The Judicial Review & Courts Bill
Link Briefing for House of Lords Report Stage on 31 March

Executive summary

- Link, England's largest environmental coalition, **asks peers to support the amendment tabled by Lord Anderson and others to clause 1 at report stage of the Judicial Review & Courts Bill on 31 March, along with further amendments to the same clause.**
- The current text of the Bill would create a presumption on judges to use weaker remedies than quashing orders when upholding Judicial Review (JR) cases.
- These weaker remedies will allow decisions to effectively stand despite being found unlawful, including decisions that harm the environment.
- Lord Anderson's amendment is required to remove the presumption and maintain judicial discretion to use quashing orders, preserving JR as a check on executive power and as a means of preventing unlawful decisions from causing further harm to the environment.

The need to amend clause 1

Clause 1 introduces weaker JR remedies

The Suspended Quashing Orders (SQOs) and Prospective Quashing Orders (PQOs) proposed by clause 1 of the Bill are weaker remedies than quashing orders currently used in JR cases.

Currently a quashing order quashes a decision found to be unlawful, meaning it has no continuing effect and has never had any effect from the moment it was made. In contrast, SQOs would allow unlawful decisions to stand until quashed by court order at a future date, thereby allowing the consequences of an unlawful decision to continue between the JR outcome and the date the SQO comes into effect. There is no upper limit to this time period, opening up the possibility of consequences from an unlawful decision being allowed to continue for a significant length of time.

Similarly, PQOs would allow the past reliance on an unlawful decision to be deemed valid. This would appear to prevent restitution for injuries arising from an unlawful decision from being delivered retrospectively. At Lords second reading Lord Thomas of Gresford gave a useful hypothetical example of the sorts of injustices this could give rise to, citing a case of a war veteran successful in reversing a decision not to issue a war pension, who could have been denied arrears of that pension by a prospective only quashing order.[1]

The delayed action and reduced scope of redress respectively provided by SQOs and PQOs amount to weaker, and in some cases ineffective, remedies compared to the standard quashing orders they are

[1] https://hansard.parliament.uk/lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill Column 1349

intended to replace. The new orders will result in less disruptive outcomes for decision makers and third parties, at the cost of reduced access to justice for claimants. From an environmental perspective, SQOs and PQOs could allow for environmental damage caused by an unlawful decision to continue after a finding of illegality (under a SQO) and for action to repair the environmental damage caused to be avoided (under a PQO) – we provide further examples below.

Finally, it is important to highlight that the need for the new orders, particularly PQOs, is not clear. Judges already have the option to find a decision unlawful but to refrain from requiring its complete revocation, through issuing a declaration. At committee on 21 February the Minister suggested that the Heathrow third runway case showed the need for PQOs as a remedy, as it would have allowed *''the unlawfulness to be corrected at lower cost and in a shorter time, while still recognising—I underline this point—that the initial decision was unlawful''*.[2] It is important to note that the Court of Appeal actually issued a declaration in the Heathrow case, stating that the Airports National Policy Statement that gave consent to the third runway was essentially void unless and until the government reviewed it.[3] This existing remedy of a declaration achieved everything the Minister suggested a PQO was needed to achieve.

The uncertain need for SQOs and PQOs, and their weakness as remedies, means **the Link is sympathetic to the removal of the entirety of clause 1 from the Bill**, **as has been proposed by Lord Ponsonby**.[4] We also **support the amendments laid by Lord Marks of Henley-on-Thames, which would remove PQOs from the Bill**. PQO's are a particularly worrying innovation, which were not included in the recommendations of the Independent Review of Administrative Law which preceded the Bill. The case for PQOs has not been made and they should be removed from the Bill.

Subsection 9 of clause 1 creates a presumption to use weaker remedies

At Lords second reading on 7 February the Minister argued that SQOs and PQOs were simply *''new tools in the toolbox''* and that it would be *''ultimately up to the judge to decide whether to take them out.''*[5]

At committee stage on 21 February Lord Beith observed that *''if I were to give my apprentice joiner grandson a tool for his toolbox, I would not say, 'In all circumstances, other than quite limited circumstances, this is the tool you must use and ignore the ones you already have'.''*[6] This is an accurate description of the effect subsection 9 of clause 1 will have.

[2] https://hansard.parliament.uk/Lords/2022-02-21/debates/4C9F3839-15A8-4BC7-85E8-370C17341960/JudicialReviewAndCourtsBill
[3] https://www.judiciary.uk/wp-content/uploads/2020/02/Heathrow-judgment-on-planning-issues-27-February-2020.pdf (see paragraph 280)
[4] https://bills.parliament.uk/publications/45555/documents/1658
[5] https://hansard.parliament.uk/Lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill
[6] https://hansard.parliament.uk/Lords/2022-02-21/debates/4C9F3839-15A8-4BC7-85E8-370C17341960/JudicialReviewAndCourtsBill

Subsection 9 directs the court to consider whether "*adequate redress in relation to the relevant defect*" would be provided by a SQO or a PQO – if so, the court *''must''* then grant one *''unless it sees good reason not to do so''*.[7] The adequate redress test is an uncertain one. It appears to direct consideration to the broad question of whether a SQO or PQO would be remedy proportionate to the defect, taking into account the interests of all parties in the case, rather than considering the more focused and relevant question of whether such a remedy would be effective in delivering justice for the claimant. Where the 'relevant defect' is a policy rather than a decision, adequate redress might be particularly hard to define. In most cases, we can expect the uncertain adequate redress test to be passed, trigging the requirement that a judge *''must''* then grant a SQO or PQO.

In contrast to the clarity of *''must''* the caveat attached to it *''unless it sees good reason not to do so''* is undefined. It requires judges to make value judgements without detailed guidance on what a good reason would be, in the knowledge that this necessarily out-on-a-limb assessment could be scrutinised in detail at appeal. At committee stage, Lord Anderson of Ipswich - a QC for over 20 years - suggested that the caveat would have limited effect, as *''the steer inherent in this proposed new subsection will, I am afraid, be picked up and will retain its power to influence and even intimidate the less experienced judge.''*[8]

The low bar to triggering a stipulation to issue a SQO or PQO, and the apparent weakness of the caveat attached to that stipulation, renders subsection 9 a strong presumption. It directs the courts to use weak SQO and PQO remedies, thereby infringing judicial discretion to the benefit of defendant public authorities and third parties reliant on the outcome of the case.

Lord Anderson's amendment will remove the presumption

This simple amendment, tabled by Lord Anderson, Lord Etherton, Lord Pannick and Lord Ponsonby of Shulbrede, would remove subsection 9 from the Bill.[9] Lord Anderson advanced the amendment at committee on 21.02.22, although he did not push it to a vote. Speaking at committee Lord Anderson made a strong case against the presumption created by subsection 9, saying:
''Such interference is unjustified as a matter of principle. Judges are skilled technicians who know that every case turns on its particular facts. The Clause 1 remedies are specialised tools, the uses of which are best judged not by remote control but by those dealing on the ground with the infinite variety of cases that human ingenuity throws at them.''

Lord Anderson also directly addressed the argument advanced by the Minister that the 'good reason' caveat will allow judges to overcome the must stipulation in subsection 9, observing:

[7] Text of clause 1 of the bill https://publications.parliament.uk/pa/bills/cbill/58-02/0198/210198.pdf
[8] https://hansard.parliament.uk/Lords/2022-02-21/debates/4C9F3839-15A8-4BC7-85E8-370C17341960/JudicialReviewAndCourtsBill
[9] https://bills.parliament.uk/publications/45555/documents/1658

''If proposed new subsections (9) and (10) constrain the free exercise of judicial discretion, they should be resisted on that ground alone; if they do not constrain it, they are pointless clutter and, for that reason, should be removed from the Bill.''[10]

This point was repeated at committee by other peers with a legal background. Lord Etherton said that, if the Government's assurance on subsection 9 is accepted, "*What on earth is the point of it all?*". Lord Pannick added. *''The more the Minister seeks to suggest—as I think he will in replying to this debate—that the presumption is weak, the less clear it is why it is included at all.''* Even Lord Faulks, whose Independent Review of Administrative Law preceded and informed the Bill, said of subsection 9 *''I am not wholly convinced of its necessity''*.

The ambiguity in the drafting of subsection 9 allows for two interpretations, both of which lead to the same conclusion. Subsection 9 either restricts judicial discretion, in which case it is injurious and should be removed (this is our belief), or it does not (as the Government maintains) – in which case it is unnecessary and should be removed. In either circumstance, the amendment is required to remove an ambiguous, weak part of the Bill.

The environmental impact of leaving the Bill unamended

The result of subsection 9 being retained in the bill will be the issuing of more SQOs and PQOs. More SQOs and PQOs will mean more environmental harms being allowed to continue.

An example of these potential environmental consequences can be found in the case *R. (on the application of Preston) v Cumbria CC [2019] EWHC 1362 (Admin)*.[11] A local planning authority's decision permitting the installation of a temporary sewage outfall and extending the period for which it would be permitted was rendered unlawful by its failure to obtain a screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and an "appropriate assessment" under the Conservation of Habitats and Species Regulations 2017. Permission was therefore quashed.

However, if a SQO were applied in the case, there could have been a (potentially significant) period of time between a finding of unlawfulness and the taking effect of the quashing order. Throughout this period, the outfall would have been allowed to continue discharging sewage into the local river system. Every month of continued sewage discharge would have been an extra month of harmful impact on fragile freshwater habitats, and on the health of river users. Indeed, this extension of harmful environmental impacts could lead to irreparable harm. It is possible to envisage a situation where a particular local plant species population might be recoverable after one month of sewage outfall but might not be recoverable after six months of sewage outfall. The local population could be entirely lost, as a result of the prolonging of environmental harms arising from a SQO.

[10] https://hansard.parliament.uk/Lords/2022-02-21/debates/4C9F3839-15A8-4BC7-85E8-370C17341960/JudicialReviewAndCourtsBill
[11] https://www.bailii.org/ew/cases/EWHC/Admin/2019/1362.html

A hypothetical mining case illustrates the potentially harmful consequences of a PQO. Should a decision to consent a new open-cast coal mine be subsequently held unlawful following JR, a PQO could allow the actions between the consent and the JR decision to stand, including the removal of wildlife habitat and the extraction (and subsequent burning) of fossil fuel – all at a time of a declared biodiversity and climate crisis. It is also appears that a PQO issued in respect of a policy decision could allow activities consented under that policy decision to continue. For example, if a policy decision to permit fracking was made, then challenged and a PQO issued, future fracking operations would not be permitted. However fracking operations granted through a reliance on the policy decision before the issuing of the PQO could be allowed to stand, as the legitimating policy decision would only be quashed prospectively.

The higher chance of such environmentally weak outcomes as a result of subsection 9 will also have a chilling effect on future JR cases. Securing legal representation and raising the funds to mount a JR – before even embarking on the legal process – is daunting enough for potential claimants. If the outcome of the case is likely to be an Order that cannot remedy existing environmental damage and risks offering ongoing legal loopholes allowing further damage, it will be a significant deterrent to those considering JR to combat environmental harms arising from an unlawful decision.

A further example can be found in the case of Manston Airport in Kent. In 2020 a climate campaigner brought a JR challenging the Secretary of State's Development Consent Order authorising the reopening of the airport, on the grounds that the SoS had not properly determined whether there was any need for the airport and had failed to provide adequate reasons for deciding that there was such a need. The claimant also maintained that the SoS failed to discharge his duty under the Climate Change Act 2008 to ensure that by 2050 the UK will reach its Net Zero target. The JR was successful, leading to the quashing of the Development Consent Order in 2021.[12] It is difficult to see how the claimant could have justified the time, expense and risk of JR if there was a high chance that the outcome on being successful was only a suspended quashing of the Development Consent Order, allowing flights to take place from the airport for a potentially prolonged period.

The new orders will also further undermine the UK's compliance with international law in the form of the UNECE Aarhus Convention[13], which requires Parties to provide legal review mechanisms providing "*adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*".[14] The UK is a Party to the Convention, although our compliance with the Convention is already patchy[15]. The current wording of subsection 9 will make it even more difficult for the UK to claw its way back into compliance. The imposition of a SQO in many cases, and the consequent lengthy delay between finding a decision unlawful and remedy is unlikely to be considered timely. Similarly, the imposition of a PQO and the consequent lack of remedial action to an unlawful decision is unlikely to be considered fair to the claimant or an effective remedy.

[12] https://www.bbc.co.uk/news/uk-england-kent-56076770
[13] The UK ratified the UNECE Aarhus Convention in 2005
[14] Article 9(4) Aarhus Convention
[15] https://www.wcl.org.uk/docs/assets/uploads/ELUK_Statement_Seventh_MoP_FINAL.pdf

Finally, it is important to consider the changes to JR against the backdrop of the Environment Act. During the passage of the Act in 2021, a cross party coalition of peers fought hard to secure effective environmental review remedies for the Office for Environmental Protection[16], to allow meaningful action to be taken through the courts to correct unlawfulness causing environmental damage. The Government refused to support these strengthening amendments. As a result, the environmental review remedies in the final Act are weaker than they should have been. The Judicial Review & Courts Bill extends this approach to judicial review remedies, weakening them in the interests of public authority defendants.

Environmental redress being delayed (SQOs), environmental harms being allowed to stand (PQOs), the discouragement of organisations, communities and individuals from bringing JRs to protect climate and nature and the further weakening of Aarhus compliance – all will reduce the inconvenience of JR for public authority defendants, at the cost of weakening the ability of JR to protect the environment. The removal of subsection 9, and with it the threat that SQOs and PQOs will arbitrarily replace quashing orders, will reduce this cost.

Support for removing the presumption

Link is one of many organisations raising concerns about clause 1 of the Bill, and the subsection 9 presumption in particular. The following quotes are representative of the scale of the concern, and the cross-sector, cross-party nature of the request for subsection 9 to be removed from the Bill:

Joint Committee on Human Rights

''A presumption in favour of quashing orders with suspended or prospective-only effects is unnecessary and undermines the remedial flexibility that the former Lord Chancellor claimed was the ultimate goal of the Bill at the time of its introduction… While generally a judge would remain free to choose whether to make a suspended and/or prospective-only quashing order, the Bill does nevertheless make them compulsory in certain circumstances. In this way, Clause 1 appears to be an attempt to weight the scales in favour of the defendant public authority over the claimant. The Government should remove the requirement that judges make quashing orders with suspended or prospective-only effects where they would provide adequate redress and there is not a good reason not to, as this amounts to an unnecessary, albeit low level, intrusion into judicial remedial discretion.'' [17]

The Law Society

''The Law Society is strongly opposed to the statutory presumption. It is a long established and fundamental principle in judicial review that remedies are discretionary. As no two judicial reviews are the same, this is necessary to ensure that there is a fair outcome that fits the circumstances of the case at hand… At a minimum, we believe this presumption must be removed from the Bill.''[18]

[16] See Greener UK & Link briefing from Environment Bill committee stage https://greeneruk.org/sites/default/files/download/2021-06/Environment_Bill_Greener_UK_Link_briefing_Lords_Committee_OEP_enforcement_2.pdf

[17] https://committees.parliament.uk/publications/8105/documents/83261/default/ p12

[18] https://www.lawsociety.org.uk/topics/human-rights/parliamentary-briefing-judicial-review-and-courts-bill-house-of-lords-second-reading

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''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.''[19]

Dr Jonathan Morgan, Reader in English Law, Cambridge University (giving evidence to Commons Bill Committee)

"I would take the presumption out altogether. I think what this clause is doing—certainly what it should be doing—is enlarging the power of the courts to tailor relief in a way that they see fit, and removing the obstacle that the Supreme Court laid in their path in Ahmed v. HM Treasury (No. 2). Thus, I just do not see why it is there. The Government say that it is to encourage the courts to use this remedy, but I do not see why we should try and push the courts in a particular direction."[20]

Andy Slaughter MP, Shadow Solicitor General

''Such a presumption not only goes against the Government's stated intention to provide flexibility for judges, but risks encouraging the use of these new orders in circumstances where it would be unjust and unfair to do so. As the Government acknowledge in their consultation response, 'presumptions were not recommended by the IRAL Panel and generally met with scepticism from respondents to the consultation.' However, it does not appear to have had any effect.''[21]

Lord Thomas of Gresford, Liberal Democrat Shadow Attorney General

''The Bill markedly tilts the judge's hitherto untrammelled discretion in determining the appropriate remedy in the Government or the body's favour, even though the judge has found that it has acted unlawfully.'' [22]

David Davis MP

The government plans to restrict the use of judicial review in an obvious attempt to avoid accountability. Such attempts to consolidate power are profoundly un-conservative and forget that, in a society governed by the rule of law, the government does not always get its way.[23]

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[19] https://files.justice.org.uk/wp-content/uploads/2022/02/22100642/JUSTICE-JR-and-Courts-Bill-Briefing-HoL-Committee-Part-1-Judici

[20] https://hansard.parliament.uk/commons/2021-11-02/debates/93b988d3-1d83-4ef6-86b1-8e9ddd944ae5/JudicialReviewAndCourtsBill(FirstSitting)

[21] https://hansard.parliament.uk/commons/2021-11-04/debates/bf58047e-0b3f-4644-9b19-f81e21a6e5aa/JudicialReviewAndCourtsBill(ThirdSitting)

[22] https://hansard.parliament.uk/lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill

[23] https://www.theguardian.com/commentisfree/2021/oct/25/judicial-review-peoples-right-fight-government-destroy-courts-undemocratic

We agree with the above remarks. Subsection 9 directs the courts to use SQOs and PQOs in a potentially large number of cases, thereby infringing judicial discretion to the benefit of defendant public authorities, to the detriment of environments harmed by unlawful public authority decisions.

For questions or further information please contact:
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Wildlife and Countryside Link (Link) is the largest environment coalition in England, bringing together 68 organisations to protect nature. Link's Legal Strategy Group works to improve law to better protect the natural environment.
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