

Judicial Review Proposals: Link Briefing Note

April 2021

Background

During the Brexit process Judicial Review (JR) became a matter of some political contention, following a number of high-profile cases where legal decisions required the revision of Government plans. The 2019 Conservative Party Manifesto subsequently contained a commitment to *'ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays'*. In line with this commitment, the Independent Review of Administrative Law (IRAL) was set up in 2020 to examine *'how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law'*.¹

The IRAL panel's final report to Government was published in March 2021. The Panel proposed only limited changes to the current system of JR, concluding that the Government should *'think long and hard'* before seeking to curtail the power of the judiciary and suggesting that, with reference to recent high-profile cases, *'on one view, a degree of conflict shows that the checks and balances in our constitution are working well'*.²

It appears that the IRAL report did not meet the Government's needs for a political response to the perceived frustrations of the 2016-2019 Brexit process. As such, the Government's response to the IRAL report, currently out for consultation³, proposes changes to JR which go far beyond those recommended by the IRAL panel. Two proposals in particular risk a considerable reduction in the power of civil society to challenge potentially unlawful decisions and achieve a remedy in the courts.

Concerning proposal 1: Giving effect to ouster clauses

Ouster clauses are attached to legislation by Parliament and their purpose is to exclude specified provisions from JR. A strong body of UK case law has led to such clauses being in effect disregarded for over fifty years.⁴ The current Government consultation proposes legislation to overturn this case law, give effect to ouster clauses and thereby remove swathes of Government decisions from scrutiny.

This proposal directly contradicts the recommendation of the IRAL panel that *'Parliament not pass any comprehensive or far-reaching legislation in this area'*. The separation of powers, where Parliament makes law, the executive implements it and the courts uphold it, is a cornerstone of our modern democracy and means that no-one is above the accountability of the law, not even Government. The proposals would impinge this principle and reduce the legal accountability of executive power.

¹ <https://www.gov.uk/government/groups/independent-review-of-administrative-law>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf

⁴ <http://ukscblog.com/case-comment-r-on-the-application-of-privacy-international-v-investigatory-powers-tribunal-and-others-2019-uksc-22/>

Concerning proposal 2: The introduction of prospective-only remedies

The consultation also proposes the introduction of a new remedy that would see courts apply a remedy effective only in the future ('prospectively') rather than addressing the decision determined to be unlawful (retrospectively). Once again, this proposal has no basis in the IRAL report.

The consultation paper acknowledges a key concern about the proposal, namely that such remedies could lead to *'an immediate unjust outcome for those already affected by an improperly made policy'*. Allowing an improperly made policy to stand, as a prospective-only remedy would, does not constitute an effective remedy for people or organisations seeking to challenge the lawfulness of that policy. In particular, it would render JR a completely blunt instrument in planning, where quashing the permission to proceed is the only meaningful remedy. The Government is also proposing that prospective only remedies could apply to disputed clauses in Statutory Instruments, thus removing entire areas of Government policy from meaningful judicial scrutiny. As such, the prospective-only proposal undermines the UK's compliance with provisions of the ECHR (as enacted by the Human Rights Act 1998) and the UNECE Aarhus Convention, both of which enshrine the right of challengers to an effective remedy if their challenge is upheld.

Why does this matter for the environment?

Judicial review is an essential foundation of the rule of law, legal accountability, and modern democracy. It provides the mechanism for the people to challenge the incorrect application of laws passed on their behalf and allows for remedies to be achieved in the courts.

The current proposals seek to remove swathes of Government decision making from such challenge, and to limit the effectiveness of remedies granted to those challengers that are successful. It is particularly concerning that these two proposals have no basis in the independent report Ministers commissioned on judicial review.

These proposals have profound implications for the environment. As with other parts of civil society, the environment sector relies on judicial review to check the potential abuse of executive power. Such challenges have prevented unlawfulness that would have inflicted a heavy and often irreversible cost on nature, human health and the UK's zero carbon efforts – a list of recent significant cases can be found attached to Link's October 2020 submission to IRAL.⁵

There is a real risk that, if the majority of these consultation proposals are progressed, important environmental safeguards will be sacrificed to a political quest for vengeance for historical Brexit grievances. This outcome is not in the best interests of nature, climate, and people – or of a Government seeking to *'make this country the cleanest, greenest on earth'*.⁶

Wildlife and Countryside Link (Link) is the largest environmental coalition in England. The full [Link Legal Strategy Group](#) response to the judicial review consultation proposals can be found [here](#).

⁵ https://www.wcl.org.uk/docs/assets/uploads/Link_submission_to_IRAL_20.10.20.pdf

⁶ Boris Johnson, 13.12.19 <https://www.bbc.co.uk/news/election-2019-50777071>