Judicial Review and Courts Bill

Written Evidence to Commons General Committee on behalf of Wildlife & Countryside Link

Executive Summary

- Judicial Review is an essential foundation of the rule of law and the final mechanism for civil society to challenge potentially unlawful decisions affecting the environment and achieve a remedy in the courts. Environmental cases are inherently in the public interest - it is the environment, and therefore society as a whole, that stands to benefit (or lose) from the outcome of an environmental case.

- The process of JR has been systematically undermined in recent years. These reforms have resulted in a decline in the number of environmental cases being brought to court, as well as a decline in their success rates at permission and substantive stages.

- The Report of the Independent Review of Administrative Law (IRAL) emphasised that any changes should only be made to JR after the most careful consideration, given the important role that it plays in the UK's constitutional arrangements and, in particular, in maintaining the rule of law.

- Clause 1 of the JR Bill creates a statutory presumption that judges will grant Suspended Quashing Orders and/or Prospective Quashing Orders in certain circumstances. Link believes these remedies offend fundamental principles of the rule of law – namely that everyone is entitled to a fair trial and an effective remedy.

- Clause 1 of the Bill will also further undermine the UK's compliance with Article 9(4) of the UNECE Aarhus Convention, which requires contracting Parties to provide legal review mechanisms that provide adequate and effective remedies and are 'fair, equitable, timely and not prohibitively expensive'.

- Link is calling for the deletion of clause 1 from the Bill. In potentially failing to provide effective remedies, it is fundamentally unfair to claimants. These defects could lead to adverse and irreversible impacts on the environment and further undermine the UK's compliance with the Aarhus Convention.

Introduction

1. Wildlife and Countryside Link (Link) is a coalition of 62 organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

2. The Legal Strategy Group provides a forum for Link's members to collaborate on legal issues. A long-established area of our work concerns the importance and application of environmental rights, with particular emphasis on access to environmental justice and Judicial Review. Link members have also taken a number of landmark environmental cases, including the Heathrow case concerning the UK's

obligations under the Paris Agreement[1], the clean air cases[2] and a successful challenge to the most recent reforms to the costs rules for environmental cases[3].

The Importance of Judicial Review for Environmental Protection

3. Judicial Review is an essential foundation of the rule of law and the final mechanism for civil society to challenge potentially unlawful decisions affecting the environment and achieve a remedy in the courts. Any potential restrictions on JR are of constitutional importance. In *R (on the application of UNISON) v Lord Chancellor*[4], Lord Reed gave a powerful exposition as to why access to the courts was a core element of the rule of law, and why being able to bring a claim and have it determined was of a broader societal benefit than merely to the individual parties involves, holding:

> "*At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other… People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.*"

4. Environmental cases are inherently in the public interest. The claimant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning – it is the environment, and therefore society as a whole, that stands to benefit (or lose) from the outcome of an environmental case.

5. All of this must be seen in the context of the environmental crises in which we find ourselves. In May 2019, Parliament declared an Environment and Climate Change Emergency. In the following month, the Climate Change Act 2008 was amended to commit the UK government to a net zero emissions target by 2050. In terms of biodiversity, the UK will miss almost all the 2020 nature targets (the "Aichi targets") it signed up to in 2010 under the global Convention on Biological Diversity (CBD) according to a recent report published by the JNCC[5]. The inability to meet these targets is characterised by a

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1 *Plan B Earth and Others v. Secretary of State for Transport* [2020] EWCA Civ 214

2 *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*: (1) [2015] PTSR 909 (CJEU & SCt); (2) [2017] PTSR 203, Garnham J; (3) [2016] EWHC 3613 (Admin), Garnham J; and (4) [2017] EWHC 1966 (Admin), Garnham J

3 *RSPB and others v Secretary of State for Justice* [2017] EWHC 2309 (Admin)

4 [2017] UKSC 51

5 Parties to the Convention on CBD are required by Article 26 of the Convention to submit national reports to the Conference of the Parties on measures taken for the implementation of the Convention

continuing decline in environmental standards. For example, in September 2020, the Environment Agency reported that just 14% of English rivers are of good ecological standard (in 2016, 97% of rivers were judged to have good chemical status, though the standard of tests used this time was tougher)[6]. Judicial Review has a critical role to play in ensuring that standards of environmental protection are met – indeed we would venture that there has never been a more important time for such cases to be heard by the courts.

Ongoing reforms

6. JR has been the subject of ongoing reforms in recent years. These reforms, from which environmental cases have not been exempt, have served to cumulatively and significantly undermine the process. To summarise:

- In 2013, the introduced a number of proposals to address 'the abuse of JR', including: (i) a reduction in the time limit for bringing planning JRs from three months to six weeks in planning cases and thirty days in procurement cases; (ii) removing the right to oral renewal in any case where the application was certified as totally without merit by the Judge considering the application on the papers; and (iii) introducing a new fee for oral renewal hearings.

- Later in 2013, the Government consulted on further reforms to JR, including (i) the introduction of a lower threshold for when a defect in procedure would have made no difference to the original outcome; and (ii) a package of financial reforms to limit the pursuit of "weak claims" including the introduction of costs exposure for interveners and the abolition of the *Mount Cook* principles. These reforms were progressed against a backdrop of significantly reduced public funding for JR generally and a doubling of Court fees across the board (including fees in the region of £7,000 in relation to the Supreme Court alone).

- In 2015, the Government implemented a package of costs reforms for environmental cases including (*inter alia*): (i) restrictions on eligibility for costs protection; (ii) a 'hybrid' cap regime enabling the default adverse caps of £5,000 (individuals) and £10,000 (all other cases) to be varied on application by the defendant[7]; and (iii) attaching the default cap to each claimant in cases where there are multiple claimants. These reforms were largely promulgated by the Civil Procedure (Amendment) Rules 2017[8]. In September 2017, Lord Marks of Henley on Thames moved a Motion that the House of Lords regret that the 2017 Rules had been laid (SI 2017/95 (L. 1)). After debate, the motion was agreed (142 content and 97 not content).

7. In 2019, the RSPB and Friends of the Earth published *A Pillar of Justice*[9], a comprehensive report based on data obtained from the Ministry of Justice from 2013. The key findings of the Report were that the number of environmental claims peaked in 2015-16 but by 2019 they had fallen back to 2013-14

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and their effectiveness in meeting the objectives of the Convention. The 6th National Report is focused on work by Parties to achieve the 20 Aichi Targets in the Strategic Plan for Biodiversity 2011-2020 and can be found here

6 See here

7 In 2020, it was held that interested parties can apply for the cap to be varied. In *R (Bertoncini) v London Borough of Hammersmith and Fulham*, the judge upheld an application on the part of the interested party to increase the claimant's cap from 10k to 20k

8 See here

9 See here

levels. The report also concluded that the number of environmental claims granted permission to proceed fell markedly following the passage of the Criminal Justice and Courts Act 2015 (CJCA 2015) and that the average number of environmental claims that were ultimately successful for the claimant at final hearing fell by two-thirds between April 2016 and May 2019.

The Independent Report of Administrative Law (IRAL)

8. The Report published by the Panel of the Independent Review of Administrative Law (IRAL) drew on the practical experience of members of the Panel, senior members of the judiciary and extensive written evidence. The IRAL Report emphasised that any changes should only be made to JR after the most careful consideration, given the important role that it plays in the UK's constitutional arrangements and, in particular, in maintaining the rule of law. It is not simply that there is little or no evidence of the need for change – the IRAL Report provided cogent and compelling reasons not to proceed with proposals that may have significant unintended consequences. The only recommendation the IRAL Report made in relation to remedies in JR was that s.31 could be amended to give the courts the option of making a Suspended Quashing Order (a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met – see below).

Judicial Review & Courts Bill, Clause 1

Suspended Quashing Orders (SQOs) and Prospective Quashing Orders (PQOs)

9. Following the findings of the IRAL Report, Link saw merit in giving judges the additional flexibility of SQOs, to be used in appropriate cases. However, we remain deeply concerned about the creation of a statutory presumption to grant an SQO. The need for such a drastic step has simply not been demonstrated and could allow environmentally damaging activities to continue taking place in the period between a contested decision and the taking effect of a suspended quashing order.

10. For example, in *R. (on the application of Preston) v Cumbria County Council*[10], 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.

11. PQOs could have a similar effect, although it is presently unclear how exactly they are intended to operate, especially in the planning sphere. Given their forward-only nature, there is clearly potential for them to fail to prevent adverse and irreversible impacts on the environment.

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10 [2019] EWHC 1362 (Admin)

Concerns about SQOs and PQOs

12. The role of the Court in JR is to declare whether a decision is lawful or not. It is anathema to the rule of law that decisions found to be unlawful by the Courts are only to be treated as such from the date that the case happens to be ruled on by the Court, with the position up to that point "deemed valid", even though thousands of people could have been affected by the unlawful decision.

13. In our view, the introduction of PQOs could go so far as to render the process of JR meaningless in those cases in which the remedy sought is to quash the decision on the basis of a prior illegality. This applies at every level of decision-making, be that a planning decision made by a local authority or approval for a major infrastructure project by the Secretary of State.

14. To deprive civil society of the appropriate remedy offends some of the most fundamental principles of the rule of law – namely the combined effect of Articles 6 and 13 of the European Convention on Human Rights (as transposed in the Human Rights Act), which serve to ensure that everyone is entitled to a fair trial and an effective remedy.

15. There are also serious implications for the UK's compliance with international law. The UK is a Party to the UNECE Aarhus Convention[11], which aims to establish important 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'.

16. The imposition of a SQO, 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 continuation of the cause for JR (the upholding of an unlawful decision with environmental impacts) is unlikely to be considered fair to the claimant. Moreover, neither outcome constitutes an effective remedy for the claimant. The UK is already in breach of Article 9(4) of the Aarhus Convention because of the prohibitively high costs of legal action – if clause 1 remains in the JR Bill it will undermine the UK's position still further.

17. Claimants need early certainty around the effectiveness of legal remedies before bringing a case. As currently drafted, clause 1 would undermine this certainty, introducing the possibility that the decision could be found unlawful, but the remedy delayed and harmful consequences allowed to continue during that delay. Claimants faced with this potential outcome will be significantly less likely to bring JRs, for fear of wasted effort and expense. The knowledge that winning might not actually prevent the damage that prompted litigation will prevent many from starting proceedings.

18. Clause 1(8) also requires courts to consider a range of factors when deciding whether to grant SQOs or PQOs. These include factors extending beyond the circumstances of the case and possibly beyond the evidence before the court, including the need for good administration. This inclusion of political considerations is concerning, as is the difficulty encountered when trying to define 'good administration'. 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.

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11 See here

19. Additional factors include the 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. This would presumably include third parties so, for example, developers who will benefit from the granting of an unlawful planning permission or polluters who 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.

20. A further factor is to consider any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the decision being consider 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.

21. Giving 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.

22. Clause 1(9) requires the court to consider whether a SQO or a PQO 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'.[12] This is likely to lead to unnecessary and unhelpful satellite litigation.

Conclusion

23. Link's preference would be for clause 1 to 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 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.

For questions or further information please contact:
Matt Browne, Advocacy Lead, Wildlife and Countryside Link E: matt@wcl.org.uk

12 See here