

New quashing orders and abolition of Cart judicial reviews under JRCA 2022

Public Law analysis: Jonathan Lewis of Henderson Chambers provides a summary of the new quashing orders brought in by section 1 of the Judicial Review and Courts Act 2022 (JRCA 2022) and discusses the abolition of Cart judicial reviews by section 2.

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In July 2020, the Independent Review of Administrative Law (IRAL) was launched to consider options for the reform of the judicial review process. In March 2021, it published its [report](#). In July 2021, the government published its [response](#). The result is the [JRCA 2022](#), which received Royal Assent on 28 April 2022. [Part 1](#) of JRCA 2022 deals with judicial review and contains only two sections (both of which came into force on 14 July 2022). [JRCA 2022, s 1](#) creates new forms of quashing orders. [JRCA 2022, s 2](#) removes what has become known as the ‘Cart jurisdiction’.

JRCA 2022, Section 1—new forms of quashing orders

IRAL was asked whether the effect of the law on judicial review on the exercise of public power can and should be ‘moderated by altering the remedies that are available’ (para 3.47). It recommended that courts be given the option of making a suspended quashing order (para 3.49). The government agreed with this recommendation, saying ‘By giving the decision-maker the opportunity to make good any errors, instead of immediately quashing the decision, the measure maintains the effectiveness of remedies for citizens, while ensuring that those remedies do not impede effective government’ (para 61).

The government noted that while IRAL had made no recommendation in respect of removing or limiting the retrospective effect of quashing to make them prospective-only, there was precedent for this under [section 102](#) of the Scotland Act 1998 (para 74). It said that ‘Giving judges the discretion to provide a prospective-only remedy will mean that, in certain situations, the adverse effects of retrospective quashing may be avoided—such as severe administrative or economic consequences’ (para 82).

[JRCA 2022, s 1](#) gives the courts additionally flexibility in the remedial orders that it can make. It works by amending the [Senior Courts Act 1981 \(SCA 1981\)](#). [SCA 1981, s 31](#) deals with applications for judicial review. Section 31(1) describes the current forms of relief in a claim for judicial review:

- a mandatory, prohibiting, or quashing order
- a declaration or injunction, or
- an injunction under s 30 restraining a person not entitled to do so from acting in an office to which that section applies

[JRCA 2022, s 1](#) inserts a new s 29A entitled ‘Further provision in connection with quashing orders’ into the [SCA 1981](#). Its background and effect are summarised at paras 13–22 of the [Explanatory Notes](#). Section 29A(1) provides that a quashing order may include two kinds of provision. The first is that the quashing not to take effect until a date specified in the order. In cases where the quashing order is suspended, the impugned act is (subject to any conditions imposed by the court) upheld until the quashing takes effect ([SCA 1981, s 29A\(3\)](#)).

The second kind of provision is an order removing or limiting any retrospective effect of the quashing ([SCA 1981, s 29A\(1\)\(b\)](#)). Here the impugned act is (subject to any conditions imposed by the court) upheld in any respect in which the order prevents it from being quashed ([SCA 1981, s 29A\(4\)](#)).

The court can impose conditions in respect of both kinds of quashing order (s 29A(2)). For both kinds of provision, where the impugned act is somehow upheld, it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect (s 29A(5)). [SCA 1981, s 29A\(8\)](#) provides that, in deciding whether to exercise these new powers, the court must have regard to the following factors (these are non-exhaustive):

- '(a) the nature and circumstances of the relevant defect;
- (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;
- (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
- (f) any other matter that appears to the court to be relevant.'

The Bill originally contained a general presumption to use these new remedial powers in circumstances where it appears to the court that they afford adequate redress unless there is a good reason not to do so. This was removed during the passage of the Bill.

[JRCA 2022, s 1\(3\)](#) makes clear that these new powers will be available to Upper Tribunal (UT) where it has jurisdiction to hear judicial review claims (in immigration matters).

Finality of decisions by UT about permission to appeal

The Supreme Court's decision in *R (Cart) v Upper Tribunal* [[2011\] UKSC 28](#); [[2012\] 1 AC 663](#) has always been somewhat controversial. It held that there was nothing in the [Tribunals, Courts and Enforcement Act 2007 \(TCEA 2007\)](#) to oust or exclude judicial review of unappealable decisions of the UT. It therefore held that if the decision of the First-tier Tribunal (FTT) was affected by an error of law, with the result that the refusal of the UT to grant permission to appeal against the FTT's decision was also affected by an error of law, then the UT's denial of permission to appeal could—in certain circumstances, be judicially reviewed and quashed. The upshot of this was that a litigant who was refused permission by the UT could judicially review that decision but that in determining such a claim, the court should adopt the 'second appeals' test (see Civil Procedure Rules (CPR) 52.7). The procedure for *Cart* judicial reviews was subsequently codified in [CPR 54.7A](#). It is fair to say that the vast majority of such claims are in the immigration context.

The IRAL report found that between 2012 and 2019, there were 5,502 of *Cart* judicial reviews of which only 12 were successful (0.22%) (§3.45). In the government's response, it addressed criticisms that had been made of this data and methodology and ultimately concluded that the real success rate was around 3% (§35). Its decision was nonetheless 'To improve the efficiency of the courts and reaffirm the position of the UT, the government has decided to legislate to overturn the *Cart* judgment' (§37).

[JRCA 2022, s 2](#) removes the *Cart* jurisdiction by inserting a new provision 11A into [TCEA 2007](#) entitled 'finality of decisions by UT about permission to appeal'. Its background and effect are summarised at paras 23–26 of the [Explanatory Notes](#). The section is carefully drafted so as to avoid being found to be an unlawful ouster clause. It concerns decisions by the UT to refuse permission (or leave) to appeal further to an application under [TCEA 2007, s 11\(4\)\(b\)](#). Section 11A(2) provides that such a decision is final, and not liable to be questioned or set aside in any other court. Section 11A(3) makes clear that (a) the UT is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision and (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

Section 11A(4) sets out some exceptions to the application of s 11A(1) and (2). Notably, s 11A(4)(c) provides that those provisions do not apply where the UT is acting or has acted (i) in bad faith, or (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice. Section 11A(5) sets out exceptions in relation to Scotland and Northern Ireland.

Comment

In making use of the new remedies afforded by [JRCA 2022, s 1](#), in most cases the courts will have to balance the interests, on the one hand of the particular claimant who seeks an immediate remedy for his or her own benefit and, on the other hand, the interests of good administration which might be disturbed considerably by the quashing of a decision or provision that might affect thousands of citizens. However, the new measures do give courts the flexibility to carry out that balancing exercise fairly, a flexibility that they have not previously had.

Interviewed by Hasna Aghrout and Claudia Stein

Jonathan Lewis, Barrister at Henderson Chambers, has a broad practice with particular focus upon public and administrative law, public procurement, consumer law, commercial law and product liability. Jonathan has published widely in leading academic and practitioner journals, particularly in the area of public law, public procurement, human rights and consumer credit.

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