

Judicial review: reading the runes

John Cleverly & Azeem Suterwalla consider the potentially far-reaching & unexpected effects of proposals in the Judicial Review and Courts Bill



The Judicial Review and Courts Bill has now entered the House of Lords. It will not likely be brought into effect until early to mid-2022. While we consider that the Bill does not have the far-reaching constitutional implications that some have suggested, the introduction of suspended quashing orders could in fact allow some claims to succeed that would previously have failed.

Suspended quashing orders

The Bill would introduce a new provision (29A) into the Senior Courts Act 1981 (the 1981 Act) which would allow judges to ‘undo’ (or ‘quash’) something that the government has done from a particular point in time. Previously, the relief that was available to a claimant was to have a court decide that the government’s actions were unlawful and had effectively never been taken. That is clearly quite a dramatic order for a court to make.

Now, if the Bill becomes law, courts will be able to say that the government’s actions remain valid in the past (so anyone who relied on them was acting in accordance with the law), but that the position in respect of a particular act, or piece of legislation, will only change in the future. Such an order will plainly be less impactful. As Tom Hickman QC (Blackstone Chambers) has pointed out, this appears to give judges significant new powers to say that unlawful government action was somehow lawful in the past. It effectively gives the courts quasi-legislative power to say that for a period of time in the past something that was in fact wrong, was, in effect, temporarily right (‘Quashing Orders and the Judicial Review and Courts Act’, Tom Hickman QC, UKCLA, July 26, 2021 at [bit.ly/3HtHx8w](https://www.ukcla.org/sites/default/files/2021-07/3HtHx8w)).

Will judges’ powers dramatically increase?

Other commentators, including Jonathan Morgan, agree with Tom Hickman QC

that a substantial new power has been conferred on judges. Morgan argues that the judiciary would only ever exercise their new-found law-making power sensibly—‘the danger of abuse of a power conferred on senior judges of the administrative court is surely miniscule’ (‘In Praise of Flexibility: Clause 1 of the Judicial Review and Courts Bill (2021)’, Jonathan Morgan, UKCLA, September 23, 2021 at [bit.ly/3GtZ1Ag](https://www.ukcla.org/sites/default/files/2021-09/3GtZ1Ag)).

However, it is possible to read the Bill differently, as neither conferring such power on judges in a practical sense, nor in a constitutional sense.

- ▶ First, in practical terms, the power may be viewed as simply a refinement of the existing ability of the courts to exercise their current quasi-legislative power to say what the law means in different circumstances and clarify the extent to which it applies. The new powers of the courts to say that something that is in fact unlawful did have legal effect for a certain period of time, could be viewed as merely a variation of their existing functions.
- ▶ Second, at a ‘constitutional’ level, the provisions do not confer any real substantive power on judges (so as to create a ‘net loss’ to Parliament) by virtue of subsections (3), (4) and (5) of new Section 29A. Those subsections make Parliament the source of the power that is doing the ‘upholding’ of the ‘impugned act’, rather than the courts. Subsection (3) provides explicit clarification that where a judge says that something that ends up being unlawful remains nonetheless enforced for a particular time, that ‘impugned act’ is upheld for that time. The statute provides the scaffold to support the judge’s decision.

Subsection (5) says that ‘where (and to the extent that) an impugned act is upheld

by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always have been, unimpaired by the relevant defect’.

If, as Tom Hickman QC says, ‘the provision would empower judges in their discretion to confer validity on ultra vires acts and decisions, even where this would cancel private rights’, then what purpose is subsection (5) serving? While in practical terms judges may exercise discretion to make orders with effects as dramatic as the one in his example, they would only do so because Parliament (will have) decreed it. There is no constitutional gap.

Will more claims be allowed through?

Where more significant changes could be felt is in the court’s assessment of delay in judicial review claims. The Independent Review of Administrative Law had recommended that Parliament remove the requirement for a judicial review claim to be brought ‘promptly’ (CPR r. 54.51(a)), but this has not been included in the new Bill. This ‘promptness’ requirement has prevented some claims from proceeding even though they were brought within the longstop limitation period of three months. If government took some action that started to have consequences in the real world immediately, and the claimant came along two months later asking for that action to be undone, the courts then have to conduct a difficult exercise, weighing up the rights and interests of people who have begun to rely on the government’s actions against the claimants’ interest in having the action undone.

Instead, under the proposed Bill, a court would be able to say ‘this act or piece of legislation was fine for those two months, and for whatever period between then and the court making its decision, but from now on, it’s not fine’.

In *A v Essex County Council* [2010] UKSC 33, [2010] 4 All ER 199 at para [116], Lady

Hale endorsed the proposition that “there is a significant public interest in public law claims against public bodies being brought expeditiously” ([2007] EWHC 1652 (QB) at [119], [2007] All ER (D) 213 (Jul)). That is of course true in judicial review, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken. It is normally a prospective remedy, aiming not only to quash the past but also to put right the future’.

In *O’Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 680 Lord Diplock had stated that ‘the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision’. The courts have in many other cases reaffirmed the need for certainty in public administration. But this was of course in a context where the only option for courts was to decide that the government action being challenged was and had always been invalid (ie unlawful *ab initio*).

Subsection (8) of the new operative clause 29A of the 1981 Act (introduced in clause 1 of the Bill) sets out a number of factors that the court must have regard to when deciding whether to suspend a quashing order. These include:

- (b) any detriment to good administration that would result from exercising or failing to exercise the power;
- (c) the interests or expectations of persons who would benefit from the quashing of the impugned act;
- (d) the interests or expectations of persons who have relied on the impugned act.

The above factors resemble the sort of issues that the courts take into account when assessing delay in a judicial review claim. A claim which has not been brought ‘promptly’ may be thrown out by the court if people have already begun to rely on the decision being challenged, and therefore it would have a negative impact on those people for the court to set the decision aside, and the claimant should have acted more quickly to avoid that detriment.

However, because of new subsection 29A(8), it might be possible for a claimant accused of not bringing a claim promptly to say that the court can side-step the potential prejudice to people who had relied on

the newly invalid government action, by making a suspended quashing order.

The issue of delay is therefore one area in which the repercussions of the new rules may be felt. There are likely to be others.

Conclusion

Viewed in this way, the conditions and the exercise of the power included in subsection (9) seem a bit back to front. The drafting seems to be predicated on a suspended quashing order being “less than” a normal quashing order as far as a claimant is concerned.

As set out above, though, it may end up potentially being an attractive remedy for claimants to seek, and may make some claims more susceptible to being allowed by the court where previously they might have failed.

On one reading, therefore, the Bill may be viewed as potentially expanding the availability of judicial review rather than doing what everyone is expecting and limiting it. It may also be the case that the ‘promptness’ requirement in CPR r. 54.5 ends up becoming almost meaningless. **NLJ**

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