The Judicial Review & Courts Bill and the Environment
Briefing for House of Lords Committee Stage on 21.02.22

Link, as England's largest environmental coalition, has significant concerns about clause 1 of the Judicial Review & Courts Bill. As with other spheres of civil society, the environmental sector relies on judicial review to check the potential abuse of executive power. Clause 1 weakens that check and will allow more abuses of executive power to stand, including those that harm the environment. We support Lord Ponsonby in his opposition to Clause 1 standing part of the Bill.[1]

Opposition to clause 1 standing part of the Bill (Lord Ponsonby of Shulbrede)

The introduction of Suspended Quashing Orders (SQOs) and Prospective Quashing Orders (PQOs) proposed by clause 1 will significantly undermine access to justice for claimants. A clear rationale for the introduction of these new orders has not been established. As such we support the removal of clause 1 from the Bill.

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 use of 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.[2]

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 intended to replace. The new orders will result in less disruptive outcomes for decision makers and third parties, but 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).

[1] https://bills.parliament.uk/publications/45275/documents/1429
[2] https://hansard.parliament.uk/lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill Column 1349

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)*.[3] 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.

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.

The need for these new weaker orders, and the harmful consequences they will sanction, has not been demonstrated. Judges already have the option to find a decision unlawful, but to refrain from quashing it, by issuing a declaration. As the Public Law Project stated in their response to the consultation that preceded the Bill: *''Courts have used declaratory relief in a way that minimises the disruption of quashing but still secures justice for the claimant. We are unconvinced that suspended quashing orders would in practice be any better at securing relief for successful claimants than a declaration would in most challenges to statutory instruments.''*[4]

The new orders will also further undermine the UK's compliance with international law in the form of the UNECE Aarhus Convention[5], 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''*.[6]

Requiring the courts to use SQOs and PQOs will reduce the effectiveness of JR for the public and have irreversible, damaging environmental consequences. As such, clause 1 should be removed from the Bill.

We are also pleased to see a range of amendments that would ameliorate the harmful consequences of clause 1 tabled for committee stage. We strongly support the following amendments:

[3] https://www.bailii.org/ew/cases/EWHC/Admin/2019/1362.html
[4] https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf
[5] The UK ratified the UNECE Aarhus Convention in 2005
[6] Article 9(4) Aarhus Convention

Amendments 1, 4 & 5 from Lord Pannick, Lord Ponsonby of Shulbrede and Lord Marks of Henley-on-Thames removing PQOs from the Bill. These new orders were not included in the recommendations of the Lord Faulks Independent Review of Administrative Law that preceded and informed the Bill and the case for them is entirely without foundation.[7]

Amendment 13 (Lord Anderson of Ipswich, Lord Etherton, Lord Pannick and Lord Ponsonby of Shulbrede)

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.''*

As many peers highlighted at second reading, the wording of subsection 9 removes any optional element, forcing the judiciary's hands towards the 'new tools'. 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''*.[8]

The adequate redress bar is a low one (which, as highlighted above, undermines the requirement for the UK to provide claimants with *''adequate and effective remedies''* under the Aarhus Convention). It concerns only the defect, not the effectiveness of a SQO or a PQO as a remedy for the impact of the defect on the claimant. As Andy Slaughter MP highlighted at Commons committee stage of the Bill, directing the courts towards this lowest of bars means that: *''The new default position will be that where a court issues a quashing order, it must suspend it, or limit any retrospective effect, unless there is a good reason not to.''*[9]

This analysis chimes with that of the Joint Committee on Human Rights, whose legislative scrutiny of the Bill concluded that: *''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.''* [10]

As a result, the Committee recommended that: *''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.''*

[7] See https://greenallianceblog.org.uk/2021/10/14/the-judicial-review-and-courts-bill-threatens-to-deter-challenges-to-unlawful-environmental-decisions/
[8] Text of clause 1 of the bill https://publications.parliament.uk/pa/bills/cbill/58-02/0198/210198.pdf
[9] https://www.theyworkforyou.com/pbc/2021-22/Judicial_Review_and_Courts_Bill/04-0_2021-11-04a.118.0
[10] https://committees.parliament.uk/publications/8105/documents/83261/default/ p12

Peers also expressed concern about this intrusion into judicial discretion at Lords second reading. Lord Anderson highlighted that one legal authority that currently uses SQOs and PQOs, the European Union, *''does not seek to dictate to its independent court the circumstances in which these remedies should be used, and I am not so far persuaded that this attempt at long-range micromanagement is appropriate here either.''* Lord Hope suggested that *'there is a question of balance here, which is best left to the judiciary, taking case by case.''* Lord Thomas observed that, through the wording of subsection 9, *''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.''* [11]

We agree with these observations. 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 and third parties reliant on the outcome of the case.

The deterrent effect of subsection 9 on people and organisations seeking to challenge unlawful decisions impacting the environment will also be considerable. The prospect that a court will be required to order a SQO or a PQO will reduce the appetite and ability of individuals, community groups and environmental organisations to challenge decisions believed to be unlawful by way of JR. 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. Link also fears that subsection 9 will deter people from acting to exercise their rights to prevent or stop adverse environmental impacts more widely.

Subsection 9 will circumscribe judicial discretion and have a chilling effect of JR claims. It should be removed from the Bill, as proposed by this amendment.

Amendment 14 (Baroness Chakrabarti and Lord Ponsonby of Shulbrede)

This amendment would also remove subsection 9 from the Bill. The substitute wording proposed by the amendment would allow judges to choose to issue SQOs and PQOs if they offer an effective remedy to the claimant.

Effective remedy constitutes a higher bar to meet before issuing a SQO or a PQO than the current 'adequate redress' wording. As discussed above, it has a clear meaning and use within international law, including in the Aarhus Convention. Article 9(4) of the 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'*. [12]

[11] https://hansard.parliament.uk/lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill
[12] https://unece.org/environment-policy/public-participation/aarhus-convention/introduction

The UK is a Party to the Convention, although our compliance with the Convention is already patchy[13]. 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. The substitute wording of subsection 9 would address this, requiring SQOs and PQOs to only be applied in circumstances where they pass an effective remedy test.

Baroness Chakrabarti's amendment would preserve judicial discretion, whilst preventing further non-compliance with the Aarhus Convention on participatory environmental rights. It should be supported.

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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[13] https://www.wcl.org.uk/docs/assets/uploads/ELUK_Statement_Seventh_MoP_FINAL.pdf