

## The Judicial Review & Courts Bill and the Environment

### Briefing for Committee stage

#### Executive summary

- Judicial Review is an important tool for securing remedies for unlawful decisions which will or could harm the environment.
- Clause 1 of the Judicial Review Bill introduces changes to JR that will make it harder for claimants to secure effective remedies for unlawful decisions.
- This would further undermine the UK's compliance with its international obligations under the Aarhus Convention on environmental rights, to which it is a Party.
- We **strongly support [amendment 25](#), which would delete the clause**. We also **support [amendments 12, 14, 19, 23, 24, 32 and 33](#)** which would ameliorate the worst impacts of the clause.

Proposals to undermine the process of Judicial Review have profound implications for the environment. As with other spheres of civil society, the environmental 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 environmental cases can be found attached to Link's October 2020 submission to Independent Review of Administrative Law.<sup>1</sup>

Clause of 1 of the Bill introduces changes that will reduce the effectiveness of JR as a means to prevent unlawful environmental harms, as part of a wider tilting of the system against claimants. The clause creates two new remedies; a quashing order to only take effect at a certain point in the future (subsection 1(a) - 'suspended quashing orders') and a quashing order to only have a forward-looking effect (subsection 1(b) - 'prospective only quashing orders').

Clause 1 also sets out the circumstances in which the court will be expected to grant the new orders, requiring that certain factors must be considered including whether "*adequate redress in relation to the relevant defect*" and if yes then the court must use the new orders (unless there is good reason not to)<sup>2</sup>. These include factors that go beyond the circumstances of the case and possibly beyond the evidence before the court. These considerations tend to favour deference to the decision-maker, prompting the court toward the new, weaker remedies, which do not deal effectively with past or on-going unlawful activities. The result is likely to be that successful JRs will become less effective deterrents against environmental harm.

#### **These changes will have the following effects:**

<sup>1</sup> [https://www.wcl.org.uk/docs/assets/uploads/Link\\_submission\\_to\\_IRAL\\_20.10.20.pdf](https://www.wcl.org.uk/docs/assets/uploads/Link_submission_to_IRAL_20.10.20.pdf)

<sup>2</sup> [Clause 1 \(29A\(9\)\) of the Bill](#)

### Sustained environmental damage

Suspended and prospective quashing orders respectively offer delayed and forward-only remedies. Such remedies could allow environmentally damaging activities to continue in the period between a contested decision and the taking effect of a suspended or prospective-only quashing order.

Impacts resulting from the continuation of environmentally damaging activities during these periods could be considerable. An illustration of this can be found in the case *R. (on the application of Preston) v Cumbria CC [2019] EWHC 1362 (Admin)*.<sup>3</sup> 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 for the newly located polluting discharge. Permission was therefore quashed.

However, if clause 1 of the bill had been in force and a suspended quashing order 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.

Prospective quashing orders could have a similar effect, although it is presently unclear how exactly they are intended to work, especially in the planning sphere.<sup>4</sup> Given their forward-only nature, there is clearly potential for them to fail to prevent potential adverse and irreversible harms to the environment.

### A chilling effect on JR cases

Claimants need advance certainty around the effectiveness of the legal remedies a court will make, before bringing a case. As currently drafted, clause 1 would undermine this certainty, introducing the possibility (through suspended and prospective quashing orders) that the decision could be found unlawful, but the remedy denied or delayed and harmful consequences allowed to continue. Claimants faced with this potential outcome will be significantly less likely to bring JRs (a costly and time intensive process) in the public interest, for fear of wasted effort and expense. The knowledge that winning might not actually prevent the damage that prompted litigation could prevent many from starting proceedings.

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<sup>3</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2019/1362.html>

<sup>4</sup> <https://greenallianceblog.org.uk/2021/10/14/the-judicial-review-and-courts-bill-threatens-to-deter-challenges-to-unlawful-environmental-decisions/>

### Contravention of the Aarhus Convention

The UK is a Party to the UNECE Aarhus Convention, the objective of which is to secure both substantive and procedural environmental rights. Article 9(4) of the Aarhus Convention provides that legal review mechanisms shall *'provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely and not prohibitively expensive'*.<sup>5</sup>

The imposition of a suspended quashing order, and the consequent lengthy delay between finding a decision unlawful and remedy is unlikely to be considered timely. Similarly, the imposition of a prospective quashing order and the consequent continuation of the cause for JR (the upholding of an unlawful decision with environmental impacts) is unlikely to be considered fair to the claimant – and neither outcome constitutes an effective remedy for the claimant.

UK compliance with Aarhus is already patchy.<sup>6</sup> Clause 1 of the JR bill will make it even more difficult for the UK to claw its way back to compliance. The UK's standing in the world is defined by its respect for the rule of law and the independence of its judiciary. Clause 1 and its wide divergence from Aarhus will undermine such standing.

### Introduction of irrelevant factors into the legal decision-making process

Subsection 8 of clause 1 also requires courts to consider a range of factors when deciding whether or not to grant suspended or prospective quashing orders. These new factors are not relevant to the lawfulness of the act and will tend to introduce irrelevant considerations (some of which may be political) into a court's decision-making, pressuring courts toward remedies that are less effective at tackling potential environmental harm. Courts are already able to consider a range of factors in deciding which remedies to impose. The effect of clause 1 would be to enshrine a weighting to political factors in legislation, which is offensive to the effective separation of the powers and the rule of law.

The factors subsection 8 requires courts to consider include the need for good administration, rendering inconvenience to decision makers as a material consideration for JR courts, even though this is a political rather than a legal consideration. This move away from legal facts to political considerations is concerning, as is the difficulty encountered when trying to define 'good administration' (as what the claimant perceives to be good administration will differ from the defendant). It is unfair to the claimant, when unlawfulness has been found, that the court may be reluctant to grant a remedy because it may prejudice whatever good administration is perceived to be. In addition as [amendment 21](#) states – surely *'good administration is administration which is lawful.'*

Further required factors include consideration of the interests or expectations of persons who would benefit from the quashing of the impugned act and the interests or expectations of persons who have relied on the impugned act. The loose wording of 'persons' would include third parties so, for example, developers who will benefit from the granting of an unlawful planning permission or polluters who

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<sup>5</sup> <https://unece.org/environment-policy/public-participation/aarhus-convention/introduction>

<sup>6</sup> [https://www.wcl.org.uk/docs/assets/uploads/ELUK\\_Statement\\_Seventh\\_MoP\\_FINAL.pdf](https://www.wcl.org.uk/docs/assets/uploads/ELUK_Statement_Seventh_MoP_FINAL.pdf)

stand to benefit from the granting of an unlawful permit. It clearly offends the rule of law to allow an unlawful act or decision to stand simply because the interests of third parties would be prejudiced. These requirements also force the court to balance the competing interests of claimants and third parties, having found illegality. This is an entirely inappropriate thing to ask the court to do. It would also be very difficult to subsequently challenge that decision by way of JR unless it could be shown to have reached the high hurdle of irrationality.

As Dr Cormacain, Bingham Centre for the Rule of Law, states in his report on the Bill <sup>7</sup>

*"It undermines the principle of legality if the default is that an unlawful action is still valid and a quashing order ought normally be suspended, or only have prospective effect. The presumption in section 29A(9) ought to be reversed so that it is in favour of quashing orders taking effect immediately".*

A further factor to consider is 'any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the decision being considered by the court'. Requiring consideration of actions taken, or proposed by persons with responsibility for the impugned act, opens the door to offered political commitment distracting the court from the legal facts of the case. The role of the court is to examine whether a decision is lawful or unlawful, irrespective of political considerations. The idea that "no one is above the law" underpins democracy and is the essence of the rule of law.

Giving legal weight to irrelevant factors, including administrative inconvenience, prejudice to the interest of third parties and political commitments, would build in a marked structural sympathy for political, decision maker arguments into the JR landscape, hindering attempts to secure environmental justice. The current approach of allowing the courts to freely consider a range of issues in granting remedies is more appropriate. The law should not push the courts toward particular options, which are likely to be less environmentally effective.

### Encouraging satellite legislation

Subsection 9 of clause 1 requires the court to consider whether a suspended or prospective quashing order would provide 'adequate redress', but fails to specify to whom adequate redress should be provided. As noted by Policy Exchange in their October 2021 paper 'How to improve the Judicial Review & Courts Bill' this lack of specification opens up potential redress to a 'wider class of persons outside the court'.<sup>8</sup> This is likely to lead to unnecessary and unhelpful satellite litigation.

### **Tabled amendments for Committee**

We recommend that clause 1 be deleted entirely from the bill. Its provisions are fundamentally unfair to claimants, as even when unlawfulness has been found, the court must then have regard to a mixture of subjective, irrelevant, and ill-defined issues before granting a remedy. The clause also restricts judicial discretion by creating a statutory presumption that judges will only exercise their powers regarding

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<sup>7</sup> Judicial Review and Courts Bill: [A Rule of Law Analysis](#) Dr Ronan Cormacain, 26 October 2021

<sup>8</sup> <https://policyexchange.org.uk/wp-content/uploads/how-to-improve-the-judicial-review-and-courts-bill.pdf>

remedies in certain circumstances. These defects could lead to adverse and irreversible impacts on the environment and further undermine the UK's compliance with the Aarhus Convention.

Deletion of clause 1 has been proposed by **amendment 25**, which we strongly support.

We also support the following amendments<sup>9</sup>, which serve to ameliorate the worst impacts of clause 1:

**Amendment 12:** The deletion of subsection 1(b) would remove provision for prospective quashing orders. This is prudent, given that the nature and scope of prospective quashing orders are far from clear. The Independent Review of Administrative Law<sup>10</sup> (that preceded the bill) did not recommend prospective quashing orders and the rationale for their inclusion in the bill has not been established.

**Amendment 14:** This useful amendment would make it clear that suspended and prospective quashing orders are only to be used in exceptional circumstances. This will provide some reassurance to potential claimants seeking more meaningful remedies, thus helping to prevent a chilling effect on JR claims.

**Amendment 19:** The replacement of 'must' with 'may' significantly improves subsection 8, changing the requirement on courts to consider irrelevant factors (likely not to favour the claimant) into an option to do so. This preserves judicial discretion and allows factors irrelevant to law, such as political commitments and good administration, not to be considered if the court so decides. Amendment 20 provides helpful clarification as to the political commitment factor, as does amendment 21 for good administration. **Amendment 33** goes still further and deletes the entire subsection, and the non-legal factors it would introduce.

**Amendments 23 and 24:** These enhance subsection 9, replacing the current unspecified 'adequate redress' test for granting a suspended or prospective order with a clearer 'effective remedy for the claimant' test. This will provide reassurance for claimants that a remedy will be meaningful, helping to prevent a chilling effect on the bringing of JR cases. The introduction of the term 'effective remedy' will also help to uphold the UK's responsibilities under the Aarhus Convention.

**Amendment 32:** This would require courts to consider the impact on the environment of passing a suspended or prospective quashing order.

*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 62 organisations to use their strong joint voice for the protection of nature and animals. Link's [Legal Strategy Group](#) works to improve law to better protect the natural environment.*

<sup>9</sup> [https://publications.parliament.uk/pa/bills/cbill/58-02/0152/amend/judicial\\_review\\_rm\\_pbc\\_1103.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0152/amend/judicial_review_rm_pbc_1103.pdf)

<sup>10</sup> <https://www.gov.uk/government/groups/independent-review-of-administrative-law>