Judicial review: a process under pressure

Matthew Smith gets under the skin of the government's concerns about judicial overreach

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Judicial review has found itself in the government's crosshairs on several occasions in the last decade or so. Ministers asserted again and again during that period that immigration judicial review took up too much time and resource; that unmeritorious judicial review cases of all types clogged up the system and led to delay; and that too much judicial review was brought to prolong unsuccessful political campaigns, with the attendant risk that the judiciary would stray into matters not properly for them.

The most recent road to reform began with the launch—in July 2020—of the Independent Review of Administrative Law, referred to universally now as IRAL. Despite its name, the focus was on judicial review, rather than the wider field of administrative law; but even so, there was, initially at least, considerable concern among legal practitioners that it would generate far-reaching proposals and threaten the pivotal role played by judicial review in upholding the rule of law.

This anxiety was abated—temporarily—when IRAL published its report in March 2021 and made a set of much more carefully calibrated recommendations than many had anticipated (see *bit.ly/3o2Xco4*). In particular, IRAL rejected any suggestion that:

- judicial review should be placed on a statutory footing, and the grounds of review be codified; or
- Parliament should legislate for what was, and was not, justiciable; or
- there should be legislatively-prescribed procedural changes, including on standing and time limits.

The collective sigh of relief post-IRAL was still hanging in the air when the government launched its own consultation, Judicial Review Reform, in March 2021. The scope of this consultation, which concluded in September 2021, suggested to some that ministers, still smarting from high profile defeats in the constitutionally important cases of *R (oao Miller & Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (oao Miller) v The Prime Minister* [2019] UKSC 41 (together the *Miller* litigation) were disappointed with IRAL's findings, and were determined to be more radical.

While making no mention of the tensions that had arisen in the *Miller* litigation, the then Lord Chancellor, Robert Buckland, said in the foreword to the government's response to Judicial Review Reform: 'The IRAL Panel produced an excellent report and I was persuaded by their recommendations, but it seemed to me, having considered the discussion in the report and the submissions to the IRAL call for evidence, that there was a case for going further.'

He then added (somewhat ominously) that the government would 'continue to think about the way Judicial Review is operating in the round and whether further changes, including procedural measures on which we consulted, may be needed'.

The Judicial Review & Courts Bill

Whatever its longer term aspirations for broader reform, the government has been content to date to include just two clauses in the Bill that deal specifically with judicial review.

Clause 1 makes provision in respect of quashing orders, inserting a new s 29A into the Senior Courts Act 1981 (SCA 1981) that:

- *allows* a court to make a suspended quashing order or a prospective only quashing order—draft s 29A(1);
- *requires* a court, when deciding whether to do so, to take into account a list of factors (this list being non-exhaustive)—draft s 29A(8);
- *requires* that a suspended quashing order or prospective only quashing order is made where it would provide adequate redress in respect of the relevant defect, *unless* there is good reason not to do so—draft s 29A(9); and
- *stipulates* that if a suspended or prospective only quashing order is made, the act or decision challenged—'the impugned act' in the language of the Bill—is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect—draft s 29A(5).

Clause 2 of the Bill, meanwhile, inserts a new section 11A into the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) to exclude (Cart) judicial reviews of decisions by the Upper Tribunal about permission to appeal from the First Tier Tribunal, *subject to certain, narrow exceptions* (see 'Reform of judicial review', Professor Michael Zander QC, *New Law Journal*, 30 July 2021, p10)

The impact of the reforms

Turning first to clause 1 of the Bill, the power to impose a suspended quashing order is perhaps the least controversial aspect of the government's proposals. After all, the IRAL panel, in para 3.68 of their report, had already recommended: '…that section 31 of the Senior Courts Act 1981 be amended to make it clear that the courts have the power to make suspended quashing orders in appropriate cases.'

Further, the fact that IRAL considered this amendment would 'make it clear that the courts have the power to make suspended quashing orders…' is important. In common with many commentators, IRAL appears to have concluded that the courts have long had this power in practice—the recommendation being intended simply to acknowledge it in terms—and legislate for it expressly.

More contentious is the proposal to include—in draft s 29A(9) of SCA 1981—a presumption, that a suspended quashing order, or a prospective only quashing order, as may be, will be made where it will provide adequate redress, unless there is good reason not to do so.

By contrast, the IRAL panel, in para 3.69 of their report, recommended that: 'If section 31 [of the SCA] were amended… it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded.'

I am one of many who think the Bill would be improved considerably if the presumption were removed.

Even then, though, prospective only quashing orders would still be problematic, and might also, as Tom Hickman QC has highlighted, have surprising consequences, especially against the backdrop of the government's apparent concerns about

judicial overreach (see UKCLA, 'Quashing Orders and the Judicial Review and Courts Act', July 26, 2021 at *bit.ly/3lIssr5*).

In particular, draft s 29A(1)(b) allows a judge to remove or limit the retrospective effect of a quashing order; and the interplay between draft ss 29(4) and 29(5) then serves to uphold, confer validity on, and give force to, unlawful acts or decisions in the past.

This marks a significant departure from the long-held understanding under public law orthodoxy that a quashing order renders the act or decision challenged *void ab initio*. In those circumstances, it is then Parliament, not the judiciary, which has the power, where appropriate, to change the position retrospectively, by means of legislation.

If, as seems likely, one of the government's motivations for proposing reform of judicial review is to clip the judges' wings, it is arguable that it has missed the target. Further, in doing so, ministers appear (perhaps inadvertently) to have undermined Parliament, thus risking further tensions in a constitutional framework which is already under considerable stress.

As for cl 2 of the Bill, its central purpose is to abolish *Cart* judicial reviews, which sound principally (although not exclusively) in the field of asylum and immigration law—arguably a particular bogeyman for the government. I do not propose to analyse in any detail here the merits—or otherwise—of that narrowly-defined objective: although the confusion over the win-loss ratio in *Cart* cases was unfortunate, or careless, depending on your perspective; and there is a real question as to whether the estimated savings likely to flow from this reform justify the threat of injustice to people in the most dire circumstances.

Instead, my focus here is on the government's suggestion that the ouster clause by which it proposes to bring an end to *Cart* judicial review might be used as a template to block judicial scrutiny of other areas of activity and decision making in the future.

I have heard the soothing words uttered by some of those called to give evidence as the Bill is scrutinised in Parliament, pointing as they do to the fact that cl 2 could not simply be lifted and shifted, and deployed in any other context in which the government wished to displace judicial review. I think they are probably right. However, that is little consolation. To my mind the bigger concern is that the government is actively, and openly, considering where else it might want to remove inconvenient judicial oversight. Unless a clear signal is given now that the jurisdiction of the judges should only be ousted in the most exceptional circumstances, it might be difficult to put the lid back on the jar.

Ironically for the government, cl 2 might well have passed through Parliament relatively untroubled, given the primary focus in *Cart* judicial reviews on immigration and asylum, and the ambivalent attitude of so many people to those issues.

However, it seems to me at least possible that the recent Owen Paterson affair will re-ignite concerns about an executive apparently prepared to test the boundaries of the rule of law to achieve its political aims; and that that in turn might underscore the need for strong judicial scrutiny and a properly-balanced constitutional arrangement. In which case, it is not wholly unthinkable that Parliamentarians will now look much more closely at cl 2 than seemed likely when the Bill was first introduced. NLJ

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