# Judicial Review and Courts Bill

# (Part 1 – Judicial Review)

# House of Lords Committee Stage

# Supported Amendments

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## 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 separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") for Committee Stage in the House of Lords. This briefing addresses Part 1 of the Bill, which relates to judicial review. Further detail can be found in JUSTICE's previous briefings for the Second Reading in the House of Lords and the Bill's stages in the House of Commons.[1]

3. JUSTICE has several significant concerns with both Clause 1 and Clause 2 of the Bill. 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.

## Quashing Orders – Part 1, Clause 1

<u>Prospective only quashing orders</u>

4. JUSTICE is opposed to prospective only quashing orders ("POQOs") which would be introduced by Clause 1 subsection (1) which inserts a new s.29A(1)(b) into the Senior Courts Act 1981. In issuing a POQO, the courts will be determining that an unlawful measure should be treated as if it were lawful in the past.[2] This goes directly against the rule of law and could significantly undermine the efficacy of judicial review to the detriment of individuals' rights and the accountability of government.

5. **We therefore support Amendments 1, 4 and 5 in the names of Lord Pannick, Lord Ponsonby and Lord Marks which would remove the power to grant prospective only remedies from the Bill.**

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[1] https://justice.org.uk/judicial-review-and-courts-bill/.

[2] 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.

Amendment 1

Page 1, leave out line 9

***Member's explanatory statement***

*The purpose of this amendment, along with amendments to page 1, line 15, and page 2, line 2, in the name of Lord Pannick, is to remove the proposed power for the court to prevent a quashing order from having retrospective effect, thereby validating what would otherwise be quashed as unlawful.*

Amendment 4

Page 1, leave out lines 15 to 18

***Member's explanatory statement***

*The purpose of this amendment, along with amendments to page 1, line 9, and page 2, line 2, in the name of Lord Pannick, is to remove the proposed power for the court to prevent a quashing order from having retrospective effect, thereby validating what would otherwise be quashed as unlawful.*

Amendment 5

Page 2, line 2, leave out "or (4)"

***Member's explanatory statement***

*The purpose of this amendment, along with amendments to page 1, line 9, and page 1, line 15, in the name of Lord Pannick, is to remove the proposed power for the court to prevent a quashing order from having retrospective effect, thereby validating what would otherwise be quashed as unlawful.*

### *Concerns with POQOs*

6. **POQOs deny redress to those impacted by unlawful government action. This weakens the protection of citizens against abuse of power and will result in unjust outcomes.** As the Government has acknowledged, the use of POQOs "*could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy.*"[3] This may also **breach the requirement for an effective remedy for breaches of the European Convention on Human Rights (ECHR), as**

[3] The Government Response to the Independent Review of Administrative Law' (Consultation), para. 61

**provided for in Article 13 ECHR**.

In 2018 the Home Office decision to cut weekly benefits to asylum seeking victims of trafficking by over 40% - from £65 to £37.75 per week – was found to be unlawful. Claimants and anyone else subjected to the cut was entitled to backdated payments.[1] However, if the court had ordered a POQO, the claimant, and thousands of other highly vulnerable victims of trafficking who had suffered significant hardship due to the reduced funds, would not be entitled to any backdated payments.[1]

7. **POQOs arbitrarily distinguish between people who have been impacted by the unlawful measure before and after a court judgment** – those that have been affected by an unlawful decision or measure before the court's decision will not be entitled to the same protection as those who may have been affected by the unlawful decision / measure after the court's decision.[4]

In 2017 the High Court found that a Home Office policy to remove EU rough sleepers was unlawful and discriminatory. The policy was quashed.[1] If a POQO had been ordered, any homeless EU citizen who had already faced removal action or who already had a removal notice issued against them, would still have faced deportation – only those potentially receiving a removal notice in the future would be protected.

8. **POQOs will weaken judicial review and therefore the accountability of government.** 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*".[5] However, POQOs:

   a. reduce the negative consequences faced by public bodies for having acted unlawfully;
   b. remove a key motivation to bring a judicial review – to reverse the consequences for the claimant of the unlawful measure. This will likely have a chilling effect on judicial review;[6] and

[4] See JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 26.

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

[6] As the JCHR has said "*judicial review claimants already face significant obstacles when seeking justice, and it is unfair and unreasonable to introduce changes that could further dissuade them from bringing unlawful action by public authorities before the court.*" JCHR, no.4 above, para. 24.

c. may also prevent claimants from securing legal aid, which requires there to be "sufficient benefit" to the individual of the advice and representation.[7]

9. **POQOs introduce serious legal and practical certainty.** The transition between a measure being valid and then quashed going forward will be difficult to navigate, including for public bodies. For example, what would happen to ongoing criminal proceedings in respect of a regulation found to be unlawful but quashed only prospectively?

10. **POQOs risk important and difficult social policy and economic issues, which require and deserve Parliament's attention, being decided by the courts.**[8] As Lord Pannick stated at Second Reading, POQOs "confer on the judiciary a very wide new power to absolve unlawful acts",[9] thereby in effect allowing them to "re-write the law retrospectively".[10]

11. **The courts already have considerable remedial flexibility** to address circumstances where, despite the concerns set out above, a quashing order would not be appropriate.[11] The courts will frequently consider the impact of quashing on third parties, certainty and *"the needs of good public administration*"[12], often declining to issue a quashing order and issuing a declaration instead.[13]

12. The key difference between a declaration and a POQO is that with a declaration the unlawfulness of the measure is still recognised, both retrospectively and prospectively, so the claimant and others in similar circumstances can rely on the unlawfulness to obtain a remedy or defend themselves in other proceedings (see further paragraphs 13

[7] Regulation 32 of the Civil Legal Aid (Merits Criteria) Regulations 2013 in relation to Legal Help.

[8] See further, Jeremy Wright, House of Commons, Volume 702, Column 212: "f*inding a decision to be unlawful but then saying that that unlawfulness applies only to those affected by it in the future and not in the past puts the court in a strange position.*"

[9] Lord Pannick, House of Lords, Volume 818, Column 1369.

[10] T. Hickman 'Quashing Orders and the Judicial Review and Courts Act', (July 2021), UK Const. L Blog.

[11] See further, JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021), paras. 45 – 50.

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

[13] Research by PLP has in fact shown that in challenges to statutory instruments, a declaration, rather than a quashing order, is the most common remedy following a successful judicial review. See, https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf.

to 15 below). This provides the public body with the necessary flexibility to address the consequences of the unlawful measure, while providing protections to those impacted.

Denial of compensation or damages for unlawful government action

13. Under s.29A(5), where a new remedy is ordered, individuals' will not be able to rely on the unlawfulness of the measure to defend themselves in criminal proceedings and those who have suffered loss and damage as a result of unlawful government action will be denied compensation or damages. **JUSTICE urges Peers to vote in favour of Amendment 6 in the name of Lord Ponsonby which would protect third-party rights and defences where one of the new remedies is ordered.**

Amendment 6

Page 2, line 4, at end insert—

> "(5A) Where the impugned act consists in the making or laying of delegated legislation ("the impugned legislation"), subsections (3) and (4) do not prevent any person charged with an offence under or by virtue of any provision of the impugned legislation raising the validity of the impugned legislation as a defence in criminal proceedings.
>
> (5B) Subsections (3) and (4) do not prevent a court or tribunal awarding damages, restitution or other compensation for loss."

***Member's explanatory statement***

*This amendment would protect collateral challenges by ensuring that if a prospective-only or suspended quashing order is made, the illegality of the delegated legislation can be relied on as a defence in criminal proceedings. This would prevent individuals from being criminalised under defective and illegal ministerial powers.*

14. Clause 1 as it currently stands goes directly against the ordinary position, where, if a court has found a measure unlawful, even if it has not been quashed, it is possible for others to rely on this finding of unlawfulness in criminal and civil proceedings. As IRAL stated this would leave the law in a "*radically defective state*"[14] and risks significant unfairness.

[14] IRAL Report, para. 3.66.

- An individual could find themselves being prosecuted or continuing to have a criminal record under an unlawful statutory instrument.
- A person who has had to pay a tax under unlawful regulations, would not be able to bring a claim against HMRC to be refunded the money.[1]
- An individual who has paid a penalty notice for a traffic offence under an unlawful byelaw would not be able to get a refund. If that person refused to pay and was subject to, or in the process of being subject to, prosecution and a fine (which can be in the £1,000s) in the magistrates' court, they would have no defence or recourse.
- Individuals who have suffered mistreatment due to unlawful actions would not be able to bring a claim for compensation, for instance for unlawful imprisonment.
- Individuals found ineligible for a welfare benefit under unlawful eligibility regulations would not receive back payments of the benefit. They would likely have to make a new application and wait for another decision to be made to receive the correct entitlement going forward.

15. We recognise that the interests of those who would benefit from the quashing is one of the s.29A(8) factors that the courts must consider, and that under s.29A(2) the court could add conditions to protect third parties' rights and defences. However, this does not provide anywhere near sufficient protection for third parties. It cannot ever be justifiable for an individual to face the loss of their liberty or a penalty on the basis of an unlawful measure. This gap in protection must be remedied. It is also completely unrealistic to expect a court to envisage all the potential third parties and groups of individuals who may be negatively affected by an unlawful measure being treated as lawful. This is especially so since the public body defendant has no obligation, or incentive, to bring the potential risks to third parties to the court's attention.

## Proposed executive actions - s.29A(8)(e)

16. Proposed new s.29A(8) lists factors that the court must take into account when deciding whether to order one of the new remedies. Section 29A(8)(e) requires the courts to consider any action "*proposed to be taken*" by a responsible body. This is incredibly vague. It 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 – continuing to be detrimentally impacted – with limited, if any, legal recourse.

17. **JUSTICE considers the words "or proposed to be taken" must be removed from s.29A(8)(e).** This would not prevent the courts from looking forward but limits it to where the public body has given an undertaking that it will carry out the proposed future acts, helping provide certainty and legal recourse if the undertaking is not followed. **JUSTICE there asks Peers to vote in favour or Amendment 11 in the name of Lord Ponsonby.**

Amendment 11
Page 2, line 21, leave out "or proposed to be taken"

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

18. Sections 29A(9) and (10) would insert a presumption in favour of the use of the new remedies. The presumption unnecessarily fetters the courts' remedial discretion, is convoluted, and risks excessive litigation. It directly conflicts with the Government's stated aim of increasing the courts' flexibility by requiring particular remedies to be used in certain circumstances. **JUSTICE urges parliamentarians to vote in favour of Amendment 13 in the names of Lord Anderson, Lord Etherton, Lord Pannick and Lord Ponsonby which would remove s.29A(9) and s.29A(10)**

Amendment 13
Page 2, leave out lines 24 to 32

***Member's Explanatory Statement***
*This amendment would protect the discretion of the court by removing the presumption in favour of issuing suspended, prospective-only quashing orders.*

19. The Government states that s.29A(9) can provide "*a clear message that Parliament expects to see the new powers used where appropriate*."[15] However, the courts already use the most appropriate remedy for the circumstances of the case before them. The

[15] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 127.

inclusion of the presumption displays a distinct lack of trust in the judiciary.

20. The Government has recognised that *"removing the presumption from the Bill would not necessarily prevent the new modifications to quashing orders from operating effectively*".[16] However, its inclusion will not only reduce remedial flexibility, but is likely to increase the length and costs of judicial review – for courts, public bodies and claimants – by encouraging further arguments and submissions at the remedy stage. This is particularly so in light of the convoluted drafting and multiple stages to the presumption.

21. **The presumption is made worse by the inclusion of s.29A(10).** This provision directs the court to give special consideration to anything which the public body with responsibility for the impugned act (which may not be the defendant) had done or says it will do when considering if the presumption applies.

22. Ordering the new remedies based on public bodies' assurances risks uncertainty and further denial of redress. For example, where someone has been deemed ineligible for a welfare benefit under unlawful regulations, the court may order a POQO on the basis of Government assurances that a mechanism for ensuring back payments will be put in place. However, such a process may take longer than initially anticipated or never materialise. In the meantime, the claimant, and others, continue to be denied the money they are due - which could very easily be the difference between whether they can afford their food and rent. It will be very difficult for claimants, and impossible for third parties in similar positions, to enforce Government assurances about a compensation scheme.

23. The courts already take into account steps that the executive or Parliament are intending to take[17] or have taken[18] (as well as now being required to by s.29A(8)(e)), and generally accept that the defendant will comply with the court's ruling on lawfulness.[19] However, it should be for the courts to determine in the circumstances of the case what weight

[16] *Ibid*, page 127.

[17] 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.

[18] The courts will exercise their discretion to not provide a remedy if events have overtaken the proceedings, *R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398.

[19] *R (Langton) v Secretary of State for Environment and others* [2019] EWHC 597 (Admin) at [130].

should be given to public body assurances.

Precondition of an effective remedy

24. The presumption requires the new remedies to be used where they offer "*adequate redress"*, but, as has been recognised by the JCHR, Clause 1 does not prevent the courts using the new remedies in situations where their use would not offer "*adequate redress"* for the claimant or others impacted by the unlawful measure.[20] This is particularly concerning given that the courts are required to consider matters that may run counter to an "effective remedy" under s.29A(8), for example the impact on good administration and public bodies of a remedy.

25. In addition, there is a lack of clarity as to whether, in considering if a remedy provides "*adequate redress*" under s.29A(9), the courts should consider all those impacted by the unlawful measure, or just the claimant. The use of the words "*adequate redress*" at s.29A(9) also risk unnecessarily lowering this bar to the detriment of those impacted by unlawful measures.[21]

26. **In the alternative to Amendment 13, JUSTICE urges parliamentarians to vote for Amendment 14 in the names of Baroness Chakrabarti and Lord Ponsonby**. This would replace ss.29A(9) and (10) with a new s.29A(9). The new s.29A(9) would (a) create a precondition to the exercise of the new remedies; (b) ensure that the new remedies are only used where (i) they provide an "effective remedy", rather than "adequate redress" and (ii) the effective remedy is for the claimant and any other person materially affected by the unlawful measure.

Amendment 14

Page 2, leave out lines 24 to 32 and insert—

"(9) Provision may only be made under subsection (1) if and to the extent that the court considers that an order making such provision would, as a matter of substance, offer an effective remedy to the claimant and any other person materially affected by the impugned act in relation to the relevant defect."

[20] JCHR, no.4 above, para. 20.

[21] As Joshua Rozenberg QC has pointed out why were the words "sufficient redress", "full redress" or just "redress" not used?, *A Lawyer Writes,* 'Fettering the courts' discretion' (July 2021).

***Member's explanatory statement***

*The amendment would remove the presumption and insert a precondition of the court's exercise of the new remedial powers that they would offer an effective remedy to the claimant and any other person materially affected by the impugned act.*

## Cart judicial reviews – Part 1, Clause 2

27. 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"). This will jeopardise the tribunal system and increase the risk of serious injustices occurring. **JUSTICE therefore urges Peers to oppose the Question that Clause 2 stand part of the Bill.**

<u>Concerns</u>

28. ***Cart*** **JRs prevent serious injustices**: As the JCHR has stated "*removing the right to judicially review refusals of permission to appeal in all but the most exceptional circumstances will result in a, statistically small, number of these cases being wrongly decided, and those individuals facing a real risk of serious human rights abuses."*[22] Almost all the cases in the Immigration and Asylum Chamber of the UT relate to asylum and human rights appeals, which engage the most fundamental rights, including in some cases the difference between life and death.[23]

[22] JCHR, no.4 above, para. 39.

[23] As Lord Dyson recognised in *Cart,* 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*."

A recent statistical study of *Cart* JRs between 2018 and 2020 found that over two-thirds of appeals raised human rights grounds, with 71% of "successful" *Cart* JRs involving human rights. [24]

Examples of successful Cart Judicial Review cases include cases where legal errors had been made in determining whether individuals in the following circumstances could remain in the UK:

- A child in need of life saving treatment.
- A victim of trafficking who was at risk of being re-trafficked and forced into prostitution if returned to Nigeria, and her daughter who was at risk of FGM.
- An individual with learning difficulties who faced being returned to Iran where they were at risk of persecution and inhuman and degrading treatment. [25]

29. *Cart* JRs apply to all permission decisions of the UT – not just in the immigration context. The tribunal system includes many other areas of law, including tax, property, social security, health, education, social care, and pensions. For instance, in the Administrative Appeals Chamber of the UT, many of the appeals relate to access to benefits, which can be the difference between destitution and safety for an individual and their family facing homelessness. In one of the first reported *Cart* JR cases, the High Court found that the FTT had failed to consider a significant witness statement which could have vitiated its decision upholding findings of misconduct against a mental health nurse.[26]

30. ***Cart* JRs ensure that errors of law that may be made by the First-tier Tribunal and Upper Tribunal are identified and are not perpetuated within the tribunal system.** As Lord Philips said, *Cart* JRs "*guard against the risk that errors of law of real significance slip through the system*".[27] UT judges are specialists in their field, however as Lady Hale recognised "*no-one is infallible*".[28] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within a 'closed' tribunals system,[29] with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

[24] Mikołaj Barczentewicz 'Cart Judicial Reviews through the Lens of the Upper Tribunal' (October 2021).

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

[26] *R. (on the application of Kuteh) v Upper Tribunal* [2012] EWHC 2196 (Admin).

[27] *Cart,* no. **Error! Bookmark not defined.**, at [92] (Lord Phillips).

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

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

A *Cart* JR allowed the tribunal to consider and clarify the law on duress when an applicant for refugee status claims that they should not be regarded as complicit in a crime against humanity due to duress.[30]

A *Cart* JR ensured that the FTT and UT correctly applied the law to find that a minor who was transported to the UK to work could not be deemed to have come "voluntarily," allowing the applicant to be recognised as a refugee and a child victim of trafficking.[31] This helped ensure that the same mistakes would not be made by the tribunal in respect of future child victims of trafficking.

31. ***Cart* JRs are not a "disproportionate and unjustified burden" on the system as the Government contends.**[32] Whilst the success rate for *Cart* JRs is not as high as other JRs, this is to be expected. *Cart* JRs will only be given permission if they meet the second-tier appeals conditions, i.e. they involve either (i) an important point of principle or practice, which would not otherwise be considered; or (ii) there exists some other compelling reason.[33] *Cart* JRs that succeed are therefore by definition the sort of "*serious and credible cases*" that the Government has said the courts should focus on.[34] There is also 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.[35]

32. The Government's Impact Assessment estimates that between 173 to 180 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.[36] However, given the important role of *Cart* JRs

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[30] *AB (Article 1F(a) – defence - duress) Iran* [2016] UKUT 00376 (IAC). See further, Case Study 14 in ILPA's response to the Government Consultation, no.**Error! Reference source not found.** above.

[31] *AA/07281/2014 and CO/2676/2015 ("TO (Nigeria)"* See further, Case Study 48 in ILPA's response to the Government Consultation, no.**Error! Reference source not found.** above.

[32] Judicial Review Reform Consultation, The Government Response, no.**Error! Bookmark not defined.** above para. 37.

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

[34] Dominic Raab, House of Commons, Volume 702, Column 190.

[35] 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.

[36] 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

in preventing serious injustice and in ensuring key decisions of the UT are not insulated from challenge, this is not a disproportionate use of resources. By comparison:

- the Government Legal Department's total administration costs from 2020-2021 was £226.7m[37] - 564 times larger than the upper estimate for yearly *Cart* JR costs; and
- in 2020/21 one single council spent £1.25m - over three times the *Cart* JR costs - on printing.[38]

Exceptions to the ouster clause

33. The Government has been clear that the ouster clause at Clause 2 is to be a template or "*a framework that can be replicated in other legislation*".[39] This is incredibly concerning. As the JCHR has said "*the use of ouster clauses, whatever the case may be for administrative efficiency, raises significant concerns as it directly prevents people being able to vindicate their rights before the courts.*"[40] Restricting the review by courts of the lawfulness of executive action directly undermines the courts' constitutional role to enforce the law as set out by Parliament. It risks the creation of categories of law which Government can breach without consequence, regardless of the impact on individuals. Accepting one ouster clause opens the possibility of many more in yet to be published areas, with consequences across society. This is why we urge Peers to oppose the Question that Clause 2 stand part of the Bill.

34. However, if the ouster clause is to be passed, it is vital that Parliament proceeds with caution, and that proper thought is given to how it is structured and the exceptions it allows. Serious injustices should not be unchallengeable under any ouster.

35. The ouster clause in clause 2 would operate subject to certain exceptions. As drafted, new s.11A(4) of the Tribunals, Courts and Enforcement Act 2007 would exempt from the ouster clause decisions giving rise to any question as to whether the UT (a) has or had a valid application before it; (b) was properly constituted; and (c) acted in (i) bad faith; or (ii) in such a procedurally defective way as amounts to a fundamental breach of

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

[38] Aberdeenshire spent £1.25m on printing costs https://www.taxpayersalliance.com/local_authority_printing_costs_2021

[39] Ministry of Justice, 'New Bill hands additional tools to judges' (July 2021).

[40] JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 43.

the principles of natural justice. **In our view these exceptions are too narrowly defined and would allow for serious injustices and errors of law to be perpetuated.**

*Natural justice*

36. The potential for Clause 2 to result in serious injustices has been worsened by a government amendment to Clause 2 adopted at report stage in the House of Commons. This changed one of the exceptions to the removal of *Cart* JRs from where the UT acted in "*fundamental breach of natural justice*" to where the UT acted "*in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.*" JUSTICE supports Amendment 18 in the name of Lord Ponsonby to revert to the original wording.

Amendment 18

Page 3, line 36, leave out "procedurally defective way as amounts to a fundamental" and insert "way as amounts to a material"

***Member's explanatory statement***

*This amendment would change the test to judicially review a decision of the Upper Tribunal to refuse permission to appeal, from a fundamental breach of the principles of natural justice to a material breach of those principles.*

37. The concept of natural justice refers to the basic standards of fairness and effectiveness in decision-making.[41] It is a core doctrine of the UK's common law, rooted in centuries of UK legal tradition, and forming the basis of parties' fundamental rights in decision making and court proceedings.

38. Whilst a procedural defect could amount to a breach of natural justice, natural justice is a broader concept. Fairness can be both procedural and substantive[42] and the restrictive nature of this exception risks unduly limiting the breaches of natural justice that can be contested in court. For instance, the tribunal acting in a way that appears biased,[43] failing

[41] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [123], "natural justice" is one of "the essential requirements laid down by the rule of law for [a statutory decision-making] process to be effective"

[42] *R v SSHD, ex p Pierson* [1998] AC 539, 591F, (Lord Steyn).

[43] *Pinochet (No.3)* [2000] 1 A.C. 119.

to consider clearly relevant factors[44] or basing its decision upon evidence with no probative value[45] have all been found to be breaches of natural justice under the common law. However, there is no clarity as to whether they are necessarily procedural defects. Indeed, what amounts to a "procedural defect" cannot be clearly defined and the inclusion of this term risks further litigation over its meaning.

39. As Lord Mustill set out in *ex parte Doody* "What fairness demands is dependent on the context of the decision."[46] The concept of "natural justice" is found across other pieces of legislation,[47] where it is not limited to procedural defects. It is not a fixed concept[48] and seeking to restrict it will undermine the flexibility the courts require to adequately assess the case before them.

40. Amendment 18 would also lower the threshold for the exemption to apply from a "fundamental" breach of natural justice, to a "material breach". There is a clear difference in the standards set by "material" and "fundamental". For example, in the context of contract law, a material breach is one which "has serious consequences on the outcome of the project", for which the innocent party can seek damages. In contrast, a fundamental breach is one for which the innocent party has a right of termination. Consequently, it is evident that a fundamental breach is more *serious*, or causes *graver harm* to the party, than a material breach.

### *Fundamental error of law*

41. JUSTICE supports Amendment 19 in the names of Lord Pannick, Lord Ponsonby, Lord Marks and Lord Beith which would continue to allow *Cart* JRs where the Upper Tribunal had made a fundamental error of law.

Amendment 19

Page 3, line 37, at end insert

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[44] *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021] EWHC 2441 (TCC).

[45] *Mahon v Air New Zealand Ltd* [1984] AC 808, 820G-H (Lord Diplock).

[46] *R v Secretary of State for the Home Department, ex p. Doody* [1993] UKHL 8 [14].

[47] For instance, see the Trade Union and Labour Relations Act 1974 Status and regulation of trade unions and employers' associations s.6(13): "In making provision for any hearing or a determination of any question, whether in relation to an alleged offence, an appeal or a dispute, the rules shall be so framed as not to depart from, or permit any departure from, the rules of natural justice."

[48] Lord Bridge *Lloyd v McMahon* "the so called rules of natural justice are not engraved on tablets of stone"

"or (iii) in reliance on a fundamental error of law"

***Member's explanatory statement***

*The purpose of this amendment is to allow courts to hear a judicial review of a tribunal decision where there is a fundamental error of law, and not just where the tribunal has acted in bad faith or in fundamental breach of natural justice.*

42. This amendment would ensure that serious errors of law are not perpetuated within the tribunals system,[49] with the Upper Tribunal continuing to follow erroneous precedent that itself or the Court of Appeal / Supreme Court has set.[50] It would also ensure that individuals do not face serious breaches of their rights on the basis of a fundamentally legally flawed decision.

**JUSTICE**
**18 February 2022**

[49] In *Cart* Lord Dyson at [112] referred to *Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 as an example of where such a problem could arise. Lady Hale noted that an approach of restricting from judicial review entirely certain errors, would risk the development of "local law" in the sense that erroneous or outmoded constructions might be perpetuated if the regular courts were effectively locked out of the tribunals system (*Cart,* no.**Error! Bookmark not defined.**, at [43]). Elliott and Thomas (2012), no.**Error! Bookmark not defined.**, note that: "[t]his view is built partly upon institutional competence—the implication being that High Court and Court of Appeal judges may be better situated to furnish corrections—and partly upon precedent, the risk being that the tribunals system might continue to apply precedent set by the courts thinking (perhaps wrongly) that those courts would be unwilling to disturb it."

[50] Sarah Craig notes that some level of judicial review "is still required because the chances of tribunals themselves giving leave to approach the higher courts are remote", S. Craig, 'Judicial Review: How Much is Too Much? A View of Eba, *Cart* and MR (Pakistan) from the Asylum and Immigration Perspective' (2012) 16 Edin LR 223.