trusted to serve the interests of justice without presumptions designed to serve the interest of their promoters.[34]

Secondly, these kinds of remedy, though useful, were and should be regarded as "exceptional" because they will so often be contrary to what the interests of justice demands. That the presumption provision would require judges to take "particular account" of the acts, proposed acts, or undertakings made by public bodies in relation to a legal defect was, in his view, a particularly "troublesome" reduction in judicial discretion.[35]

Lord Hope of Craighead (Crossbench)

Having endorsed prospective-only remedies, Lord Hope was similarly critical of "the presumption". He said that he found it difficult to work out, from the Government's explanatory materials, why the presumption was included. He also suggested the statutory language would prove onerous for courts to navigate and run the risk of satellite litigation e.g. on the meaning of "adequate redress" and "good reason":

> This remedial tool is being encrusted with so much stuff that it is almost unusable. It really is ridiculous to overwork to this extent the amount of directions being given to the judge. It is not necessary, it is bad legislation and it is extremely dangerous. It is not a remedial tool at all; the Government are trying to create something in their own interest, as has been pointed out already, and make it as difficult and dangerous as possible for judges to use this tool. It should certainly not be legislated for in this form.[36]

Lord Etherton (Crossbench)

When moving the amendment at Report Stage to remove "the presumption" from the Bill (now **Lords Amendment 4**) Lord Etherton described it as "either constitutionally dangerous or unnecessary". The "danger" was that it "provides a precedent" for the Executive interfering with judicial discretion.

In response to Government's counter-claim that this statutory "nudge" did not fetter judicial discretion, Lord Etherton suggested it was, in that case, redundant. The proposed statutory list of relevant factors to take into

34 HL Deb 21 February 2022 c83.
35 HL Deb 21 February 2022 c84.
36 HL Deb 21 February 2022 c87.

account (set out above) would be sufficient to remind judges of their newfound remedial discretion.[37]

The defence of "the presumption"

In the course of debate, the Government defended the inclusion of the presumption. Lord Faulks, the chair of IRAL, expressed agnosticism as to its inclusion.

Government position

In defending "the presumption" Lord Wolfson insisted that it was only a "low-level" presumption. It was there to:

> nudge the court to consider and use these new remedies where they are appropriate, and to build up a strong body of case law to increase legal certainty.[38]

He referred to the use of similar special remedies in Canada under "Schachter categories", through which the courts have developed guidelines for when suspended and prospective-only orders are appropriate.[39] He was keen that the UK courts speedily develop similar principles of their own.

Lord Wolfson argued that the presumption may in fact cause Governments and public bodies to lose more judicial review cases, as judges would be less concerned about the remedial implications of their judgments. He also argued that the statutory presumption strengthens the position of third parties, rather than the Government or public body:

> The benefit of the presumption is that the court... has to go through that thought process of whether this would be the appropriate remedy, thinking about people... who are not before the court, because on the facts of a particular case, the claimant may not actually be too bothered about whether these remedies are used. The defendant may not be too bothered whether the remedies are used, but it could well affect the position of third parties.[40]

Lord Faulks (IRAL Chair)

IRAL not having recommended in favour of a presumption, Lord Faulks confessed to "struggling with" its inclusion in the Bill saying that it clause 1 would "survive without it". However, he tentatively concluded that "it is doing no more than reminding the judge of the new power".[41]

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37 HL Deb 31 March 2022 c1720.

38 HL Deb 31 March 2022 c1727.

39 The "Schachter categories" on remedial discretion were developed by the Supreme Court of Canada in *Schachter v Canada* [1992] 2 S.C.R. 679. No "presumption" is found in the Constitution Act 1982 itself.

40 HL Deb 21 February 2022 c94.

41 HL Deb 31 March 2022 c1722.

Lord Sandhurst (Conservative)

Expressing a similar sentiment to the Government, Lord Sandhurst said:

> It is only a presumption; it means merely that the court must start from there… It does not impose a destination. If there is good reason not to make such an order, the court will be obliged to follow its conscience and depart from the principle—but, if there is not good reason, why should there be a problem? In short, the court is simply prompted to do what good reason dictates.[42]

1.8 What has the House of Lords proposed?

The House of Lords has proposed to remove from the BIll:

- "prospective-only" quashing orders (**Lords Amendments 1-3**); and
- "the presumption" in favour of using the special quashing order provisions (**Lords Amendment 4**).[43]

At Committee Stage it also debated (though did not vote on) proposals to widen and modify the range of factors courts must take into account when considering whether to suspend or retrospectively limit a quashing order.

[42] HL Deb 31 March 2022 c1724.
[43] Lords Amendment 4.

2 Cart and Eba judicial review

2.1 What are Cart/Eba judicial reviews?

Judicial review is a form of legal challenge against (typically) an act or omission of a public body. In England and Wales and Northern Ireland, judicial review is normally initiated in the High Court.[44] It is a means by which a decision tainted by, for example, an error of law, can be challenged.

If the Upper Tribunal refuses someone permission to appeal against a decision of the First-tier Tribunal, and a party then challenges that decision of the Upper Tribunal, it is known as a Cart judicial review (in England and Wales) or an Eba judicial review (in Scotland). Those names are given after the parties to two legal challenges that reached the Supreme Court in 2011.[45]

There was, before those cases resolved it, disagreement about whether the Tribunals, Courts and Enforcement Act 2007 allows Cart/Eba reviews. That Act includes a provision severely limiting other opportunities for parties to challenge decisions of the Upper Tribunal.

The UK Supreme Court concluded in both cases that it was possible to bring an action for judicial review in these circumstances, but it also developed legal limits. One of the justifications it offered for this was the effective use of finite judicial resources.

Most, but not all, Cart and Eba judicial reviews relate to decisions of the Immigration and Asylum Chamber of the Upper Tribunal.

2.2 Why does the Government want to abolish them?

The Independent Review of Administrative Law concluded that Cart/Eba judicial reviews had a disproportionate impact on court and tribunal time relative to their "success rate". It recommended that Parliament legislate to abolish this route of legal challenge.[46]

44 In Scotland, it is initiated in the Outer House of the Court of Session.

45 *Cart v Upper Tribunal* [2011] UKSC 28 and *Eba v Advocate General for Scotland* [2011] UKSC 29.

46 IRAL para 3.46.

Lord Faulks, the Chair of IRAL, has also argued, from principle, for the abolition of Cart judicial reviews. His view is that the 2007 Act never intended to allow Upper Tribunal decisions to be judicially reviewed, because it is a superior court of record and was therefore understood to be an equivalent or alternative, rather than a subordinate, body to the High Court.[47]

The Government agreed with IRAL's recommendation and brought forward **clause 2** of the Judicial Review and Courts Bill to implement it.

2.3 What has the Government proposed?

Clause 2 of the Bill as introduced proposed amendments to the Tribunals, Courts and Enforcement Act 2007.

An ouster clause

New section 11A of that Act would provide that a permission decision of the Upper Tribunal is "final, and not liable to be questioned or set aside in any other court." It provides further that:

> the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision

and that:

> the supervisory jurisdiction [of the High Court or the Court of Session] does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

This is what is known as an "ouster clause": a provision in an Act of Parliament that prevents the courts from questioning the validity of, or otherwise overturning, something done by a public body.

Exceptions to the ouster

The Government's clause included four exceptions or constraints on the ouster clause. In practice, these are narrow and unlikely to give rise to as many Cart/Eba judicial reviews as are currently brought.

Devolution and territorial exceptions

Firstly, the clause would not apply to Scotland or Northern Ireland so far as the Scottish Parliament or Northern Ireland Assembly could have legislated to give the First-tier Tribunal jurisdiction over a particular dispute.

47 HL Deb 7 February 2022 cc1352-1353.

For example, the clause would abolish Eba judicial reviews in immigration cases (because the immigration system is a reserved matter) but it would not abolish them in relation to devolved social security benefits.[48]

Validity of applications

Secondly, a Cart/Eba judicial review can still be brought on the question of whether:

> the Upper Tribunal has or had a valid application before it under section 11(4)(b).

This route of challenge might be relevant, for example, if the Upper Tribunal mistakenly concluded that a litigant had missed an application deadline.

Tribunal not validly constituted

Thirdly, a Cart/Eba judicial review can still be brought on the question of whether:

> the Upper Tribunal is or was properly constituted for the purpose of dealing with the application.

This would deal with extremely unlikely situations, such as where a presiding judge was not actually eligible to sit on the Upper Tribunal.

Bad faith or breach of fundamental principles of natural justice

Fourthly, a Cart/Eba judicial review could still be brought where it was claimed that the Upper Tribunal:

> Is acting or had acted [either] in bad faith, or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

This exception ensures that a judicial review can still be brought, for example, against bias or corruption on the part of a judge (e.g. if a judge does not recuse themselves despite a conflict of interest).

2.4 Responses to the proposals

There have been, broadly speaking, four distinct criticisms of the proposal to abolish Cart/Eba judicial reviews, namely that:

- IRAL and the Ministry of Justice have used flawed statistics when arriving at the "success rate" for this type of legal challenge;

[48] Note, however, that the Scottish Tribunals and Courts Service now has a unified tribunals system of its own under the Tribunals (Scotland) Act 2014. That system includes a bespoke Social Security chamber in which determinations of Social Security Scotland (the devolved equivalent of the Department for Work and Pensions) can be challenged.

- the Government has overstated the burden of Cart/Eba judicial reviews on court and tribunal time;
- the nature of the disputes involved warrants retaining Cart/Eba judicial reviews even if the success rate is lower than for other types of judicial review; and
- there are better ways to relieve the pressures on the courts and tribunals system.

Joint Committee on Human Rights

The Joint Committee described the abolition of Cart judicial reviews as a "nuclear option" and said that other reforms to the tribunals system should be considered before it is pursued. It emphasised that, though Cart reviews had a lower success rate:

> those applications may prevent individuals being wrongly removed from the UK to face the most heinous human rights violations.[49]

It called for **clause 2** to be left out of the Judicial Review and Court Bill.

Lords Constitution Committee

The Lords Constitution Committee took no position on **clause 2**, simply concluding that the House of Lords:

> may wish to consider how clause 2 might operate in practice and whether it achieves the right balance between efficiency and access to justice.[50]

Other organisations

Shortly after IRAL published its findings, several academics questioned the empirical research it had carried out into the success rate Cart and Eba judicial reviews. In particular, they questioned the methodology they adopted, and the conclusion that only about 0.22% of Cart judicial reviews were successful. This led to the Ministry of Justice carrying out a further analysis, which put the success rate figure at a higher, but still low, 3.44%.

The 3.44% figure has also been contested, as it discounts situations where permission is granted to appeal against an Upper Tribunal decision, but where the appellant is unsuccessful on the substantive issue. As the Law Society for England and Wales put it:

> This definition does not however take account of the value of correcting an error of law made in a decision by the Upper Tribunal to refuse permission to appeal, even where the case then does not succeed on the substantive issue at

[49] Joint Committee on Human Rights, Legislative Scrutiny: Judicial Review and Courts Bill (PDF), HC 884 HL Paper 120, 7 December 2021.

[50] Constitution Committee, Judicial Review and Courts Bill (PDF), HL Paper 160, 18 February 2022.

appeal. When this is factored in, the true success rate is closer to 5.7%, according to analysis by the Public Law Project.[51]

Several organisations argued that, even if the success rate for Cart/Eba reviews was considerably lower than for judicial reviews generally, they should nevertheless be retained. In addition to the Law Society, the Public Law Project (PDF), Liberty (PDF), JUSTICE and the Bingham Centre for the Rule of Law each called for **clause 2** to be removed completely from the Bill.[52]

2.5 Debate in the House of Lords

The case for retaining Cart/Eba judicial reviews

Lord Ponsonby of Shulbrede (Official Opposition)

Part of the Official Opposition's concern about **clause 2** was the prospect that it would be used as a precedent for further restrictions on judicial review further down the line. Lord Ponsonby also drew attention to the fact that **clause 2** would have a disproportionate impact on litigants with protected characteristics, and would predominantly affect those in very precarious positions within the asylum and immigration system.[53]

At Committee Stage, the Official Opposition tabled amendments which would have widened the exceptions to the abolition of Cart judicial reviews, but these were not pushed to a vote. Among those proposals were that Cart judicial reviews should still be available in cases involving:

- those unable to secure legal representation;
- children and those lacking capacity;
- appeals made where the applicant is not in the UK;
- the use of accelerated tribunal procedures;
- statutory directions when evaluating the credibility of evidence; and/or
- interpretation of obligations under an international agreement.

51 Law Society, Parliamentary Briefing: Judicial Review and Courts Bill – House of Commons second reading, 29 October 2021.

52 Public Law Project, Judicial Review and Courts Bill Briefing for House of Commons Second Reading (PDF), September 2021; Liberty, Judicial Review and Court Bill Briefing for Second Reading in the House of Commons, October 2021; Justice, Judicial Review and Courts Bill House of Lords Committee Stage Supported Amendments (PDF), February 2022; Bingham Centre, Judicial Review and Courts Bill: A Rule of Law analysis (PDF), 26 October 2021.

53 HL Deb 7 February 2022 c1348.

Lord Marks of Henley-upon-Thames (Liberal Democrat)

At Second Reading, Lord Marks said that the low success rate of Cart judicial reviews had to be balanced against the nature of those cases:

> the overwhelming majority of Cart JRs—some 92%—are immigration and asylum cases. The stakes are often very high: deportation is frequently involved, often to very hostile countries where there is a serious risk of torture or maltreatment... There is no exception in the Bill for such cases, and the cases that give rise to Cart JRs are often paradigms of circumstances that affect hundreds of other cases, so a low number of successful JRs may have a disproportionately broad effect.[54]

He also argued that, since the vast majority of Cart cases were "weeded out as hopeless at permission stage on the papers" there was not a significant impact on judicial resources. He pointed out further that:

> large numbers of others are either settled by the Government or reheard by the Upper Tribunal by agreement.

Lord Etherton (Crossbench)

While recognising – from personal experience as a former Court of Appeal judge – that many Cart judicial reviews were unmeritorious and doomed to fail, Lord Etherton said that completely doing away with this avenue of challenge was unnecessary. He pointed to the fact that there are 40-50 cases each year (on average) in which the Upper Tribunal wrongly refuses a litigant permission to appeal against the decision of the First-tier Tribunal, and almost all of these are in asylum and immigration cases.[55]

At Report Stage, he questioned the Government's assessment about the amount of court and tribunal time taken up by Cart judicial reviews.[56]

Lord Etherton proposed (and the House of Lords endorsed) a more modest restriction on onward appeals of Cart and Eba judicial reviews, instead of the abolition of Cart and Eba reviews themselves. This is explored in further detail in **Section 2.6** of this briefing below.

The case for abolishing Cart/Eba judicial reviews

Government position

The Government's main argument for Parliament abolishing Cart/Eba judicial reviews has been focused on judicial resources and their low success rate. As Lord Wolfson put it in Lords Committee:

> The Upper Tribunal does not err often, with only 3.4% of claimants who were refused permission to appeal being granted an appeal and then having that appeal found in their favour. That can usefully be compared to a general 30%

54 HL Deb 7 February 2022 c1376.
55 HL Deb 31 March 2022 c1741.
56 HL Deb 7 February 2022 c1735.

> to 50% success rate for judicial review cases. Due to this, and the sheer number of Cart JRs per year—around 750—the IRAL recommendation was for Parliament to legislate to remove the Cart judicial review process...
>
> ... the Supreme Court attempted in Cart... to create a route for judicial review on errors of law but with a sufficiently high bar not to create a flood of cases. That attempt obviously failed.[57]

The Government's Impact Assessment suggested, that, although abolishing Cart judicial reviews would mean the courts would lose out on about £92k of revenue (in court fees) per year, the amount of time saved in the courts and tribunals would be the non-monetised equivalent of £364-402kpa. This would be realised by freeing up, on the Ministry of Justice's calculations, 173-180 judicial sitting days per year between the High Court and Upper Tribunal to hear other cases.[58]

Lord Wolfson also made an argument from principle about the number of opportunities someone should have to challenge a decision of a court or tribunal:

> The long-established precedent in our judicial system is to have two appeal tiers and for a case to be considered for permission to appeal by two different judges. This is seen with the First-tier and Upper Tribunal system that we have. In this example, the applicant will have lost in the First-tier Tribunal, will have been refused permission to appeal by the First-tier Tribunal, and will then have been refused permission to appeal by the Upper Tribunal, and that should be an end of it. However, a Cart judicial review offers the applicant a third attempt to gain, effectively, permission to appeal, an anomaly not seen in the criminal or civil court systems. It is this third bite of the cherry that we seek to remove.[59]

Lord Faulks (IRAL Chair)

Having made the original recommendation to abolish Cart judicial reviews in the IRAL report, Lord Faulks said that the statistics on success rates were a secondary consideration. More important, he indicated, was the fact that those behind the Tribunals, Courts and Enforcement Act 2007 had never intended to allow Cart judicial reviews in the first place.

He quoted a lecture from Lord Carnwath, a former UK Supreme Court justice, who insisted it had been intended that "the Upper Tribunal should, within in its specialist sphere ... be immune from review by the High Court."[60]

As for the principled reason for ousting judicial review in these cases, he said:

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57 HL Deb 21 February 2022 cc113-115.

58 Ministry of Justice, Impact Assessment: Judicial Review and Courts Bill: Judicial Review Reform (PDF), July 2021.

59 Note, however, that section 13 of the Tribunals, Courts and Enforcement Act 2007 does allow statutory appeals against certain Upper Tribunal decisions to the Court of Appeal, which might equally be regarded as a "third bite of the cherry".

60 HL Deb 31 March 2022 c1739.

> sometimes there has to be an end to litigation, and one has to take into account the administration of justice and the many hours that judges spend conscientiously looking through a very substantial number of documents to find that there is essentially no limit to the challenge. Of course, if there is the possibility of a challenge of the sort that a judicial review might involve, people will take advantage of it—one can hardly blame them.[61]

On Lord Etherton's proposed compromise, Lord Faulks said:

> I respectfully submit that we need to grasp the nettle. The poor prospects of success have not deterred applicants from making Cart judicial review applications in the past. I accept that this amendment would further reduce the avenues of challenge, but it would not, I suspect, put anybody off. I am sorry to say that this amendment seems to be something of a fudge. It will frustrate the purpose of the Bill. I fear that, if passed, a Cart JR application will continue to be the most popular JR application.[62]

Lords Hope and Brown of Eaton-under-Heywood (Crossbench)

Both Lords Hope and Brown sat on the UK Supreme Court's panel when the Cart and Eba judgments were handed down. Each indicated, during debate on **clause 2**, that they supported Parliamentary steps to abolish or further restrict this avenue of judicial review.

Lord Hope said, of the UK Supreme Court's approach:

> we set the bar as high as we could when we were defining the test that should be applied... there may be a question as to whether... experience has shown that our choice of remedy has not worked, although the noble Lord, Lord Faulks, has given us much of what was in his report to indicate that that is the case. If that is so—and I am inclined to follow the noble Lord—it seems to be time to end this type of judicial review.[63]

Lord Brown expressed a similar sentiment:

> In my judgment [in Cart]... I pointed out that the limitation of the review we were permitting in that case was to conserve judicial resources. Even that formula, however, proved altogether too wasteful of judicial resources. For that reason, it is now best to narrow it down still further to the formula to be found in Clause 2(4).[64]

2.6 What has the House of Lords proposed?

The House of Lords has proposed, through **Lords Amendment 5**, to replace **clause 2**. Lord Etherton, Crossbencher and former Master of the Rolls, brought forward this alternative proposition. It has three key components:

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61 HL Deb 21 February 2022 cc101-102.

62 HL Deb 31 March 2022 c1736.

63 HL Deb 7 February 2022 c1368.

64 HL Deb 7 February 2022 cc1358-1359.

- Cart and Eba judicial reviews would not be abolished;
- It would no longer be possible to appeal against a Cart judicial review of any kind to the Court of Appeal;[65]
- There would be a very limited right to appeal directly from the High Court to the UK Supreme Court, subject to the latter's higher permission threshold.[66]

Why keep Cart/Eba judicial reviews?

Lord Etherton argued that the Government had significantly exaggerated the impact of Cart and Eba judicial reviews in terms of the pressure they put on the courts and tribunals system.

For him and others, the lower success rate of Cart/Eba challenges was outweighed by the severity of the consequences of their no longer being available (especially in the immigration and asylum context).

Why remove the normal appeal route for a Cart/Eba judicial review?

The compromise amendment proposes that Cart/Eba judicial reviews should not be able to be appealed to the Court of Appeal or Inner House of the Court of Session. The purpose of this constraint is to accommodate the Government's criticism that litigants get too many "bites of the cherry" at challenging an immigration decision.

If two tribunals and a senior court have concluded there are no grounds for challenge against an administrative decision, Lord Etherton has suggested, that would usually strike a generous enough balance between access to justice and proportionate use of judicial resources.

Why have a direct appeal route to the UK Supreme Court?

In Lords Committee, Lord Pannick suggested that any compromise amendment should allow for a limited right of appeal from the High Court (or Outer House of the Court of Session) directly to the Supreme Court:

> Lord Etherton... may wish to add in a provision along the lines of what we see in relation to criminal matters and under the Administration of Justice Act: that if the judge or the Supreme Court certified that it was a matter of public importance, either the judge or the Supreme Court could give permission for the matter to go straight to the Supreme Court. The judge at first instance may

[65] In Scotland, it would no longer be possible to appeal against an Eba judicial review to the Inner House of the Court of Session.

[66] In Scotland, this direct right of appeal would be from the Outer House of the Court of Session. This would effectively create a "leapfrog" appeal, something which does not currently exist in Scotland.

> throw out the point, but may nevertheless recognise that it is a point of some significance that perhaps the Supreme Court may wish to consider.[67]

Lord Etherton's amendment at Report stage adopted this recommendation. He explained that the binding nature of Court of Appeal precedent justified its inclusion:

> Where there is established case law against the claimant at the level of the Court of Appeal, inevitably leading to a refusal of permission to appeal by the Upper Tribunal, the inability to take a case to the Supreme Court could be very damaging to the development of the law.[68]

He illustrated this with a 2010 example: the case of *HJ (Iran) v Secretary of State for the Home Department* (see box on **page 27** below).[69]

Government reaction

The Government resisted Lord Etherton's amendment at Report Stage, but was defeated on a division (146 Content to 132 Not Content).[70]

Lord Wolfson argued that the primary burden imposed by Cart judicial reviews was on the High Court, rather than the Court of Appeal:

> my concern is that the amendment does not address the main problems, which are, first, that approximately 750 Cart cases per year place a burden on the High Court, and, secondly, that the Cart decision and approach undermines the tribunal system and the proper relationship between the Upper Tribunal and the High Court. I recognise that there is a burden on the Court of Appeal at present, as some Cart cases will be appealed to that court. I do not have precise figures, but I understand that those to the Court of Appeal are substantially less than 750 cases of this kind per year. The burden of the current system falls on the High Court and, for reasons of its resourcing and efficiency, that is where we need to concentrate our efforts.[71]

Against that backdrop, he insisted that:

> The halfway house therefore does not satisfy the Government's policy position of correcting the Cart decision. Cart was, with great respect, a legal misstep… We should overturn it effectively, which is what the [original] Clause 2 does. The halfway house put before us by… Lord Etherton, would, I fear, leave us in a legal no man's land.[72]

67 HL Deb 21 February 2022 c107.
68 HL Deb 31 March 2022 c1735.
69 *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31.
70 HL Deb 31 March 2022 cc1743-1744.
71 HL Deb 31 March 2022 c1740.
72 HL Deb 31 March 2022 c1741.

HJ (Iran) v Secretary of State for the Home Department

Under the Refugee Convention 1951 and Protocol relating to the status of refugees 1967, a person's eligibility for refugee status depends on whether they have a:

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

HJ (an Iranian national) and HT (a Cameroon national) were both gay men. They sought asylum in the UK because of how they expected to be treated in their home countries because of their sexuality.

Previous Court of Appeal precedent, in *J v Secretary of State for the Home Department*, provided that a "well-founded fear" of persecution would not arise if an asylum seeker could reasonably be expected to modify their behaviour (to be "discreet") in their home country.[73]

The Court of Appeal almost always follows its own precedents, and courts and tribunals below it are bound by its precedents. There was therefore no real prospect of either the Asylum and Immigration Tribunal or the Court of Appeal upholding a legal challenge against this existing interpretation of the relevant international legal instruments.

By contrast, the UK Supreme Court, which is not bound by Court of Appeal precedents, upheld HJ and HT's appeals. It concluded the tribunal and the Court of Appeal had made an error of law. They had wrongly interpreted what is required by the relevant sources of international law. Setting out the appropriate legal test, Lord Hope said:

> [An asylum seeker] cannot and must not be expected to conceal aspects of [their] sexual orientation which [they are] unwilling to conceal, even from those whom [they know] may disapprove of it. If [they fear] persecution as a result and that fear is well-founded, [they] will be entitled to asylum however unreasonable [their] refusal to resort to concealment may be.

As a result of this, the Supreme Court remitted the decisions back to the Tribunal for reconsideration.

Lord Etherton argued at Lords Report Stage that this case illustrates the need for a limited right of appeal against Cart/Eba judicial reviews to the UK Supreme Court. Prohibiting outright the appeal of a High Court decision could lead to injustice, as the High Court may itself have been bound by disputed Court of Appeal precedent.

[73] *J v Secretary of State for the Home Department* [2009] EWCA Civ 172.

3 What will the Commons take decisions on?

In relation to **Part 1 of the Bill**, the Government has tabled motions inviting MPs to reject:

- **Lords Amendments 1-3** (on prospective-only quashing orders); and
- **Lords Amendment 5** (on whether to abolish Cart/Eba judicial reviews).

However, the Government has decided to accept **Lords Amendment 4** (removing "the presumption" from the Bill).

As part of its proposal to reject **Lords Amendment 5** (thereby reinstating **original clause 2**) the Government has also offered a further drafting amendment. The new language more accurately reflects the devolution settlement in Northern Ireland, and the definition of reserved matters.

4 Further judicial review reforms?

4.1 What has the Government said?

The Government's six-week consultation, which took place between March and April 2021, considered a range of reforms that went beyond the recommendations of IRAL.

What else did the Government consult on?

In addition to prospective-only quashing orders and "presumptions", the Government consulted on:

- legislating to clarify the effect of statutory ouster clauses
- legislating to clarify the principles and concept of nullity

In its consultation response of July 2021, the (then) Lord Chancellor Robert Buckland indicated that those proposals would not be taken forward.[74]

Clause 2 as an ouster clause "template"

When it announced that it was bringing forward the Judicial Review and Courts Bill, the Government said:

> The explicit Cart ouster clause, designed to meet the common law requirements for effectiveness, will be used as an example to guide the development of effective legislation in the future. Furthermore, after legislating to implement an effective ouster in relation to Cart Judicial Review, the Government 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.[75]

Recent press reports

More recent press briefing suggests that the Government may not proceed with further judicial review reforms in the next Parliamentary session. The Sunday Times reported on 3 April 2022 that:

74 Ministry of Justice, Judicial Review Reform: Consultation Response (PDF), CP 477, July 2021, para 11.
75 ibid. para 55.

> The government's plans for wider-reaching reforms to the judicial review process, in which individuals and organisations could challenge official decisions in the courts, have also been put on hold.[76]

And the Law Society Gazette has reported that:

> The government has signalled that it will drop further reforms of judicial review from its legislative programme after suffering three narrow defeats in the House of Lords last week.[77]

4.2 Policy Exchange proposals

In October 2021, Professor Richard Ekins of Policy Exchange's Judicial Power Project published a report proposing ways in which the Judicial Review and Courts Bill could go further.[78] It highlighted several cases in which Ekins and others have disagreed with the approach taken by the UK courts to judicial review and the exercise of power by Ministers and public bodies.

The report suggested, among other things, a list of proposed amendments to several existing statutes, most notably the Interpretation Act 1976, Constitutional Reform Act 2005, Regulation of Investigatory Powers Act 2000 and the Freedom of Information Act 2000, as well as proposing some completely new statutory provisions. These changes would (mostly) seek in whole or in part to overturn previous judicial precedents with which Ekins and others disagree, including:

- the *Miller II/Cherry* case on prorogation;[79]
- the *Adams* case on the Carltona principle;[80]
- the *Privacy International* case on ouster clauses;[81]
- the *UNISON* case on employment tribunal charges;[82]
- the *Evans* case on blocking freedom of information requests;[83]
- the *Axa* case on common law review of Acts of devolved legislatures;[84]

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76 Harry Yorke and Caroline Wheeler, Queen's Speech 2022: Boris Johnson rows back on planning and courts in effort to avoid Tory split, The Sunday Times, 3 April 2022.

77 Sam Tobin and Michael Cross, Government 'cools on JR reforms' after Lords defeats, Law Gazette, 4 April 2022.

78 Richard Ekins, How to improve the Judicial Review and Courts Bill (PDF), Policy Exchange, October 2022.

79 *R (Miller) v Prime Minister and Cherry v Advocate General* [2019] UKSC 41.

80 *R v Adams* [2020] UKSC 19.

81 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

82 *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

83 *R (Evans) v Attorney General* [2015] UKSC 21.

84 *Axa General Insurance v Lord Advocate* [2011] UKSC 46.

- the *Palestine Solidarity Campaign* case on public pension fund policies;[85]
- the *Litvinenko* case on Ministerial accountability for (not) setting up a public inquiry.[86]

In the course of the House of Commons Public Bill Committee debates, several of Ekins' suggested amendments were tabled for consideration, and two were debated. One clause would have sought to reverse the decision in the UK Supreme Court case of *Privacy International*. The effect of that reversal would be to make decisions of the Investigatory Powers Tribunal immune from judicial review, in a similar vein to the Government's proposal for Cart judicial reviews under **clause 2**.

The Minister, James Cartlidge, made clear that the Government did not support its inclusion in the current Bill, but did say that:

> the Government will keep an open mind on whether that tribunal might be a candidate for an ouster clause in future… this is an issue to which the Government are already alive and to which I am sure future consideration will be given.[87]

The other proposal debated concerned the strategic use of judicial review proceedings to compel disclosure of information by public bodies. When explaining what it would have done, Professor Ekins said it:

> would help avoid the situation in which the launch, or even the threat, of judicial review proceedings forces public bodies to disclose information, or to give evidence, in relation to matters that the public body argues are non-justiciable or are excluded from liability to judicial review by an ouster clause. If the matter is non-justiciable or if legislation excludes review, the public body should not have to disclose information or give evidence in relation to it. Provision of information or evidence in such a case may be inimical to the public interest and may distort the court's consideration of whether the matter is justiciable or excluded by legislation.[88]

The Minister James Cartlidge again resisted the inclusion of this new clause in the Bill, but did not rule out revisiting the issue in future:

> As I have already indicated, the Government remain open-minded about the possibility of going further on judicial review reform in time. Although my instinct continues to be that any issues with the operation of the duty of candour are better addressed through other means, and not through primary legislation, I will reflect on the arguments that my right hon. Friend has made for a legislative response.[89]

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85 *R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government* [2020] UKSC 16.

86 *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194.

87 Judicial Review and Courts Bill Deb 23 November 2021 cc413-414.

88 Richard Ekins, How to improve the Judicial Review and Courts Bill (PDF), Policy Exchange, October 2022 pp34-35.

89 Judicial Review and Courts Bill Deb 23 November 2021 c424.

4.3 Other reforms

The Government is widely expected to introduce legislation concerned with reforming the Human Rights Act in the next Parliamentary session. Following the publication of the report of the Independent Human Rights Act Review in December 2021, the Government launched a further consultation on Human Rights Act reform.[90] That consultation closed for most purposes on 8 March 2022.[91]

The previous Lord Chancellor, Robert Buckland, also indicated repeatedly in public statements that the Ministry of Justice would carry out a review of the Constitutional Reform Act 2005.[92] That legislation created the UK Supreme Court, reformed the role of the Lord Chancellor, and established the independent Judicial Appointments Commission. It remains unclear what form that review will take, to what timescales it is operating, and whether legislative proposals are likely in this Parliament.

90 The Independent Human Rights Act Review, Full Report, CP 586, December 2021; Ministry of Justice, Human Rights Act Reform: A Modern Bill Of Rights, CP 588, December 2021.

91 An extension was made available until 19 April 2022 for those who would need an Easy Read or audio version of the consultation in order to be able to respond.

92 Monidipa Fouzder, 2005 Constitutional Reform Act up for review, Law Gazette, 14 June 2021

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