The Bar Council

Judicial Review and Courts Bill – Part 1
Briefing for MPs

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Executive Summary

This briefing note addresses Part 1 (Clauses 1 and 2) of the Judicial Review and Courts Bill. A separate briefing note has been put together to address Part 2 which deals with certain aspects of procedure (both live and online) in the Criminal Courts and Employment Tribunals, and Coroners' powers.

The Bill

Part 1 – Judicial Review

Clauses 1 and 2 of the Bill arise from the recommendations of the report by the *Independent Review of Administrative Law (IRAL)* panel published in March 2021. Since clauses 1 and 2 of the Bill substantially draw back from the proposals in the Government's Consultation Paper, the Bar Council does not have significant concerns about the current version of the Bill. However, the Bar Council regards the role of the courts under clause 1 as of prime importance.

Clause 1 – Quashing Orders

While it may be said that the presumption in Clause 1 is unnecessary given that the Courts probably have the power in any event, it is not a strong presumption ("good reason" and 'adequate redress" are the key phrases) and §19 of the Explanatory Notes makes it clear that it is likely to be rarely used and is subject to the Court's control:

> "The Government's public consultation proposed legislating for 'prospective quashing orders' where the courts could declare an action or decision unlawful onwards from a particular point. Consultees had mixed views on this proposal and a number argued that they struggled to conceive of many cases where such a remedy would be appropriate. The Government acknowledges that these circumstances may arise relatively rarely, however, it believes that the courts will apply their discretion appropriately and as an additional tool for them to use in deciding on remedies the proposal does have merit. Therefore, the Bill provides the courts an additional power to remove or limit the retrospective effect of any quashing order it makes."

Proposed schedule (s.) 29A(8) and (9) are very unlikely to have a "chilling effect" on Judicial Review (JR) applicants or to prejudice them which is what some respondents may fear for the very reason that the factors required to be considered are factors the courts would consider in any event and s.29A(8) is not exclusive of relevant factors, which are bound also to include the extent and seriousness of the unlawful act or decision.

The provisions propose no change to the basis on which JR is applied for or how the courts will approach the grounds of the JR. The standard of accountability for government and public bodies generally is not changed since the provisions are directed to remedies only.

The courts will decide whether the remedy is adequate and whether there are good reasons to disapply the assumption. It is likely that s.29A(9) will simply be a starting point for the courts' consideration of remedies, which will factor in matters including those in s. 29A(8) including the effect on defendants and other affected persons and the appropriateness of the remedies provided.

Issues such as unfairness, prejudice to individuals or groups of individuals and arbitrariness/discrimination (e.g. between those before the court and those not, or those only affected after the application to the court) would be considered by the court in any event if they arise and in any event as mandated by s.29A(8) and would lead to a conclusion as to whether a suspended or prospective remedy was *adequate* and thus whether there was *good reason* to depart from the presumption. That is entirely a judgment for the Court to make.

In ***Re Spectrum Plus*** [2005] 2 AC 680 especially paras. 15-17, 26-38, 71-74 (which did not rule out in principle prospective overruling which raises similar issues to suspended or prospective quashing) Lord Nicholls explained the problems which militated against the grant of such a remedy:

> "26. The retrospective nature of a court ruling on a point of law means that the ruling applies in all cases, past as well as future. This is subject only to defences of general application, such as limitation, laches, and res judicata. Whatever its faults the retrospective application of court rulings is straightforward. Prospective overruling creates problems of discrimination. Born out of a laudable wish to mitigate the seeming unfairness of a retrospective change in the law, prospective overruling can beget unfairness of its own.
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> 27. This is most marked in criminal cases, where "pure" prospective overruling would leave a successful defendant languishing in prison. "Selective" prospective overruling avoids this consequence but it could see a successful defendant freed while others in like case stayed in prison. In civil cases "pure" prospective overruling would hinder the development of the law by discouraging claimants from challenging a prevailing view of the law. "Selective" overruling, if only the successful claimant benefits from the change, is likely to mean that persons in like case are treated differently. Further, it would introduce an arbitrary element into the law. The ability to obtain an effective remedy could depend upon which of several challenges reaches the House of Lords first. Even if everyone who had already commenced proceedings was given the benefit of the court ruling there would still be scope for discrimination: there would be discrimination between those who knew they might have a claim and started proceeding post-haste and those, lacking proper advice, who were unaware they might have a claim."

There is no reason why the courts should depart from the general approach set out by Lord Nicholls in *Spectrum*, which is compatible with the terms of clause 1 and the comments in the Explanatory Memorandum.

There are other practical issues in the presentation also attached e.g. that the courts may require further evidence under s 29A(8)(e) if the body under challenge seeks to show why proposals would provide an adequate remedy, and there is scope for extended or satellite litigation on these issues and further costs (which seem likely to be imposed on the body challenged) – since the court's view on the grounds of challenge and any alleged unlawfulness would not be known until the case was heard. It is possible that the body challenged might "front load" the evidence, setting out the basis for seeking a s.29A form of remedy if the Court were to find it had acted unlawfully but that itself would serve to lengthen proceedings and would generate the prospect of additional evidence from claimants and interested parties.

It is very likely that the courts will apply a high degree of rigour with respect to (8)(e) to any proposals advanced by the person/body having been found to have acted unlawfully especially if issues of fairness, prejudice to groups of affected people and/or arbitrariness are likely to arise from the operation of the presumption.

Clause 2 – Exclusion of review of Upper Tribunal's permission-to-appeal decisions

Clause 2 will end Cart Judicial Review, although it currently has a very low success rate. The Bar Council's response to the IRAL report drew attention to the incomplete data, which concluded that very few Cart appeals were successful in comparison to the volume of appeals. It is worth noting that, notwithstanding the change to Cart, there will always be pressures particularly in the Immigration and Asylum Tribunal, as this is the nature of the demand-led system.

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