ClientEarth

October 2021

Judicial Review and Courts Bill

Parliamentary Briefing: House of Commons Second Reading: Clause 1

Introduction

The Judicial Review and Courts Bill is now returning to the House of Commons. As an environmental law organisation, we are concerned that Clause 1 will weaken the right that the public currently have to an effective remedy when a public body has acted unlawfully.

The proposals in Clause 1 are likely to lead to unfairness and the erosion of the rule of law. Importantly the provisions that allow for an unlawful decision to remain in place also go against the longstanding legal obligations the UK committed to under Article 13 of the European Convention on Human Rights and Article 9(4) of the Aarhus Convention[1]. The current proposals in Clause 1, particularly on prospective-only quashing orders therefore risk undermining our international reputation as a place where the rule of law is respected. They should be removed from the Bill.

ClientEarth remains concerned about the other provisions on judicial review in the Bill, specifically the proposals in Clause 1 on suspended quashing orders and Clause 2 on ouster clauses. This briefing, however, will focus specifically on the urgent need to address the damage the proposal to introduce prospective-only quashing orders in Clause 1 will have on environmental democracy in England and Wales, and why the power to make prospective-only remedies should be removed from the Bill.

[1] the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was ratified by the UK.

The UK & the Aarhus Convention

The context of the Judicial Review and Courts Bill must be seen against the UK's longstanding international legal commitments. In 2005 the UK ratified the Aarhus Convention, which acknowledges the special nature of environmental legal cases taken by members of the public around the world. The Convention gives members of the public and groups of individuals, such as environmental charities, certain procedural rights under the Convention.

These rights are designed to empower individuals and groups to defend the public's right to, and interest in, a healthy environment. The Convention enshrines the right to access justice in environmental cases as an integral component of the "right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[2]

A core aspect of the Convention is therefore the ability to access the courts. ClientEarth is concerned, however, that the current proposals in Clause 1 for prospective-only remedies run contrary to the UK's international law obligations under this Convention and will have a damaging knock-on effect on the environment.

Environmental Democracy

Environmental litigation has a particularly unique quality, given that claims do not tend to be concerned with the personal financial interests of claimants, but are brought in the public interest for wider society. As the environment cannot appear in court to defend itself, environmental litigation relates to general issues of public interest for wider society. It is members of the public who must make the case for clean air, unpolluted rivers and the protection of biodiversity against the failure by public authorities or national governments to fulfil their duties. Often, it is members of the public who have the proximity and awareness of these failures and who are motivated to seek to improve legal compliance through the courts.

The proposals in Clause 1 compound the current obstacles, such as prohibitive legal costs, that the public face when challenging the lawfulness of environmental decisions. Judicial review in England and Wales will therefore be weakened.

Clause 1: the details

The specific details of Clause 1 are that it inserts a new section 29A into the Senior Courts Act 1981.

The UK government consultation on the proposals in Clause 1 of the Bill itself acknowledged that the imposition of prospective-only remedies "could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy".[3]

Prospective-only remedies therefore place victims of unlawful action and those who seek to protect the environment in the public interest in an unfair and uncertain position. A claimant is unlikely to invest their own time, money and resources in bringing a claim to protect an area of natural beauty or protect wildlife

[2] Article 9 in conjunction with Article 1 Aarhus Convention.
[3] Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (March 2021) ('Government consultation document'), paragraph 61.

from an unlawful decision (which they do in the public interest) if there is a presumption in favour of the court not granting an effective remedy that protects the natural environment from irretrievable harm.

The presumption created by Clause 1 fetters the court's discretion and risks offending the rule of law, which will seriously undermine the role of the court and risks adversely affecting the quality and appropriateness of remedies. It should be noted that the Independent Review of Administrative Law established by the government in 2020 did not recommend legislating for prospective-only quashing orders and it in fact recommended against limiting a quashing order in this way.

A further concern is the inclusion of a provision[4] that undermines a person's right to bring a collateral challenge where there has been an illegal act by a public authority. This is because the impugned act is to be treated as if it was valid, in force and not defective. A claimant therefore not only loses an effective remedy in the judicial review action but also any other legal redress they may have, such as a claim for compensation for loss of land, false imprisonment or recovery of wrongly levied tax. Polluters may also avoid a sanction that requires them to meet the cost of the damage they have caused to the environment.

Prospective-only quashing orders will critically undermine good public decision making as they permit poor decisions to remain and be unchallenged, which in turn reduces scrutiny and accountability. Unlawful decisions are allowed to stand, leaving people and businesses in a position where they are unable to defend their rights or protect the environment for all of us and future generations.

ClientEarth is calling for the power to make prospective-only remedies to be removed from the Bill.

If you would like to discuss any aspect of this briefing with one of our lawyers, please do not hesitate to get in touch.

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[4] S 29(A)(5A) Senior Courts Act (to be inserted Clause 1)