Judicial Review and Courts Bill

(Part 1 – Judicial Review)

House of Commons Second Reading

Briefing

September 2021

For further information contact

Stephanie Needleman, Acting Legal Director sneedleman@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7762 6439
email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. JUSTICE has put together two separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") ahead of its Second Reading in the House of Commons on 18 October 2021. This briefing addresses Part 1 of the Bill, which relates to judicial review.

3. JUSTICE has throughout its existence been concerned with administrative justice, focusing on good decision-making, complaints, and redress, including through access to judicial review. JUSTICE responded to the Independent Review of Administrative Law ("IRAL") and the Government Response to IRAL (the "Consultation"), which included proposals similar to those in the Bill. Both of JUSTICE's responses[1] were informed by an advisory group of lawyers who had a range of judicial review experience, both for claimants and respondents, across the UK.

4. JUSTICE have several significant concerns with a number of provisions within the Bill:
    a. Judicial review is of critical importance to the UK's constitutional arrangement, the rule of law, access to justice, and in promoting good governance. However, Clauses 1 and 2 seek to limit this vital check on executive action.
    b. Clause 1, (new section 29A(1)(b)) introduces prospective-only remedies in judicial review. This clause risks undermining individuals' ability to hold the government to account, erasing legal rights, and creating significant uncertainty in practice. **Section 29A(1)(b) should be removed.**
    c. Clause 1 fails to protect the ability of individuals to rely on the finding of unlawfulness of a measure in other contexts, for example as a defence to criminal proceedings. **A further subsection should be included to protect collateral challenge and third-party rights and defences where a remedy**

[1] JUSTICE, 'The Independent Review of Administrative Law Call for Evidence – Response' (October 2020); JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021).

under s.29A(1) is ordered.

d. Clause 1 (s.29A(9) and (10)) contains a presumption in favour of the use of suspended quashing orders and prospective only quashing orders which favours the assurances of the executive over other important considerations, in particular the impact of suspending a quashing order or making it prospective only on claimants and third parties. **This presumption restricts the remedial discretion of the courts and should be removed**.

e. Clause 2 would severely restrict *Cart*[2] judicial reviews. This type of judicial review is a crucial safeguard against legal errors in the Tribunal system in decisions often involving the most fundamental rights for the people concerned. **Clause 2 should therefore be removed from the Bill.**

Quashing Orders – Part 1, Clause 1

5. A quashing order is a remedy a court can make after finding that a public body acted unlawfully. A quashing order makes the unlawful act null and void – it never had any legal effect,[3] and therefore its consequences must be "unwound".

6. Clause 1 subsection (1) inserts a new s.29A into the Senior Courts Act 1981. This introduces on a statutory footing two types of remedies: (i) a quashing order which does not take effect until a date specified by the court (s.29A(1)(a)) (we refer to these as suspended quashing orders ("SQOs")); and (ii) a quashing order which takes effect only from the point of court order onwards (s.29A(1)(b) (we refer to these as prospective only quashing orders ("POQOs")). These remedies may be used independently or cumulatively.[4]

Suspending quashing orders

7. As stated in our responses to the Consultation and to IRAL[5] we support the introduction of a clear statutory basis for the courts, at their discretion, to enable an unlawful act to remain temporarily valid. We envisage that this would be used in exceptional circumstances, such as those in *Ahmed*[6] where, for example, a quashing order that had

[2] *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

[3] *SSHD v JJ* [2007] UKHL 45 [2008] 1 AC 385 at [27], Lord Bingham: "an administrative order made without power to make it is, on well-known principles, a nullity".

[4] 'Judicial Review and Courts Bill Explanatory Notes', para. 86.

[5] JUSTICE response to Consultation, n.1 above, para. 64; JUSTICE response to IRAL, n.1 above, para. 83.

[6] *Ahmed v HM Treasury (No 2)* [2010] 2 AC 534.

immediate effect put the UK in breach of its international law obligations. The new s.29A(1)(a) should resolve any lack of clarity that currently exists as to whether the courts already have this power.

8. The type of SQO that was originally envisaged by the IRAL would have been conditional, such that the relevant decision or provision would not be quashed at all if certain steps were carried out by the defendant in a specified time frame. This would have given rise to several practical difficulties but also potentially deprived claimants of a remedy (in the same way as a POQO would (see paragraph 10 below)). We therefore support the inclusion of s.29A(1)(6) which provides that the suspension of any quashing order does not limit any retrospective effect of the quashing order once the quashing takes effect on the date specified in the SQO.

9. However, as set out in paragraphs 17 to 21 below we resist the inclusion of any presumption in favour of their use.

Prospective only quashing orders

10. In issuing a POQO the courts will be determining that an unlawful measure should be treated as if it were lawful retrospectively.[7] This is problematic for the following reasons:

    a. **It undermines the rule of law**, which at its core dictates that all are subject to the law, that no person should be subject to unlawful action,[8] and that individuals have access to an effective judicial remedy against unlawful measures.[9] POQOs entail a direct rejection of these principles – they allow unlawful executive acts to stand and therefore prevent individuals who were previously impacted by them from challenging them. As was recognised by the Consultation,[10] this could lead to severe unjust outcomes.

       The Government states that POQOs would allow the executive to implement

[7] New ss.29A(4) and (5) set out the implications of doing this – the decision or act in question is to be treated as valid and unimpaired by the relevant defect for all purposes for the period of time before the prospective effect of the quashing order.

[8] As has been expounded countless times by the courts, "[t]he rule of law requires that those exercising public power should do so lawfully." *Bobb v Manning* [2006] UKPC 22 at [14] (Lord Bingham).

[9] *R v Commissioner of the Metropolis, ex p Blackburn* [1968] 2 QB 118, at p. 148E-G.

[10] 'Judicial Review Reform, The Government Response to the Independent Review of Administrative Law' (Consultation), para. 61. [the use of prospective only remedies] "could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy."

other forms of remedies for those previously impacted by the unlawful measure.[11] However, the Government would be under absolutely no legal duty to address the injustices caused by the unlawful measure, nor would there be scrutiny as to the effectiveness of any such remedies. We do not consider that to be an appropriate or principled solution.

b. **It arbitrarily distinguishes between people who have been impacted by the unlawful measure before and after a court judgment**, undermining certainty, consistency and equal treatment under the law. Individuals who have not litigated, but are impacted by an unlawful measure, have just as much a need for the law's protection, as the potential individuals who would be impacted in the future.

c. **It undermines Government accountability,** in turn undermining the quality and effectiveness of decision-making.[12] POQOs could allow the executive to act unchecked, safe in the knowledge that were the act to be unlawful the implications would be limited. Ensuring government accountability through the courts is in the interests of all: effective and good governance must be lawful governance.[13] Further, the possibility of judicial review and its consequences motivates public bodies to maintain high standards in their administration and ensure that it is lawful. Ultimately, as the summary of Government submissions to the IRAL states, judicial review ensures "that care is taken to ensure that decisions are robust", which "improves the decision".[14]

d. **It will likely have a chilling effect on judicial review.** Bringing a judicial review has many disadvantages to applicants, not least the costs, uncertainty and length of the process. The key motivation for many applicants – for the impact of the measure on them to be remedied – will be lost if a POQO is made.

---

[11] The Consultation suggests that these could be "conciliatory political mechanisms" that are used to "set up a compensation scheme", Consultation, n.10 above, para. 60.

[12] L. Platt, M. Sunkin and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales', Journal of Public Administration Research and Theory 243 (2010), considering research showing the various benefits to local authorities and their public service provided by judicial review.

[13] This is recognized in the Government's guidance on judicial review for civil servants , which states that "administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked", Government Legal Department, 'The judge over your shoulder – a guide to good decision making' (2016), p. 31.

[14] 'Summary of Government Submissions to the Independent Review of Administrative Law', para. 29.

e. **It undermines legal and practical certainty.** The impact of a POQO and the transition between a measure being valid and then quashed going forward will be difficult and unwieldy to navigate, including for public bodies. By way of example, it is unclear if proceedings to pay a penalty notice could be brought against an individual for breach of an unlawful byelaw if the events occurred prior to the byelaw being quashed prospectively but the charges and/or proceedings are brought afterwards. The introduction of POQOs removes the certainty provided by the position that a measure if found to be unlawful will then be treated as such. Laws should be able to guide conduct to enable persons to be able to act in accordance with the law[15] – a position where a measure is both recognised as being unlawful but is also to be treated as if it were lawful is contrary to this.

f. **It allows the courts to in effect "re-write the law retrospectively."**[16] The power at s.29A(1)(b) (combined with s.29A(5) see paragraph 13 below) to treat an unlawful measure as valid retrospectively could be used even where a measure contravenes primary legislation. This is a considerable transfer of power to the judiciary from Parliament (and Government). It risks important and difficult social policy and economic issues, which require and deserve Parliament's attention, including in retrospectively validating previous unlawful measures if necessary[17], being decided by the courts.

11. Furthermore, POQOs are not necessary to address the Government's concerns. The Government states that POQOs would ensure that "the adverse effects of retrospective quashing may be avoided – such as severe administrative or economic consequences."[18] We recognise that there will be circumstances where, despite the concerns set out above, it would not be appropriate to quash an unlawful decision. However, the courts have a wide remedial discretion which they can use to address

[15] As one Government department made in its submissions to IRAL: "[t]he rule of law requires predictable rules around which citizens, businesses and government can plan their activities and lives" ('The Independent Review of Administrative Law', para. 2.62).

[16] As Professor Tom Hickman QC explains, T. Hickman 'Quashing Orders and the Judicial Review and Courts Act', (July 2021), UK Const. L Blog.

[17] See, for instance, the example provided by Professor Tom Hickman QC of a 2013 decision of the Supreme Court finding that regulations imposing penalties on persons claiming jobseekers' allowance who failed to undertake unpaid work were ultra vires. Parliament enacted retrospective legislation to validate historic benefit deductions as repayment was considered an unjustified claim on public funds.

[18] 'Judicial Review Reform Consultation The Government Response', para. 82.

these circumstances, and frequently do so.[19] In exercising their remedial discretion, the courts will consider a range of factors and will take into account the impact of quashing on certainty and "the needs of good public administration".[20] Where significant administrative disruption or "chaos" could result from a quashing order, the courts have the power to, and often do, issue a declaration instead.[21] Research by PLP has shown that in challenges to statutory instruments, a declaration, rather than a quashing order is the most common remedy following a successful judicial review.[22] The courts have also stated that in wholly exceptional cases it may be appropriate for a quashing order to have prospective only effect.[23] A legislative power to grant POQOs is therefore not necessary.

12. **The Bill should be amended to remove s.29A(1)(b).**

Collateral challenge and erasure of private law rights - s.29A(5)

13. Section 29A(5) provides that where an impugned act is upheld either until the quashing takes effect (in respect of an SQO) or retrospectively (in respect of an POQO) it "is to be treated for all purposes as if its validity and force were, and always had been unimpaired by the relevant defect". We have significant concerns about the impact of this on collateral challenge. Ordinarily, where a court has found a measure unlawful, even if it has not been quashed, it is possible to rely on this finding of unlawfulness in other proceedings, called "collateral challenge". For example, a person who has had to pay a tax under unlawful regulations would normally be able to bring a claim against HMRC to be refunded the money.[24]

[19] See further, JUSTICE Response to Consultation, n.1 above, paras. 45 – 50.

[20] *Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union* [2011] UKPC 4 at [40] (Lord Walker).

[21] See for example, in *R (Hurley and Moore) v. Secretary of State for Innovation, Business and Skills* [2012] EWHC 201*; R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1; *R (South West Care Homes Ltd) v Devon County Council* [2012] EWHC 1867 (Admin); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin); *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438; *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

[22] See the Appendix of PLP's submission to the government's consultation on judicial review reform and our response to question 5 particularly: https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf.

[23] *Re: Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41 per Lord Nicholls at [40] and Lord Hope at [71-74]. See also *BASCA,* no.**Error! Bookmark not defined.**. See Lord Slynn (obiter) in *R v Governor of Brockhill Prison Ex p. Evans (No.2)* [2001] 2 A.C. 19 at pp. 26-27. See further, JUSTICE Response to Consultation, n.1 above, para. 50.

[24] A cause of action under the law of restitution exists for money to be returned where tax has been unlawfully extracted from a taxpayer by virtue of a legislative requirement. *Woolwich Equitable Building Society v IRC* [1992] STC 657; *Test Claimants in the Franked Investment Income Group Litigation v IRC* [2012] All ER (D) 188.

14. However, s.29A(5) requires an unlawful measure to be treated as lawful. This would preclude relying on the unlawfulness of a measure in other proceedings. For example, it raises the possibility of people being charged with a criminal offence under unlawfully made delegated legislation, but not being able to raise the fact that the legislation was subsequently found to be unlawful as a defence. As IRAL recognised, this position would leave the law in a "radically defective state".[25] **A further subsection should be included to protect collateral challenge and third-party rights and defences where a remedy under s.29A(1) is ordered.**

The requirement to consider proposed executive actions - s.29A(8)(e)

15. S.29A(8)(e) states that the court must consider "*any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*". The Explanatory Notes state "*this may concern actions to rectify any unlawfulness, or review a decision in light of the court's judgment*."[26]

16. JUSTICE is particularly concerned with the requirement on the courts to consider any action "*proposed to be taken*". This provides little or no legal basis to require the public body to act, especially if only said during submissions and not reflected in the court's judgment. The reality of public body decision-making, executive action and the legislative timetable, is that priorities and policy positions change, and resources and time may have to be diverted. In the meantime, the judicial review claimant and all others adversely impacted by the measure must wait – potentially continuing to be detrimentally impacted – with limited, if any, legal recourse against the defendant (or other relevant public body). **The words "*or proposed to be taken*" should be removed from s.29(8)(e) so that it only refers to undertakings.**

Presumption - s.29A(9) and s.29A(10)

17. The Government describes s.29A(9) as implementing a "broad presumption"[27] in favour of the courts issuing SQOs and POQOs. It is a convoluted provision which introduces several steps and terms which will lead to increased arguments and submissions at the remedy stage of litigation, increasing the costs and length of litigation to the detriment

[25] IRAL Report, n.15 above, para. 3.66.

[26] Explanatory Notes, n.4 above, para. 92.e.

[27] *Ibid*, para. 2. Paragraph 21 of the Explanatory Notes describes s.29A(9) as a "general presumption".

of parties and the courts. It is also unclear how s.29A(9) accords with the list of factors the court are directed to consider at s.29A(8). We recognise that any legislation will lead to debates in court as to the meaning of terms, however, introducing processes and new concepts for the courts to grapple with where this is unnecessary is not justifiable.

18. The Government states that s.29A(9) can "direct and guide the court's reasoning to certain outcomes in certain circumstances,"[28] notably where the remedies at s.29A(1) "can provide adequate redress."[29] However, the courts already seek to craft the most appropriate remedy for the circumstances before them. A court will issue a POQO / SQO if it is the most appropriate remedy; there is no need for a convoluted legislative provision telling the courts to do so.

19. The presumption also conflicts with the Government's stated aim of increasing remedial discretion,[30] requiring particular remedies to be used in certain circumstances. We oppose POQOs for the reasons stated above, however if they are to be used this should be at the courts' discretion. SQOs should also be used only in exceptional circumstances, as determined by the court. It would greatly undermine the protective constitutional role of judicial review and risk incoherence, if due to s.29A(9) the courts were constrained to issue a SQO or POQO, when a straightforward quashing order would be more suited to the circumstances of the case. **Section 29A(9) should therefore be removed.**

20. In applying the presumption, s.29A(10) requires the court to "*take into account, in particular*" anything under s.29A(8)(e). This directs the court to give special consideration to anything which the public body with responsibility for the impugned act, which may or may not be the defendant,[31] has done or says it will do. However, there are difficulties with making a POQO on the basis of statements made, or even undertakings given by the defendant. First, only the claimant would be able to enforce, if at all (see paragraph 16 above), the undertaking or statement, even though others will also be impacted by the defendant's non-compliance. Further, claimants may not have the funds, ability or resources to bring the case back to court. Second, the recourse would only be against the defendant public body not any other public bodies who have

[28] Judicial Review Reform Consultation, The Government Response, n.18 above, para. 96.

[29] *Ibid*, para. 98.

[30] See for instance, Explanatory Notes, n.4 above, para. 19.

[31] *Ibid*, para. 92.e.

said they would act. Third, in rejecting the introduction of a conditional quashing order (see paragraph 8 above), the Government recognised the practical difficulties with deciding whether a condition has been complied with[32] – the same concerns apply equally to court orders made on the basis of public body assurances, including the potential for further protracted and costly litigation.

21. The courts do already take into account steps that the executive or Parliament are intending to take[33] or have taken[34], (as well as now being required to by s.29A(8)(e)), and general accept that the defendant will comply with the court's ruling on lawfulness.[35] However, it should be for the courts to determine in the circumstances of the case what weight should be given to public body assurances; to ensure that the most appropriate remedy is made, considering the difficulties with relying on assurances. The courts should not be required to preference these assurances at the expense of other considerations, in particular the impact on the claimant and other third parties. **We therefore strongly oppose s.29A(10) and it should be removed from the Bill.**

Cart judicial reviews – Part 1, Clause 2

22. Clause 2 of the Bill, through a new s.11A in the Tribunal, Courts and Enforcement Act 2007, seeks to greatly restrict the possibility of judicial reviews of Upper Tribunal ("UT") refusals of permission to appeal a decision of the First-tier Tribunal (the "FTT") ("*Cart* JRs"). JUSTICE continues to oppose the removal of *Cart* JRs for the below reasons. **Clause 2 should therefore be removed from the Bill.**

Cart JRs prevent serious injustices

23. The Government recognised in the Consultation that the removal of *Cart* JRs "*may cause some injustice*".[36] However limiting oversight of the UT's permission decisions, could have extremely serious consequences for those affected.

---

[32] Judicial Review Reform Consultation, The Government Response, n.18 above, para. 68.

[33] For example, in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, in refusing to make a declaration of incompatibility under the Human Rights Act 1998 regarding the prohibition of assisted suicide, the Supreme Court considered the fact that Parliament was "still actively engaged in considering associated issues" in the context of a private members bill in the House of Lords at the time.

[34] The courts will exercise their discretion to not provide a remedy if events have overtaken the proceedings. For instance, to refuse to quash a decision to disclose a report which had, by the date of judgment, already been disclosed (*R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398).

[35] *R (Langton) v Secretary of State for Environment, Food and Rural Affairs, Natural England* [2019] EWHC 597 (Admin) at [130] where the court was not persuaded that "declaratory relief" was required since Natural England had "indicated that it [was] ready to take any action required by the judgment".

[36] Consultation, n.10 above, para. 52.

24. A significant proportion of *Cart* JRs relate to immigration claims.[37] Almost all the cases in the Immigration and Asylum Chamber of the FTT relate to asylum and human rights appeals, which engage the most fundamental rights, including in some cases the difference between life and death.[38] This can be seen by the 57 real case studies of successful *Cart* JRs provided by the Immigration Law Practitioners' Association (ILPA) in response to the Consultation, as well as the 10 cases identified by IRAL.[39] Each case involved a person's fundamental rights and the UT incorrectly applying the law in refusing to grant permission to appeal. The examples provided by ILPA include parents' applications for their child to be reunited with them, a child's application to remain in the UK to receive life-saving treatment, the asylum claim of a victim of human trafficking and Female Genital Mutilation, and many other deportation and asylum decisions where, if deported individuals faced persecution, their lives were at risk and/or they would be separated from their families. Under Clause 2, this crucial and focused review will be lost, and with it the potential for fundamental injustices to be prevented.

25. There is also an important wider public interest at stake. *Cart* JRs prevent the UT from becoming insulated from review, by ensuring that there is a means by which errors of law, which could have very significant and ongoing impacts across the tribunal system, can be identified and corrected. As Lord Philips said, *Cart* JRs "*guard against the risk that errors of law of real significance slip through the system*".[40] UT judges will be specialists in their field, however as Lady Hale recognised "*no-one is infallible*".[41] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within the tribunals system,[42] with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

26. The *Cart* JR cases that succeed will involve either (i) an important point of principle or practice, which would not otherwise be considered; or (ii) some other compelling reason,

[37] 5,870 judicial review applications since 2012 are labelled "Cart – immigration" in the Ministry of Justice data on civil justice and judicial review for 2020. 423 judicial review applications are labelled "Cart – other". Civil justice statistics quarterly: October to December 2020, Civil Justice and Judicial Review data file.

[38] As Lord Dyson recognised in *Cart,* no.2, at [112], "In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture."

[39] ILPA, 'ILPA's response to the government's consultation on Judicial Review Reform' (April 2021).

[40] *Cart,* no. 2, at [92] (Lord Phillips).

[41] *Ibid*, at [37] (Lady Hale).

[42] *Ibid,* at [43] and [37] (Lady Hale).

such as a wholesale collapse of fair procedure.[43] These are the second-tier appeals conditions that were set as a threshold by the Supreme Court in *Cart,* and are now in the Civil Procedure Rules, for a *Cart* JR to be considered.[44] The Supreme Court sought to address the most significant injustices while making efficient use of judicial resources.[45] It was in fact the Supreme Court's intention that few *Cart* JRs would be successful, but those that were would be the most egregious and important cases.

Proportionate use of resources

Cart JR "success"

27. The Government's Impact Assessment in respect of the Bill concludes that the "success" rate for *Cart* JRs is around 3.4%,[46] which it is worth noting is a highly significant increase (15.5x) from the figure of 0.22% used to initially justify the removal of *Cart* JRs by IRAL.

28. Further, the Government's definition of "success" does not reflect the purpose of *Cart* JRs and is unduly narrow. The Government defines "success" as not only success in the judicial review but also a finding in favour of the claimant at the subsequent substantive appeal in the UT.[47] However, *Cart* JRs have several purposes (see paragraphs 23 to 26), including the identification of errors of law in UT permission decisions where important issues of principle or practice are raised. This will be achieved if the UT's refusal of permission to appeal is quashed. The Impact Assessment states that a total of 92 cases, out of 1249 applications,[48] were remitted to the UT for a permission to appeal decision, in the context of immigration *Cart* JRs for 2018 to 2019[49] (minus cases pending an appeal decision in the UT). Therefore, based on these figures and a more accurate definition of "success", which still does not account for settlement, the "success rate" is **7.37%** – more than double the 3.4% relied upon by the Government and more than 30 times the 0.22% relied upon by IRAL.

---

[43] CPR 54.7A(7)(b).

[44] As well as requiring an "arguable case, which has a reasonable prospect of success" (CPR 54.7A(7)(a)).

[45] Elliott and Thomas (2012), no.**Error! Bookmark not defined.**; Bell (2019), no.**Error! Bookmark not defined.**; *Cart,* no. 2, at [89] (Lord Phillips).

[46] The Government conducted its own statistical analysis following strong criticism of IRAL's analysis, which seriously misrepresented the IRAL's statistical findings, had methodological flaws and did not represent the range of "positive results" for claimants, including settlements (as is recognised by the Government, Impact Assessment, paras. 59 – 60). See, J. Tomlinson and A. Pickup, 'Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews', U.K. Const. L. Blog (March 2021), JUSTICE response to the Consultation, n.1 above, paras. 24 to 29.

[47] 'Judicial Review and Courts Bill: Judicial Review Reform, Impact Assessment', para. 62.

[48] *Ibid*, para. 74.

[49] Which the Impact Assessment determines to be the relevant years and are used for the figure of 3.4%.

The costs argument

29. The costs of Cart JRs are described as a "*disproportionate and unjustified burden*" on the system.[50] The Impact Assessment estimates that between 173 to 180 days High Court and UT sitting days will be freed up each year by Clause 2, representing savings of between £364,000 to £402,000 a year. This figure is not high at all – especially when considering the important role of *Cart* JRs in preventing serious injustice and in ensuring key decisions of the UT are not insulated from challenge. By comparison, the Government Legal Department's total administration costs from 202-2021 was £226.7m[51] (564 times larger than the upper estimate for yearly *Cart* JR costs).

30. This figure is also inflated since it considers the costs of the UT rehearing the case, which will occur because an unlawful UT permission decision has been identified by the High Court. To include these costs in the Impact Assessment is to include savings that result from allowing unlawful decisions to stand. This position cannot be acceptable.[52] Further, the average number of hours per *Cart* JR in the High Court that the Impact Assessment provides for is 1.3 hours, or five *Cart* JRs per day.[53] This could easily be overestimating the time it takes a High Court judge to consider a single *Cart* JR case. This is especially since there is a specific streamlined procedure for *Cart* JRs, including that if permission for the *Cart* JR is granted, unless a substantive hearing on the *Cart* JR is requested, the court will automatically quash the UT's refusal of permission.[54]

JUSTICE

28 September 2021

[50] Judicial Review Reform Consultation, The Government Response, para. 37.

[51] Government Legal Department Annual Report and Accounts 2020 – 21, page 25.

[52] See further on this PLP, Judicial Review and Courts Bill, PLP Briefing for House of Commons Second Reading, para. 23.

[53] Working back from the numbers provided (150 day saving for the High Court, 6.5 hours per day and an average 750 case load per year

[54] CPR 54.7A(9) and 5A.7A(10). The approximations of time taken to review a Cart JR in the High Court is based on a time and motion study conducted by Lord Justice Briggs in 2016. However, as the Impact Assessment recognises this study did not focus on a specific court level or case type.