PARLIAMENTARY DEBATES

HOUSE OF COMMONS
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GENERAL COMMITTEES

Public Bill Committee

JUDICIAL REVIEW AND COURTS BILL

Fourth Sitting

Thursday 4 November 2021

(Afternoon)

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Monday 8 November 2021

The Committee consisted of the following Members:

Chairs: † Sir Mark Hendrick, Andrew Rosindell

Barker, Paula *(Liverpool, Wavertree)* (Lab)
† Cartlidge, James *(Parliamentary Under-Secretary of State for Justice)*
† Crawley, Angela *(Lanark and Hamilton East)* (SNP)
† Cunningham, Alex *(Stockton North)* (Lab)
† Daby, Janet *(Lewisham East)* (Lab)
Fletcher, Nick *(Don Valley)* (Con)
† Hayes, Sir John *(South Holland and The Deepings)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
† Hunt, Tom *(Ipswich)* (Con)
Johnson, Dr Caroline *(Sleaford and North Hykeham)* (Con)
† Longhi, Marco *(Dudley North)* (Con)
† McLaughlin, Anne *(Glasgow North East)* (SNP)
† Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
† Marson, Julie *(Hertford and Stortford)* (Con)
† Moore, Damien *(Southport)* (Con)
† Slaughter, Andy *(Hammersmith)* (Lab)
† Twist, Liz *(Blaydon)* (Lab)

Huw Yardley, Seb Newman, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 4 November 2021

(Afternoon)

[Sir Mark Hendrick *in the Chair*]

Judicial Review and Courts Bill

Clause 1

Quashing orders

Amendment proposed (this day): 12, in clause 1, page 1, line 8, leave out from "order" to the end of line 9. —*(Andy Slaughter.)*

This amendment removes the statutory power for courts to award prospective only quashing orders and preserves the status quo in relation to the retrospective effect of quashing orders.

2 pm

Question again proposed, That the amendment be made.

The Chair: I remind the Committee that with this we are discussing the following:

Amendment 35, in clause 1, page 1, leave out lines 10 and 11.

This amendment removes the ability to make a suspended or prospective-only quashing order subject to conditions.

Amendment 40, in clause 1, page 1, leave out lines 15 to 18.

See explanatory statement to Amendment 12.

Amendment 41, in clause 1, page 2, line 2, leave out "or (4)".

See explanatory statement to Amendment 12.

The Parliamentary Under-Secretary of State for Justice (James Cartlidge): It is a pleasure to serve under your chairmanship again today, Sir Mark. I welcome all members of the Committee. I hope we can look forward to an interesting and robust debate on this important Bill.

I welcome the Labour spokesman, the hon. Member for Hammersmith, to his position. He is returning after six years, I think, to a similar post. While he obviously looked in significant detail at the Bill, he almost strayed into political caricature, suggesting somehow that we, as a party, thought all lawyers were lefties—I think that is the phrase that was used. That is quite interesting, not least if one thinks of the Secretary of State, for example, who is a lawyer by background, but not, I think, a leftie. The hon. Member for Stone (Sir William Cash) is a solicitor and is certainly not a leftie, and neither was the late, great Baroness Thatcher, who was a barrister by training and one of the greatest Prime Ministers in our history—a victor in the cold war, no less.

My hon. Friends the Members for Sleaford and North Hykeham and for Dudley North were not as chronologically comprehensive in their contributions as the Labour spokesman, but they made some extremely important points. Both of them stressed the point about trusting the judiciary. We certainly do not see lawyers as lefties, nor are we engaged in any kind of conspiracy or attempt to somehow engineer a confrontation with the judiciary. On the contrary, the whole basis and premise of the Bill is to trust in the ability of judges to use their discretion to reach judgments that reflect the most appropriate remedy, given all the factors in a specific case at hand. That is the underlying principle.

The amendments in this group relate to the measures on so-called prospective-only quashing orders—those being quashing orders with limited or no retrospective effect—and the ability of the courts to apply conditions when using either a prospective-only or suspended quashing order. Amendment 12 attempts to remove entirely the ability of the court to permanently limit or remove their retrospective effect. The belief behind the amendment seems to be that limiting the retrospective effect of a quashing order will always unfairly affect the claimant—the person who has brought the judicial review. We wholly reject that argument and take the contrary view.

I believe there is significant benefit in providing powers to limit or remove the retrospective effect of quashing orders, obviously in specific cases. Normally, when a decision is quashed, the effect of that quashing is retrospective, in that it deprives the decision of ever having had legal effect. As such, regulations and decisions are deemed never to have been made, and therefore a person undertaking what they thought was a lawful act on the basis of those regulations or decisions may in fact have been relying on something that had no legal effect whatsoever. That is particularly problematic for certain regulations that many people rely on every day in good faith.

The hon. Member for Hammersmith said that the sort of cases where there would be wide-ranging side effects from a quashing order, particularly of an economic or social kind, would be rare. They are certainly not huge in number. The Public Law Project—an organisation that we all recognise has significant expertise in this matter—did a study in 2015, which found that, of a sample of 502 judicial reviews, 18% related to procedure and policy and 8% to wider public interest. These judicial review cases that have much wider impact are not insignificant in number, but there is a much more important point to be made. Even if the number is small, the number of persons affected is likely to be many thousands. That is why it is so significant.

I raise again the real case study that I brought up on Second Reading. I will keep coming back to it because, while there are many other examples one could use, it neatly summarises where one would use one, if not both, of the remedies we are introducing, and do so not to undermine the rights of the claimant or the victory in court that they obtained—far from it—but to avoid detriment in the real world to our constituents.

I gave the example on Second Reading of general licences for the control of wild birds and the chaos that was caused when those licences were revoked, leaving farmers unsure whether actions they had taken in the past on the basis of those licences would suddenly land them in trouble. I remind the Committee that it was Natural England that immediately decided to revoke the licences, through fear of a judicial review. The case did not go through; it was the fear of one that meant Natural England was given advice that it should withdraw the licences.

As a rural MP, I received the correspondence at the time, so I know that that caused great concern, frustration and, as I quoted the National Farmers Union saying on Second Reading, anger among farmers and others. It is all about this point of good faith.

Sir John Hayes (South Holland and The Deepings) (Con): The Minister is right, and of course the fact of the matter is that judicial review is available to responsible and sensible people who are pursuing a grievance, but it is also available to vexatious and irresponsible people who are pursuing an argument that has been settled elsewhere, but that they seek to perpetuate through the process of law. That is why it needs to be redirected to its proper purpose in the way the Minister is outlining.

James Cartlidge: I am grateful to my right hon. Friend, who has considerable expertise in these matters and speaks on them very well. By the way, I am not suggesting that the Natural England case—it did not go to court, but there was a threatened judicial review from an organisation called Wild Justice, which I think Chris Packham is associated with—was vexatious. I make no comment on that. The point is that it would have achieved its aim, which was to have those particular licences declared unlawful, so the claimant would have been successful.

As I said at the time, had the remedies in the Bill been available, the legal advice could have assumed that at least one, or both, would have been used. If the prospective remedy, which we are debating in respect of these amendments, had been used, it would have made the many thousands of farmers, gamekeepers and others who were using those licences for shotguns far more certain that there would not be some kind of action, which from their point of view would be essentially retrospective, regarding the way they had used those licences that could undermine their rights, even though at the time—this is always the key thing about retrospectivity—they would have been using them both in the belief that they were lawful and in good faith. That is why this point is so important.

Anne McLaughlin (Glasgow North East) (SNP): The Minister is talking about giving judges the right to use suspended or prospective-only quashing orders, but that is not what the Bill is about. The Bill is about the presumption that they will use those orders unless they can demonstrate good reason not to. Why not do what he is saying this means, and what other people seem to think this means, and just allow judges to use these orders?

James Cartlidge: We will debate the presumption in more detail, because there are a number of amendments to it in the later groups. With the greatest respect for the hon. Lady, I would simply say that that is an erroneous interpretation of the presumption. First, the Bill does bring in those new remedies, irrespective of the presumption, but the presumption is there. It does not force the judge to use them; yes, it highlights the fact that they are there and that we would expect them to be used were it appropriate, but what it ensures is that, whether they are used or not, the reasons and the thinking are written down. In a nutshell, this is about encouraging and expediting the accumulation of jurisprudence, which is incredibly important in a common-law system.

I understand the concern that such orders should not be used to prevent claimants from getting just outcomes. That very point was made on Second Reading by the Chair of the Justice Committee. However, I submit that the clause as drafted already protects against that. The list of factors for the court to consider in using the new remedies, which is set out in subsection (8), includes at paragraph (c) a requirement for the court to have regard to

"the interests or expectations of persons who would benefit from the quashing of the impugned act".

In other words, it must consider the interests of the person or persons who has brought the judicial review.

In addition, the presumption at subsection (9) requires the court to use the new modifications for quashing orders only where it would offer "adequate redress". Furthermore, subsection (2) allows the court to impose conditions on any remedy it gives, which is another way that the court can tailor any remedy to ensure it properly serves the interests of justice.

I therefore submit that the ability to limit or remove retrospective effect does have a clear purpose and that there are already sufficient safeguards in the provisions before the Committee to ensure the interests of the claimant are fairly balanced against the interests of good administration. The clause gives the courts the necessary flexibility to tailor its remedies appropriately.

Amendment 35 seeks to remove the subsection that states:

"Provision included in a quashing order under subsection (1) may be made subject to conditions".

However, the whole point is that the ability to set conditions is very important, so that the court can strike the right balance in how it gives a remedy. For example, to avoid detriment to a claimant or those in the same situation, the court might specify that the defendant cannot take any new action to enforce the impugned decision, but is nevertheless afforded time to amend or correct it by virtue of a suspended quashing order. Removing the court's ability to set such conditions would not be in the interests of justice or flexibility.

The final two amendments in the group, amendments 40 and 41, were originally connected to amendment 39, which the hon. Member for Hammersmith has withdrawn, and now relate to amendment 12. They are consequential amendments that remove elements of the clause that seek to provide further clarity in respect of the ability to limit or remove the retrospective effect of quashing orders. I agree with the hon. Gentleman that if we were to accept amendment 12, those amendments would logically follow. However, for the reasons I have explained, we do not accept the rationale of amendment 12 and, as such, we also oppose amendments 40 and 41. I urge him to withdraw his amendment.

Andy Slaughter (Hammersmith) (Lab): Welcome back to the afternoon sitting, Sir Mark. I can reply fairly briefly to this short debate.

The hon. Member for Dudley North said that a power grab by the Government was not what was happening in this Bill. However, whatever language is used, the Bill does alter the balance of power. In that sense, it is a movement of power from the courts to the legislature, for reasons I will explain more under the next group of amendments. He said that it adds powers

[Andy Slaughter]

to the judge's armoury. Technically that may be true, but if the net effect in reality is to create uncertainty and fewer protections for claimants, that is not a welcome development.

Marco Longhi (Dudley North) (Con): The hon. Member referred earlier to his leftie lawyers. In describing them in such a way, he is implying that he does not have confidence in these people doing the right thing. What we are doing is giving them the ability to use their discretion.

Andy Slaughter: I think it is actually the senior judiciary, and I would never ascribe any political motivation to them whatsoever. I take the point that the Deputy Prime Minister may well not be a leftie lawyer, but it is the Prime Minister, I think, who coined the phrase rather than me. I do not know who he had in mind exactly; I hope not the former Prime Minister, Lady Thatcher, but there it is. People move around the political spectrum all the time these days.

The main issue I take from what the hon. Member for Dudley North said is that there remains an element of discretion. Up to a point, Lord Copper, is the answer to that. Why have a presumption at all? We are coming on to that debate, so perhaps we went off at a slight tangent a few moments ago, but it is a relevant point to make. If Government Members wish to emphasise the discretion that is available to judges, why are they supporting a clause that inserts conditions?

2.15 pm

I did not say very much about amendment 35, but I think the point effectively makes itself: why do we need conditions? Under the presumption, it would say, "The court must exercise the powers, unless it sees good reason not to do so." Yes, there is an element of discretion left, but it is severely curtailed—that is the point. If the Government are praying in aid the argument, "We don't wish to interfere with judicial discretion," why have a presumption at all, and why then subject it to conditions in this way? It all seems to add baggage and to complicate things, and it potentially creates, as I say, a degree of uncertainty.

The hon. Member for Sleaford and North Hykeham, who is not in her place, spoke about suspended quashing orders. I have indicated that we have a slightly more nuanced approach to those; we can see pluses and minuses. However, I will not respond on them, because the appropriate point to talk a little about them will be in the clause stand part debate. If we are going to oppose the clause in its entirety, we will oppose suspended quashing orders, so I will make the case when we get to that debate, albeit not at any great length. In amendment 12, we want to point out the greater mischief in prospective-only orders. I do not particularly disagree with what she said, but I think that there are arguments to be put against as well as for suspended quashing orders.

The Minister was taken off track by an intervention, but he mentioned that the presumption does not exist in a vacuum, but has qualifying conditions, discretions and so on. I will just put a question to him, which he can perhaps answer in the course of the next debate: why put the presumption in at all, because it is, as it is phrased at the moment, a heavy direction? It does not prevent the use of discretion, but it heavily constrains it and moves it to one side.

I think that I made all the points that I needed to make in my earlier remarks and we will come back to some of these matters when we consider the next two sets of amendments. As far as amendment 12 and this group of amendments are concerned, I am not satisfied with the Minister's reply, so we will press amendment 12 to the vote and seek to remove prospective-only quashing orders from the Bill.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 1]

AYES

Crawley, Angela	McLaughlin, Anne
Cunningham, Alex	Slaughter, Andy
Daby, Janet	Twist, Liz

NOES

Cartlidge, James	Longhi, Marco
Hayes, rh Sir John	Mann, Scott
Higginbotham, Antony	Marson, Julie
Hunt, Tom	Moore, Damien

Question accordingly negatived.

Andy Slaughter: I beg to move amendment 13, in clause 1, page 1, line 9, at end insert—

"(1A) Provision under subsection (1) may only be made if the court considers that it is in the interest of justice to do so."

This amendment would limit the remedies in subsection (1) to where the court considers it is in the interests of justice.

The Chair: With this it will be convenient to consider the following:

Amendment 14, in clause 1, page 1, line 9, at end insert—

"(1A) Provision under subsection (1) may only be made in exceptional circumstances."

This amendment would limit the use of the remedies in subsection (1) to exceptional circumstances.

Amendment 19, in clause 1, page 2, line 12, leave out "must" and insert "may".

This amendment would make clear that the factors which the court considers are a matter for its judgment.

Amendment 32, in clause 1, page 2, line 13, at end insert—

"(aa) any detriment to the environment that would result from exercising or failing to exercise the power;

(ab) whether exercising or failing to exercise the power would constitute an effective remedy for the claimant;"

This amendment would require the court to have regard to any detriment to the environment that would result from the use of any suspended or prospective-only quashing order.

Amendment 36, in clause 1, page 2, leave out lines 14 and 15.

This amendment removes one of the factors to be given consideration by the courts when deciding whether to award a suspended quashing order or quashing order with limited or no retrospective effect. The removal of this factor is intended to rebalance the factors to be given consideration so as not to disadvantage the claimant unfairly.

Amendment 33, in clause 1, page 2, leave out lines 14 to 22.

This amendment would reduce the requirement to consider non-legal factors in assessing the legality of decisions made.

Amendment 37, in clause 1, page 2, line 17, at end insert "including, but not limited to, the interests and expectations of a claimant in receiving a timely remedy".

This amendment would make an addition to one of the factors to be given consideration by the courts when deciding whether to award a suspended quashing order or quashing order with limited or no retrospective effect. This amendment would make it clear that the provision of a timely remedy to the claimant is a factor to be given consideration.

Amendment 38, in clause 1, page 2, line 19, at end insert "which are to be identified by the defendant".

This amendment would require the defendant to identify what the interests and expectations of persons who have relied on the impugned act are and to explain these to the court.

Amendment 20, in clause 1, page 2, line 21, leave out "or proposed to be taken".

This amendment would remove the requirement to take account of actions which the public body proposes or intends to take but has not yet taken.

Amendment 21, in clause 1, page 2, line 23, at end insert—

"(8A) In deciding whether there is a detriment to good administration under subsection (8)(b), a court must have regard to the principle that good administration is administration which is lawful."

This amendment would clarify that the principle of good administration includes the need for administration to be lawful.

Amendment 23, in clause 1, page 2, leave out lines 24 to 32 and insert—

"(9) Provision may only be made under subsection (1) if and to the extent that the court considers that an order making such provision would, as a matter of substance, offer an effective remedy to the Claimant and any other person materially affected by the impugned act in relation to the relevant defect."

The amendment would remove the presumption and insert a precondition of the court's exercise of the new remedial powers that they would offer an effective remedy to the claimant and any other person material affected by the impugned act.

Amendment 24, in clause 1, page 2, leave out lines 24 to 32 and insert—

"(9) If—

(a) the court is to make a quashing order, and

(b) it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer an effective remedy to the Claimant and any other person materially affected by the impugned act in relation to the relevant defect, the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so."

This amendment would require an effective remedy to the claimant and any other person materially affected by the impugned act.

Amendment 22, in clause 1, page 2, leave out lines 24 to 32.

This amendment would remove the presumption in favour of using the new remedial powers in clause 1 and protect the discretion of the court.

Amendment 34, in clause 1, page 2, line 27, leave out "adequate redress" and insert "effective remedy to the claimant".

This amendment would specify that the remedy should be for the claimant.

Amendment 27, in clause 1, page 2, line 29, leave out from "court" to end of line 30 and insert "may exercise the powers in that subsection accordingly".

This amendment would remove the requirement for a court to issue a suspended or prospective quashing order when the provisions of section 1(9)(b) apply.

Andy Slaughter: The amendments in this group are principally in my name, although amendment 27 has been tabled by the SNP. They lead on quite conveniently from the short debate we have just had. It is a large group and I intend to speak to all the amendments, although for most of them I can be fairly brief. The common theme is that they propose ways of mitigating the introduction of prospective-only quashing orders, and in some cases suspended quashing orders, which, as I think we have made clear, we do not believe should be in the Bill at all. If they are to be in the Bill, we want to ensure that they are appropriately caveated and mitigated.

However, the crucial amendment here is amendment 22, which would remove the presumption from the Bill. Various Members have commented already on the presumption, which is perhaps the most controversial provision in part 1. I look forward to hearing the Minister justify it, particularly as the comments from the Government side so far have emphasised the retention of discretion. Sir Mark, we will seek a vote on amendment 22 if the Government persist in their support for the presumption.

By way of background—I will be a lot shorter than I was with the first group, because I have already laid out our concerns about clause 1—the rule of law requires compliance with the law, which means that everyone in the state, including public authorities, must act in accordance with the law. Judicial review, as we discussed this morning, is a fundamental way that these rule of law principles are vindicated. If the state does not comply with the law, an individual can bring a case to court in order to force the state to comply with the law.

The current law on remedies in judicial review also vindicates these principles. The default approach is that if the state does something unlawful, that decision will be quashed and have no legal effect. People generally do not bring cases to court for declarations; they bring cases to court to right a wrong, for a tangible result, and to actually achieve something. If I am injured in a car crash, I bring a case so that the court can rule that I am not at fault and so that the judge will award me damages.

As ever, there is nuance, and it is possible that there would be some instances where it would be appropriate for an unlawful action to retain its validity in some way. That was the outcome in the Gallagher case, where the Supreme Court held that ruling a statutory instrument void would introduce a discrepancy in the statutory scheme. This is very much the exception, but it is a course of action open to a judge in making a decision on the remedy to be awarded in judicial review.

However, proposed new section 29A(9) of Senior Courts Act 1981, as set out in clause 1, flips that principle on its head. 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. This undermines the rule of law, because judicial decisions are not effective or are less effective.

Consider a hypothetical case where a homelessness charity challenges a decision on the availability of social security benefits. The default remedy will be prospective-only, meaning that those who have missed out on their benefits in the past due to an unlawful action will not be entitled to back pay of those benefits. The remedy will help people in the future, but will do nothing to help those who have already suffered. What is the point in going to court in such a case, when the remedy granted will be of zero help to the applicant?

[Andy Slaughter]

Proposed new section 29A(9) and (10) contains a presumption in favour of the use of suspended quashing orders and prospective-only quashing orders, which will favour the assurances of the Executive over other important considerations, particularly the impact on claimants and third parties of suspending a quashing order or making it prospective-only. Proposed subsection (9) sets up a presumption in favour of suspended quashing orders or prospective-only remedies. It says, in effect, that if the court considers that if such an order would offer "adequate redress", it has to make one unless there is a good reason not to. It is a convoluted provision that introduces several steps and several terms that will lead to increased arguments and submissions at the remedy stage of litigation, increasing the costs and length of that litigation to the detriment of parties and the courts. It is also unclear how the subsection accords with the list of factors that courts are directed to consider in proposed subsection (8).

The Lord Chancellor has argued that while we quite rightly have judicial checks on the Executive, they have to be applied

"in a constructive and sensible way which allows the Government to deliver the projects that it's tasked and mandated by Parliament to do"

and ensures that

"taxpayers' money is not being squandered because projects are being harpooned."

That argument is self-contradictory, because it states two quite different things—first, that there ought to be judicial checks on Government, and secondly, that the Government must be allowed to do things they have been mandated by Parliament to do. The whole point of judicial review is to prevent the state from acting unlawfully. The Lord Chancellor's argument seems to be that even if the state is acting unlawfully, it ought to be allowed to continue to act unlawfully. A presumption in favour of suspending a quashing order is precisely that—permission for the state to continue to act unlawfully. In most cases, the "constructive and sensible" thing to do with an unlawful Government decision is to rule that it has no effect.

Professor Tom Hickman has called proposed new section 29A(9) "muddled" and suggested that it would be best to omit it altogether. Jonathan Morgan, who we heard from earlier this week, welcomed clause 1 generally but also argued that the proposed subsection is wrong. Liberty has said that it is

"entirely opposed to any presumption in favour of suspending a quashing order".

The Public Law Project's conclusion is that clause 1

"should be amended to remove the presumption and make clear that remedies should only be restricted in this way in exceptional circumstances."

Creating a further barrier to getting an effective remedy is wrong in principle. There are already substantial hurdles to citizens bringing a successful judicial review: they have to show standing, get past the preliminary hearing, have the money to pay large legal fees, bring the case very promptly, and then show that a public authority has acted unlawfully. After all that, it is unfair to place another hurdle in their way. Proposed subsection (9) means that even after all those hurdles have been cleared and the court has ruled that the public authority is in the wrong, the presumption is that the effect of the quashing order will be limited. It undermines the principle of legality if the default is that an unlawful action is still valid and that a quashing order ought normally to be suspended or have only prospective effect. The presumption in the subsection ought to be reversed so that it is in favour of quashing orders taking effect immediately.

In its report, the independent review of administrative law did recommend legislating for suspended quashing orders, but it did not presume that such a remedy would be mandatory. The panel suggested that the courts are best placed to develop remedies that work in practice, and that rather than giving judges increased flexibility, imposing this presumption would limit their ability to provide redress to claimants.

Instead of preserving judicial discretion over whether to suspend a quashing order or remove or limit its retrospective effect, proposed new subsection 29A(9) and (10) in clause 1 introduces a statutory presumption in favour of doing so if it would "offer adequate redress". We are strongly opposed to the statutory presumption. It is a long-established and fundamental principle in judicial review that remedies are discretionary. As no two judicial reviews are the same, it is necessary to ensure that there is a fair outcome that fits the circumstances of the case at hand. The Government's response to their consultation on their judicial review proposals showed that the overwhelming majority of responses that they received were clearly against the introduction of statutory presumption and in favour of preserving judicial discretion. We are concerned that the Government have chosen to disregard the expertise and opinions of their stakeholders and to push forward with a statutory presumption that has little or no support, particularly as there is no evidence to suggest that without the presumption, the courts would not use the additional remedial tools at their disposal where appropriate.

2.30 pm

Sir John Hayes: I have no desire to prolong the hon. Gentleman's oration, but he says that the statutory presumption has little or no support. The witnesses that we heard from when we first met as a Committee said the exact opposite, however. They said that the reform was necessary because of the change that has occurred to judicial review over time. As I said earlier, this Bill is an attempt to affirm the sovereignty of judicial review by reaffirming its proper purpose. Does the hon. Gentleman discount the views of those expert witnesses when he says that almost no one supports it?

Andy Slaughter: I take the right hon. Gentleman's point very seriously. We touched on that point this morning, although I know he was not in Committee. I gave a little thumbnail of some of the witnesses and indicated that their views were—as one might expect from senior academics and practitioners—free from bias and prejudice, and what they said was quite interesting and variegated.

If the right hon. Gentleman were talking about suspended quashing orders, I would have some sympathy with him, because I think the balance was probably in favour of those, with some reservations. Even on prospective-only orders, there was a degree of support, and that may be what he is referring to. I thought that

there was very limited support for the statutory presumption, however. Some people think it is okay and some wish to go further than what is in the Bill, but I would say that the balance of opinion, in the responses to the previous consultation—let us remember that in addition to IRAL, the Government have had their own consultation—and in the written evidence submitted to the Bill Committee, has been overwhelmingly against the presumption, for some of the reasons that I am giving.

We do not believe that a statutory presumption is in keeping with the Government's own stated commitment to pursuing incremental change. It is not yet clear in what cases a suspended or prospective-only quashing order would be appropriate, and there remains some apprehension about the possible consequences of those orders. They should, therefore, be used with caution. A statutory presumption could force the court into using these provisions in circumstances in which they would not be appropriate.

Any legislation will lead to debates in court as to the meaning of terms, but it is not justifiable unnecessarily to introduce new processes and concepts for the courts to grapple with. The Government state that proposed new section 29A(9) of the Senior Courts Act 1981 can

"direct and guide the court's reasoning to certain outcomes in certain circumstances",

notably, whether remedies under new section 29A(1) can provide adequate redress. However, the courts already seek to craft the most appropriate remedy for the circumstances that are before them. A court will issue a prospective or suspended order if it is the most appropriate remedy. There is no need for a convoluted legislative provision telling the courts to do so.

The presumption also conflicts with the Government's stated aim of increasing remedial discretion, as it requires particular remedies to be used in certain circumstances. We oppose prospective-only orders for the reasons set out in the earlier debate, but if they are to be used, it should be at the court's discretion. Suspended orders should also be used only in exceptional circumstances, as determined by the court.

It would greatly undermine the protective constitutional role of judicial review and risk incoherence if proposed new section 29A(9) constrained the courts to issue a suspended order or a prospective-only order when a straightforward quashing order would be more suited to the circumstances of the case. I therefore submit that proposed new section 29A(9) can be removed. In applying the presumption, proposed new section 29A(10) requires the court to

"take into account, in particular"

anything under proposed new section 29A(8)(e). This directs the court to give special consideration to anything that the public body with responsibility for the impugned act, which may or may not be the defendant, has done or says it will do. However, there are difficulties with making a prospective-only quashing order on the basis of statements made, or even undertakings given by the defendant.

First, only the claimant would be able to enforce, if at all, the undertaking or statement, even though others will also be impacted by the defendant's non-compliance. Further, claimants may not have the funds, ability or resources to bring the case back to court. Secondly, the recourse would only be against the defendant public body, not against other public bodies who have said they would act. Thirdly, in rejecting the introduction of a conditional quashing order, the Government recognised the practical difficulties with deciding whether a condition has been complied with—the same concerns apply equally to court orders made on the basis of public body assurances, including the potential for further protracted and costly litigation.

The courts do already take into account steps that the Executive or Parliament are intending to take or have taken, as well as now being required to by proposed new section 29A(8)(e), and generally accept that the defendant will comply with the court's ruling on lawfulness. However, it should be for the courts to determine in the circumstances of the case what weight should be given to public body assurances, to ensure that the most appropriate remedy is made, considering the difficulties with relying on assurances. The courts should not be required to preference these assurances at the expense of other considerations, in particular the impact on the claimant and other third parties.

Suspended and prospective quashing orders both have a significant impact on the ability of individuals who have been subject to state wrongdoing to receive a full and timely remedy. Furthermore, they allow, to varying degrees, an act that has been found to be unlawful to remain valid and untouched. The courts must remain alert to the potential impact of these provisions in particular cases, and a statutory presumption would hinder their ability to do so. At a minimum, we believe this presumption must be removed.

Clause 1 stands to weaken the effectiveness of remedies available to the courts. The Government claim that they are giving extra tools to judges—as we heard earlier—but by imposing a presumption in favour of their use, they are in fact restraining the freedom of the courts to rule as they see fit. That is the key point that the Minister needs to answer. This presumption restricts the remedial discretion of the courts and should be removed.

As a less preferable alternative to removing the presumption altogether, our amendment 23 seeks to remove the presumption in proposed new section 29A(9) and insert a precondition of the court's exercise of the new remedial powers, that they would offer an effective remedy to the claimant and any other person materially affected by the impugned act.

Amendment 24—less preferable than both 22 and 23—leaves the presumption and would require an effective remedy to the claimant and any other person materially affected by the impugned act. The Committee cannot say that we are not trying, at least, to meet the Government halfway on this matter. I have set out a smorgasbord of alternatives, from which the Government can select what they wish.

The phrase "adequate redress" in proposed new section 29A(9)(b) should be amended to "effective remedy" to increase certainty, and it should be made clear that the redress or remedy must be adequate both for the claimant and for any other person affected by the impugned act. The proposed new section 29A(10) should also be removed in its entirety.

With amendments 13 and 14, the power to suspend quashing orders and prospective-only quashing orders would be limited to exceptional circumstances where it

[Andy Slaughter]

is in the interests of justice through an amendment to proposed new section 29A(1). I do not think I need go into any detail on those amendments; they speak for themselves. Again, they are not ideal, but it would be good if in the Bill it was indicated that where these—in our view—undesirable remedies are to be available, that they should be limited to where there are acceptable circumstances or it is in the interests of justice.

Amendment 20 seeks to address the issues caused in proposed new section 29A(8)(e), which states that the court must consider

"any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act".

I am particularly concerned with the requirement on the courts to consider any action proposed to be taken. This provides little or no legal basis to require the public body to act, especially if only said during submissions and not reflected in the court's judgment. The reality of public body decision making, Executive action and the legislative timetable is that priorities and policy positions change, and resources and time may have to be diverted. In the meantime, the judicial review claimant and all others adversely impacted by the measure must wait—potentially continuing to be detrimentally impacted—with limited, if any, legal recourse against the defendant or other relevant public body. There is too much uncertainty in the actions a public body proposes to take to form a legal basis for suspending a quashing order or making it prospective-only. Any intentions indicated to the court could change in the light of subsequent developments, leaving those affected potentially without any recourse. The words

"or proposed to be taken"

should be removed from proposed new section 29A(8)(e) so that it refers only to undertakings.

Amendment 36 provides clarity that the principle of good administration includes the need for administration to be lawful. This requires clarification. There are five main reasons why greater recourse to these weakened remedies, and especially any presumption in their favour, should be resisted. I will conclude my comments when I have gone through those five reasons.

First, these remedies place victims of unlawful actions in an unfair position; remedies which are prospective-only may leave individuals without redress at all. Secondly, they insulate Government from scrutiny and make it more difficult for decision makers to be held to account. Prospective-only remedies would be particularly likely to have a chilling effect on individual claimants bringing judicial review claims. Why, as we have already said, would someone spend money, time and effort to challenge an unlawful decision made against them if that decision cannot be rectified in their specific case? The proposed changes risk creating a situation where unlawful actions go unopposed and individuals' ability to defend their rights against an overbearing state is undermined.

Thirdly, the remedies make it more—rather than less—likely that judges will be forced to enter the political realm. The effect of a suspended or prospective-only quashing order may be to grant legal validity to an action that, on its face, contravenes an Act of Parliament. It creates a judicial fix for an unlawful Government act, when such an action would ordinarily be the exclusive domain of Parliament. Further, when deciding whether to issue a weakened remedy, judges must consider the likely future actions of public bodies, something that judges have previously described as a job they are ill-equipped to undertake. That would be an especially regrettable and ironic consequence when the Government's avowed aim is to prevent judges stepping into the political realm.

Fourthly, and as senior judges have acknowledged, one of the benefits of the current system of quashing orders is its simplicity. While being presented as a measure that promotes certainty, the new remedies in fact generate significant uncertainty about how they will operate and are likely to result in expensive post-judgment satellite litigation. That uncertainty, together with an increase in costs, will create yet another practical barrier to individual claimants bringing judicial review claims in the first place. Fifthly, proposed new section 29A(5) undermines a person's right to bring a collateral challenge following an illegal public act. That is a point we will deal with more fully when we come to the third group of amendments.

2.45 pm

I have dealt with, if only briefly, the amendments in this group, and if I have omitted one or more, I think I have still created the import to explain why, if prospective-only and suspended orders are to form part of the Bill, there must be substantial amendment to the later subsections of clause 1 to ensure that the bias or requirement—hon. Members can put it as they wish—to use these, in our view, unnecessary measures is mitigated or if possible removed altogether. I have put it in the alternative. I have given a range of possible ways of reducing the harm that is done by the creation of prospective-only orders.

What we wish, which we believe is the overwhelming opinion of both academics and practitioners, is to dispense with this presumption altogether as it affects prospective-only orders, because we believe they are inherently wrong, but also as it affects suspended orders, because it is simply unnecessary. It effectively infantilises the senior judiciary of this country to say that they need this sort of heavy steer from Parliament, particularly in this area. I made a few comments this morning on how the doctrine of judicial review grew up as a creature of common law. It seems particularly insulting and inappropriate to be loading the judiciary with the thoughts of Parliament in the way that this presumption and the conditions attached to it would do.

Those are my comments on this group of amendments. When we get to the appropriate moment, depending on what the Minister has to say, we intend to press amendment 22.

Anne McLaughlin: Suspended quashing orders and prospective-only remedies will not apply in Scottish courts, but because they can and will affect UK-wide laws, the people of Scotland, who remain subject to UK-wide laws until they are independent—I have just disenfranchised myself from everybody on this side, apart from my hon. Friend the Member for Lanark and Hamilton East—are also impacted.

Our primary objection is that there is a statutory presumption written into the provisions. In other words, the default position for judges is expected to be that

quashing orders are suspended and prospective-only. Government and Opposition Members, both today and in previous debates, have suggested that the presumption does not curtail a judge's discretion to use the full suite of available remedies. They are wrong—*[Interruption.]*

The Chair: Order. Can I ask those who are playing with electronic devices to turn the sound down or off? Sorry, Anne—go on.

Anne McLaughlin: Thank you, Sir Mark.

On the power to issue a suspended quashing order with the option of prospective-only effect, the Bill says:

"the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so."

Our amendment 27 seeks to remove the word "must" and replace it with "may". Given that Government Members are claiming that that is what they really mean, they ought not to have any problem supporting the amendment.

The word "must" clearly directs a judge's reasoning and interferes with judicial independence and discretion, and the Government claim they do not want to do that. It is not just members of this Committee who have said so. The Secretary of State for Justice, the Lord Chancellor himself, said on Second Reading that the Bill

"gives judges greater flexibility in judicial review".—[*Official Report*, 26 October 2021; Vol. 702, c. 195.]

As the Public Law Project pointed out, however, the inclusion of the statutory presumption contradicts that stated aim by tying the hands of judges so that they are required to use the new remedies in certain circumstances. If the powers are to be created, they ought to be the exception and not the norm, as the report of the independent review of administrative law suggests and as a number of Government Back Benchers, including the hon. Member for Bromley and Chislehurst (Sir Robert Neill) and the right hon. and learned Member for Kenilworth and Southam (Jeremy Wright) also suggested.

The PLP helpfully goes on to say why a statutory presumption is harmful, which is that it sets modified quashing orders as the starting point in all cases, which the judge then deviates from only if the court sees a good reason to do so. Even those who support that statutory presumption can list only a small number of cases in which such remedies might be appropriate. From what hon. Members have said this morning, however, they do not support the statutory presumption aspect, so they will have no difficulty in supporting amendment 27.

I do not know whether this is the appropriate time to say so, Sir Mark, but as the hon. Member for Hammersmith is pressing amendment 22 to a vote, I will be happy to withdraw my amendment and to support his instead.

James Cartlidge: It is a pleasure to follow the hon. Lady. I would not characterise the comments of my hon. Friends about judicial discretion as implying that they would therefore willingly see the presumption removed. I will not quite call it cheeky, but that is certainly a presumption of its own about our position on the matter and not entirely correct, as I hope we will discover should the amendment be pushed to a vote—it sounds as if it will be.

In her intervention on the speech by my hon. Friend the Member for Dudley North, and in her speech now, the hon. Member for Glasgow North East, although she clearly has a strong view on presumption, did not deny the point, which is significant in terms of the previous group of amendments, that under the Scotland Act 1998 the Scottish Government—and, under other legislation, the other devolved Administrations too—have a power to make prospective-only orders. That is important. I am not suggesting that the power is used frequently, but it exists, although admittedly without the presumption.

Anne McLaughlin: But the Minister's last point was that it is without presumption, and only in certain circumstances. As I understand it, in certain circumstances in England and Wales those orders can be used anyway. Basically, we are trying to turn things on their head so that judges are told, "This is what you will do, unless you can convince us otherwise." That is not comparable with the Scottish system at all.

James Cartlidge: I entirely accept that the hon. Lady disagrees on the point of presumption, which I will come to in a moment, but in terms of the first group of amendments, which were primarily about the important changes to quashing orders—that is, the prospective-only remedy—all of this underlines the fact that, as my hon. Friend the Member for Dudley North said, these things far from unprecedented in our constitution.

Before I turn to the specific amendments, one of the most interesting points made by the hon. Member for Hammersmith—which he made early on—was that people who bring a judicial review do not do so because they want a declaration; they want a quashing order. They want, as it were, the full bifta, rather than a relatively toothless outcome. On that point, an extremely important case to draw on is Hurley and Moore *v.* the Secretary of State for Business, Energy and Industrial Strategy. That was an important decision regarding university tuition fees. Lord Justice Elias, one of the key judges, basically made a declaration against a quashing order—I quote the reasons why—saying that it

"would cause administrative chaos, and would inevitably have significant economic implications, if the regulations were now to be quashed."

In my view therefore—this is important—the very presence of the new remedies, which as Conservative colleagues have said give more flexibility, makes it more likely and, dare I say, easier for a judge to issue a quashing order, rather than being restrained to the extent that the judge would otherwise simply issue a declaration. That is from the perspective of the best interests and the desire of the claimant to get their pound of flesh—their remedy—and to see their justice served. It is important to remember that point.

I turn now to the many amendments in the group. They deal primarily with the presumption, which the hon. Member for Glasgow North East was just talking about, in proposed new section 29A(9) of the Senior Courts Act 1981, and the factors that the courts must consider when deciding whether to use the new modifications—the quashing orders—at subsection (8).

There are two general points to stress. First, the Government's intention in including both the presumption and the list of factors that the courts must consider is to assist in developing the jurisprudence around the new

[James Cartlidge]

remedies. As the courts begin to consider cases where such remedies might be used, they will build up a body of case law about when the presumption is or is not rebutted and when the relevant factors apply. That will increase legal certainty, which is to everybody's benefit. Secondly, I remind the Committee that we consulted both on the presumption and on which factors might be relevant in applying the new remedies. We reflected on the responses to that consultation. Respondents' suggestions were helpful, particularly in allowing us to come up with the list of factors at subsection (8).

I turn now to amendments 22 and 27, tabled respectively by the hon. Members for Hammersmith and for Glasgow North East, which seek to remove the presumption at subsection (9). The amendments are based on a flawed assumption that the presumption is somehow intended to force the courts into using the new remedies where they are not appropriate. That is not the case. The Bill encourages the courts to use the remedies only where appropriate. It will be entirely up to judges to decide whether they offer adequate redress. If judges consider that they do not or that there is some other good reason not to use them, the court can rebut the presumption.

Anne McLaughlin: While the subsection says that

"the court must exercise the powers"

and amendment 27 asks for it to say that the court "may" exercise them, the Minister's interpretation is that courts may exercise them. Does he understand why we want to amend the subsection? What he describes is what we are trying to amend it to.

James Cartlidge: That is a fair point. The words "must" and "may" often have significant meaning in Bills. The Bill's wording does not seek to force a court's hand but provides a clear message that Parliament expects to see the new powers used where appropriate. With respect, I think that clarity comes with the Bill's wording.

However, the presumption also plays another important role in ensuring that the principles and practice around the new remedies are developed quickly. Jurisprudence can be a slow-moving beast, and the presumption will expedite the process and bring greater legal certainty. While removing the presumption from the Bill would not necessarily prevent the new modifications to quashing orders from operating effectively, we continue to believe that there is merit in providing this indication to the courts that they should properly consider the use of the new remedial options available to them, and to develop the case law as to their usage more quickly.

I turn now to amendments 24 and 34, the central purpose of which is to change the wording of the test that the court must apply when considering the presumption. The hon. Member for Hammersmith proposes "effective remedy" as an alternative to "adequate redress", which he argues would be a more stringent test. I fear that we are getting pretty close to what we call semantic arguments. The Government's intention is that the remedies are used only in circumstances where it is appropriate. We are not seeking to deny or restrict justice to claimants. I am not, therefore, persuaded that his wording would result in a higher test or make any material difference to the clause.

Amendment 24 also seeks to ensure that, in considering the "effective remedy", the court considers the interests of not just the claimant but other affected persons. The way in which our "adequate redress" test is framed in no way prevents the court from considering the impact on persons other than the claimant. Indeed, when it is considered in conjunction with paragraph (c) of the list of factors at subsection (8), I contend that that is already captured by the clause.

Turning to amendment 23, which would remove the presumption contained at subsection (9) and replace it with a precondition—I think we are moving into smorgasbord territory—I submit that that would constitute a significantly more restrictive approach, which would limit the court's flexibility to adapt the remedies to the situation before it. The amendment is redundant since the current presumption and list of factors provide an appropriate guide to the use of the new remedies. I do not see how it would make the situation clearer than the current drafting.

Let me turn now to a series of amendments that relate specifically to the list of factors at subsection (8), which is crucial to the operation of the new remedies. Amendments 13 and 21 seem to suggest that we need to tell the courts that the remedies that they use in judicial review cases should be used in the interest of justice and add a vague direction that

"good administration is administration which is lawful."

The problem here, which confuses me, is that the implication of what the hon. Member for Hammersmith is suggesting appears to be that the courts would not otherwise act in the interests of justice or consider that lawful administration is a good thing. I do not think he necessarily trusts the courts to understand those rather fundamental concepts.

I argue that these amendments would add nothing of value to the Bill, as judges will retain the ability to use remedies in a way that they feel offers adequate redress for the claim brought. Our new remedies do not seek to change that. We are also struggling to find a clear justification for why a theoretical inquiry into the relationship between "goodness" and "lawfulness" needs to be made. Those concepts are very open to interpretation, and the amendment gives no indication as to their meaning in this context, while, in contrast, the current drafting makes the meaning clear and focused on practical issues.

3 pm

Amendment 20 proposes to remove the requirement in subsection (8)(e) of proposed new section 29A of the Senior Courts Act 1981 for courts to take account of actions that the public body proposes or intends to take. At present, subsection (8)(e) of proposed new section 29A provides that the courts must have regard to certain factors in deciding whether to exercise their powers under proposed new subsection (1). The rationale for those factors is rooted in flexibility and recognising that a more responsive remedy leads to better administration.

Leaving open the ability for courts to have regard not only to actions taken and undertakings that have already been given, but to actions that are proposed to be taken, is a key element of the additional adaptability around remedies that we are addressing in the Bill. That includes giving the defendant the opportunity to rectify any unlawfulness, or to review a decision and assess the best way forward in light of the court's judgment.

An undertaking by a defendant to commit such action should be an important factor for the court to consider. Removing the ability for courts to be forward-looking would undermine the rationale of this section, which aims to correct administrative defects in a sensible and practical manner, and would deprive the courts of a consideration they need to bring about a significant practical benefit.

Amendment 32 aims to add a specific condition for the courts to consider any environmental impact of a judgment when using the new remedies, as well as specifying that the court must consider whether exercising or failing to exercise the power would constitute an effective remedy for the claimant. There is nothing in the current drafting of the Bill that would stop the court from considering environmental impacts if such issues were raised in the case. Subsection 8(f) of proposed new section 29A of the 1981 Act states that a court can consider

"any other matter that appears to the court to be relevant."

Furthermore, delving into the specifics of certain subject areas such as environmental impacts, which in many cases will not be raised by the parties or be relevant to the claim, is an odd approach. It would require the court to make assessments of policies that it is not expert in; it would not be best placed to determine what environmental impacts might be relevant. Where the parties raise such issues, proposed new subsection 8(f) allows the court to consider them.

In a similar vein, respondents to our consultation warned of the risks of using economic impacts as a factor, as that would risk drawing judges into a specific policy space. I would argue that this is also the case for environmental matters. It is therefore more appropriate to retain the approach in the current clause: that of a non-exhaustive list.

Amendment 36 seeks to remove the words

"any detriment to good administration that would result from exercising or failing to exercise the power"—

that is, the power contained within clause 1—from the non-exhaustive list of factors in proposed new subsection (8). The premise would appear to be that the inclusion of this factor in the current drafting might disadvantage claimants. I completely disagree that this factor creates an imbalance against the needs of the claimant. The very next factor on the list, proposed new subsection 8(c), requires the court to consider

"the interests or expectations of persons who would benefit from the quashing of the impugned act".

We know there are clear examples of where quashing orders could cause chaotic outcomes that our proposals would resolve. I mentioned one case earlier, which I am going to come back to because it is so easy to understand why it embodies the potential use of these remedies: the decision of Natural England to revoke general licences that enabled farmers, landowners, and gamekeepers to shoot pest birds. The decision to remove those licences created immediate widespread chaos for licence holders who were left without the necessary legal certainty as to how to protect their livestock. This uncertainty continued for a period of seven weeks until Natural England was able to issue new licences.

However, had the remedies included in clause 1 been available at the time, Natural England might have been more willing to contest the judicial review in the knowledge that even if the existing licensing scheme were found by the court to be unlawful, the court had the ability to protect past reliance on old licences—acting prospectively—and suspend the effect of any revocation using the suspended remedy, thus allowing the status quo to remain in place until such a point as new licences could be issued. That remedial flexibility could have allowed Natural England to consider the concerns raised in the new licensing arrangements, while providing the court with the ability to protect those who relied on general licences, ensuring that they could still operate lawfully, and thereby provide some consistency for farmers. The case provides a tangible example of how that additional remedial flexibility could have a real economic impact.

To quote the National Farmers Union,

"People have been left without a legal means to control problem birds. Their inability to protect livestock, crops, wildlife and livelihoods in ways which the law has until now allowed has left them concerned and angry."

That embodies the whole premise of these new remedies. Far from in some way being seen as part of a conspiracy, almost, to undermine someone bringing a judicial review, the new remedies are wholly to the contrary. They are there to avoid side effects that are detrimental to our constituents, while ensuring that the person or body bringing the judicial review has their successful outcome, admittedly deferred or prospectively changed temporarily. That is absolutely clear from the Bill's drafting. We have to ask ourselves: could such an outcome be seen as anything other than good, given what we were trying to avoid in 2019? How would it be detrimental to good public administration?

Amendment 37 suggests that we should explicitly require that a claimant should receive a timely remedy. I should make clear that the provisions in this Bill that allow for quashing orders to be suspended are not seeking to delay justice, and we would not expect the courts to use them in such a way. Our intention is only to provide the courts with the power to suspend a quashing order where it is appropriate to allow decisions to be re-made or for alternative arrangements or preparations to be put in place to prevent a legal lacuna. If the court feels this would delay an outcome for a claimant, it can use its ability to add conditions to its order to strike an appropriate balance. That is why the list of conditions is so important.

In some cases, timeliness may actually work against the claimant. I referred earlier to the case of Hurley and Moore, in which the court declined to give a quashing order despite a finding of unlawfulness in the Government's decision. It chose this option because a quashing order, immediate and retrospective, would have caused administrative chaos. A suspended order presents a solution: the Government could have time to put in place arrangements to deal with the outcome of the case, and the claimant would be given a far more equitable remedy, despite it not being as timely as an immediate order. If timeliness is relevant to the case, the court can and should consider it. But we should be careful about directing the court's adjudication on a matter that can very easily cut both ways.

Amendment 38 puts a requirement on the defendant to outline what the interests are of those who may have relied on an impugned act and detail those to the court. I feel it would be unnecessary and inappropriate to articulate this as a requirement on the face of the Bill. It

will be for the defendant to successfully make arguments to the court about the appropriate remedy, and it is for the defendant to freely choose the arguments they want to put. A requirement for litigants to argue certain points is unusual, and I do not think we would wish to depart from the normal course of court proceedings.

Amendments 33 and 19 propose to

"reduce the requirement to consider non-legal factors in assessing the legality of decisions made."

That would not be the effect. The list of factors is not about assessing legality, but assessing what the appropriate remedy would be. Amendment 19 seeks to amend the weight given to those factors. The Government consider it appropriate to provide the court with a non-exhaustive list of factors to consider when deciding whether to suspend, limit or remove the retrospective effect of a quashing order. I would also like to make clear that we consulted on the sorts of factors that should be included in the list and received some very useful contributions that we reflected in developing these provisions.

As courts navigate application of these new remedies, this list of factors will ensure that a consistent approach is taken across the board. We reject the contention that this presumption is an attempt to fetter the courts' discretion. In fact, subsection 8(f) of proposed new section 29A explicitly makes provision that the court can consider any other factors it deems relevant. These are common-sense, well-established principles that allow ample room for judicial consideration. In this instance, substituting the word "must" with "may" invites the risk of inconsistencies in granting such remedies, which would undermine legal certainty. The list of factors will mitigate the risk of conflicting decisions from the courts, and consistent application of the new remedies will help citizens to know what to expect and how their case may be considered. I see no reason to remove, limit or alter the list.

Amendment 14 seeks to limit the use of the new remedies to exceptional circumstances—an amendment which would create more uncertainty, rather than providing clarity, and would reduce the flexibility we are seeking to provide to the court. First, what is considered an exceptional circumstance in the context of remedies? What test would we expect the courts to apply? I do not see why we would want to limit the discretion of the court in this way and perhaps prevent these remedies from being used where they would provide a better, more practical outcome in what may be described as a mundane—rather than exceptional—case.

As an example, the court has previously used declarations in a way akin to a prospective quashing order. This point was raised by my hon. Friend the Member for Dudley North, in his excellent speech earlier. In R (on the application of British Academy of Songwriters, Composers and Authors and others) *v.* Secretary of State for Business, Innovation and Skills, the court declined to give a quashing order and instead made clear that its declaration was for the future. The case concerned a regulation governing the private copying exemption in copyright law. Why would this need to be an exceptional circumstance for the court to give what was a sensible and proportionate remedy?

The purpose of these measures is to allow the courts to ameliorate any negative effects of immediate and retrospective quashing, which is why I keep going back to the licensing point. This could be where claimants or third parties had relied on decisions in good faith and would suffer injustice by having their legitimate expectations denied or by becoming open to civil claims. While many of these circumstances may not be usual, providing a statutory limitation on these remedies feels both unnecessary and arbitrary and might produce unintended consequences. Even if those cases were rare, it is likely that they would involve large numbers of affected persons.

In conclusion, the Government believe that the list of factors in subsection (8) and the presumption in subsection (9) add real value to this clause. They guide the courts on the factors to which they must have regard when applying the new remedies in clause 1, and they assist in developing the relevant jurisprudence around the remedies to increase legal certainty for all. This is not about adversely affecting claimants or restricting their access to justice; it is about giving the courts the tools they need to do their jobs effectively.

In debates in the other place, two former Supreme Court judges, Lord Hope and Lord Brown, have talked about the bluntness of the current remedial options available to the court in certain circumstances, particularly with a straightforward quashing order. We are tackling that issue in this Bill, and it is right that we do so. For those reasons, I respectfully suggest that the hon. Member for Hammersmith withdraws his amendments.

Andy Slaughter: I am grateful to the hon. Member for Glasgow North East for her comments, and for withdrawing her amendment, which was essentially the same—or would achieve the same effect—as our amendment 22. We will, therefore, push that to a vote in due course.

As far as the Minister's comments are concerned, I mentioned the administrative chaos point already; I will return to that briefly on clause stand part because, as I think some of his comments conceded, there are ways around this at the moment. My view is that if the courts can find a route to resolve difficulties, they should be left to do that themselves, and there is no need for us to interfere, but that is specifically around suspended orders—I will come back to that.

The Minister calls it semantics or language; well, I agree with him, but I just think our language is better. By that, I mean it is more precise and more familiar: concepts such as "exceptional circumstances", "the interest of justice" or "effective remedy" more correctly sum up what we are intending to do here, and will be more familiar to the court in applying its jurisdiction. That is also why we wanted to say that good administration must be lawful.

The central point, which the Minister just has not persuaded me on—that is why I will persist with amendment 22—is, "Why is the presumption in there?" I am not at all persuaded by the non-exhaustive list of matters to which the court must have regard in subsection (8) either. They are not well drawn. Whatever the Minister says, he cannot get away from the fact that the presumption is a heavy-handed way to give a steer to the judiciary about how to operate, and it does not actually need to be there at all. He and the Government should trust the judiciary on the presumptions that it wishes to put forward.

There is a simple disagreement here, as sadly must happen sometimes between Government and Opposition. We cannot see any reason or logical argument in favour

of the presumption, so we will exercise our right to press amendment 22 to a Division, although I beg to ask leave to withdraw amendment 13.

Amendment, by leave, withdrawn.

3.15 pm

Andy Slaughter: I beg to move amendment 16, in clause 1, page 1, line 13, after "subsection (2)" insert "and to subsection (5A)"

See explanatory statement to Amendment 15.

The Chair: With this it will be convenient to discuss the following:

Amendment 17, in clause 1, page 1, line 16, after "subsection (2)" insert "and to subsection (5A)"

See explanatory statement to Amendment 15.

Amendment 18, in clause 1, page 2, line 1, at beginning insert "Subject to subsection (5A),"

See explanatory statement to Amendment 15.

Amendment 15, in clause 1, page 2, line 4, at end insert—

"(5A) Where the impugned act consists in the making or laying of delegated legislation (the impugned legislation), subsection (4) does not prevent any person charged with an offence under or by virtue of any provision of the impugned legislation raising the validity of the impugned legislation as a defence in criminal proceedings.

(5B) Subsection (4) does not prevent a court or tribunal awarding damages, restitution or other compensation for loss caused to the claimant by the impugned act before the date on which the quashing takes effect."

This amendment would protect collateral challenges by ensuring that if a prospective only or suspended quashing order is made, the illegality of the delegated legislation can be relied on.

Andy Slaughter: This third and final group of amendments deals with one specific point that causes us concern, but it is a matter on which I can be relatively brief. I give notice that, subject to what the Minister has to say, we will seek a vote on amendment 15, which is the substantive amendment.

Proposed new section 29A(5) provides that

"Where…an impugned act is upheld"—

either until the quashing takes effect in respect of a suspended quashing order, or retrospectively in respect of an prospective-only quashing order—

"it is to be treated for all purposes as if its validity and force were, and always had been unimpaired by the relevant defect."

We have significant concerns about the impact of that provision on collateral challenge, which this group of amendments would address.

Ordinarily, where a court has found a measure unlawful, even if it has not been quashed, it is possible to rely on that finding of unlawfulness in other proceedings—that is called "collateral challenge". A person who has had to pay a tax under unlawful regulations, for example, would normally be able to bring a claim against HMRC to be refunded the money. However, new section 29A(5) requires an unlawful measure to be treated as lawful. That would preclude relying on the unlawfulness of a measure in other proceedings. That raises the possibility of people being charged with a criminal offence under unlawfully made delegated legislation, for example, but not being able to raise as a defence the fact that the legislation was subsequently found to be unlawful. As IRAL recognised, that position would leave the law in a "radically defective state". A further subsection should be included to protect collateral challenge and third-party rights and defences where a remedy under new section 29A(1) is ordered.

New section 29A(5) states:

"Where...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 had been, unimpaired by the relevant defect."

Imagine if one of the statutory instruments issued by the Health Secretary during the coronavirus crisis, which created imprisonable criminal offences, were declared illegal by a court. If a court granted one of the new remedies, this subsection would make it as though that imprisonment were always legal. A person could therefore not argue as a defence in the magistrates or Crown court that the statutory instrument was invalid, because this subsection requires a judge to pretend that it was valid.

As IRAL noted in paragraph 3.66 of its report:

"We readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible."

We agree and believe that collateral challenges should be expressly preserved in the Bill.

Alex Cunningham (Stockton North) (Lab): Successive Tory-Lib Dem coalition and Tory Governments have made much of wanting to do away with red tape and simplify the law, but we have seen quite the opposite in practice. Does my hon. Friend agree that the legislation is yet another example of that? The sentences that he has just voiced are perhaps the best illustration of it. There will be all sorts of consequences to these particular measures. They are actually making things more complicated, less clear, and will provoke further litigation in time.

Andy Slaughter: My hon. Friend makes a very good point, and makes it better than I did. When one starts down this tinkering route—as the Government have in the Bill—and starts trying to nudge judges one way, putting in lists of qualifications and conditions with matters that have to be taken into account, altering the time period over which orders will take place, there are bound to be consequences. We have already said that there is likely to be uncertainty and satellite litigation, but genuine harm could also be caused in this way. I agree, as well, about red tape. It is all very well to try to cut through in that way—and it sounds very good when Ministers say it at the Dispatch Box—but unfortunately it leads to tragedies such as Grenfell Tower. Without the protection given by legislation and regulation on issues such as health and safety, the public are put at risk.

Even where a case has been brought and a decision has been found unlawful, the Bill stands to threaten the ability of people to bring collateral challenges. Proposed new section 29A(5) states that when a prospective-only or suspended quashing order has been made, the unlawful act is

"to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect",

either retrospectively or until the quashing comes into effect. That situation, in which the court pretends that an unlawful decision was valid for a period of time,

[Andy Slaughter]

would appear to inhibit the ability of the person to rely on its unlawfulness in other proceedings. In other words, a person could be arrested under a regulation ruled unlawful by a court, but they would not be able to use that in their defence. The IRAL report quotes Professor David Feldman, whom we heard from, on the "intuitive revulsion" felt against that state of affairs, and concludes:

"We readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible."

Clause 1 fails to protect the ability of individuals to rely on the finding of unlawfulness of a measure in other contexts—for example, as a defence to criminal proceedings. A further subsection should be included to protect collateral challenge and third-party rights and defences where a remedy under proposed new section 29A(1) is ordered. The possibility of collateral challenges should be expressly protected by proposed new section 29A(5A), which is what amendment 15 seeks to do by ensuring that if a prospective-only or suspended quashing order is made, the illegality of the delegated legislation can be relied on.

That is really the only point I need to make on this group of amendments; of course, the other amendments are consequential on amendment 15. I hope that the Minister has taken the point. I ask him, in responding, to say first whether he supports amendment 15; if he cannot, as I say, we will press it to a vote. Would he then accept that this is an issue that needs to be dealt with? It clearly is. It may be unintended, but it is nevertheless a consequence of what the Government have set out to achieve in clause 1. Before the Bill comes back, it really needs to be dealt with.

James Cartlidge: The amendment aims to ensure that illegality of decisions can be relied upon when using the new remedies. I am also responding to amendments 16, 17 and 18, as they are dependent on the adding of proposed new section 29A(5A) and would require courts to consider proposed new section 29A(5A) when considering the effect on validity.

This new addition seeks to address concerns regarding claimants relying on the illegality of rulings as a defence in criminal proceedings or prejudicing their access to compensation. I would argue that we have already factored in such considerations and given the court ability to make special provision in such a case.

I draw the Committee's attention to clause 1(1), in which proposed new section 29A(8) lists a number of factors that the court should have regard to when considering the use of our new measures. These importantly cover the interests or expectations of persons who would benefit from the quashing. One would presume that the ability to raise a defence would be one such benefit. Fundamentally, proposed new section 29A(8)(f) states,

"any other matter that appears to the court to be relevant",

ensuring that such factors can be covered in any eventuality

I would argue that the factors listed, or any that the court feels adequate, would be used in good faith to ensure that the rule of law is upheld. Having considered those factors, the court can use its powers by virtue of subsection (2) to add any conditions to its order, for instance that the defendant does not take any further action to enforce the unlawful decision, such as bringing forward criminal proceedings. With the powers in the Bill the court can make clear, to its satisfaction, the precise effects of the order that it makes. That ensures that there is greater flexibility for the courts to arrive at a positive outcome for all those affected.

The list of factors and the ability to add conditions already allow what the hon. Member for Hammersmith is suggesting. Therefore, the amendment would make no useful change to the Bill. I urge him to withdraw it.

Andy Slaughter: The Minister has made my point for me in drawing attention to proposed new section 29A(8) in clause 1, which does not deal with this point other than under the non-exhaustive provision—

"any other matter that appears to the court to be relevant."

It is too serious and too specific to be left to be casually dealt with in that way. Therefore, I wish to press amendment 15 to a vote.

I would ask the Minister to go back and look at this provision, and whether we need further, specific qualification of the kind that I have outlined that could be introduced at a later stage of the Bill. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

3.30 pm

Amendment proposed: 15, in clause 1, page 2, line 4, at end insert—

"(5A) Where the impugned act consists in the making or laying of delegated legislation (the impugned legislation), subsection (4) does not prevent any person charged with an offence under or by virtue of any provision of the impugned legislation raising the validity of the impugned legislation as a defence in criminal proceedings.

(5B) Subsection (4) does not prevent a court or tribunal awarding damages, restitution or other compensation for loss caused to the claimant by the impugned act before the date on which the quashing takes effect."—*(Andy Slaughter.)*

This amendment would protect collateral challenges by ensuring that if a prospective only or suspended quashing order is made, the illegality of the delegated legislation can be relied on.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 2]

AYES

Crawley, Angela	McLaughlin, Anne
Cunningham, Alex	Slaughter, Andy
Daby, Janet	Twist, Liz

NOES

Cartlidge, James	Longhi, Marco
Hayes, rh Sir John	Mann, Scott
Higginbotham, Antony	Marson, Julie
Hunt, Tom	Moore, Damien

Question accordingly negatived.

Amendment proposed: 22, in clause 1, page 2, leave out lines 24 to 32.—*(Andy Slaughter.)*

This amendment would remove the presumption in favour of using the new remedial powers in clause 1 and protect the discretion of the court.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 3]

AYES

Crawley, Angela	McLaughlin, Anne
Cunningham, Alex	Slaughter, Andy
Daby, Janet	Twist, Liz

NOES

Cartlidge, James	Longhi, Marco
Hayes, rh Sir John	Mann, Scott
Higginbotham, Antony	Marson, Julie
Hunt, Tom	Moore, Damien

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

Andy Slaughter: We have had a good debate on the clause and I do not want to try the Committee's patience by making a long speech. However, I would like to speak about suspended quashing orders, which we have danced around but not really touched on. I will explain why it is more appropriate to do so in this clause stand part debate. While I do not want to give away the denouement of my remarks too soon, our view is that although there are elements on both sides in relation to suspended quashing orders, we do not think, on balance, and certainly given our hostilities to the rest of clause 1, that there was enough in that to preserve clause 1. It is therefore our intention to vote against clause stand part. It depends on what the Minister has to say.

Proposed new section 29A(1)(a) of the Senior Courts Act 1981 allows for the use of suspended quashing orders, which would delay the imposition of a quashing order until a specified date. Up until the date was reached, the unlawful decision or policy would be treated as if it were valid. In the case of suspended orders, the public body would effectively be permitted to continue taking the same approach, despite that approach having been found to be unlawful, until a certain future point in time.

Fundamental to the principle of justice is that if an action of a public body is found to be unlawful, the victim can expect that unlawfulness to be rectified in a timely manner. As it is currently drafted, the clause fails to do that and dilutes the effectiveness of judicial review as a necessary means of holding public bodies accountable for their actions and as a means of offering fair redress to victims. Through the use of suspended quashing orders, judges will be capable of allowing the unlawful conduct that led to the legal case in the first place to remain in effect.

There are some exceptional cases where it may make sense to suspend the effect of a quashing order, when neither immediate quashing nor a declaration of unlawful action seems appropriate. For example, earlier the Minister mentioned the case of Hurley and Moore, where the court found the Secretary of State to have breached his public sector equality duties in making regulations that allowed tuition fees of up to £9,000 without properly assessing the policy's potential discriminatory impact, but declined to quash the regulations due to the expected logistical difficulties. Instead, the court just issued a declaration.

The report of IRAL, which as we know was established to feed in to the Bill, says of that case:

> "As a remedy, a suspended quashing order would have had more teeth. Such an order would have indicated that the Regulations would be quashed within a couple of months of the Court's judgment unless the Secretary of State in the meantime properly performed his 'public sector equality duties' and considered in the light of that exercise whether the Regulations needed to be revised. Such a remedy would have ensured that the Secretary of State was not left free to disregard his statutory duties in regard to the Regulations."

That may be a legitimate use of this power, but there are concerns that the possibility of making such an order was ruled out by the UK Supreme Court in Ahmed (No. 2), which was also mentioned earlier today. In that case, the court readily concluded that it has the discretion to suspend the effect of an order that it makes. The difficulty was that the court had already made a concrete decision, which held that the provisions were void, and did not want to undermine that decision.

The making of these orders remains at the courts' discretion, although they have usually declined to do so, on the basis that doing so will often conflict with the fundamental principles of administrative law. It is recognised that there is debate on this point, so clarifying that suspended quashing orders are available is not an illegitimate aim.

Professor Jeff King agrees with the default approach that substantial orders for relief are much better than a declaration only, but he recognises that in exceptional cases it might be justifiable to depart from that presumption. That is why the pragmatic approach of the courts, occasionally issuing declarations in lieu of quashing orders with attendant justification, is defensible in principle as well as evident in practice. This is intuitively correct; if something is unlawful, it ought to be invalid. However, there may be some unusual cases in which a court may feel that a quashing order ought not to be made. The court has the discretion to do that.

For example, if a quashing order would cause what I think the Minister called administrative chaos in a range of public actions, or indeed with many individuals, the court may instead simply make a declaration. Alternatively, it may make a quashing order but suspend its operation, allowing the public authority some time to fix the legal problem itself. That means that the order is made, but there is a delay before it comes into effect. For example—I think we have used this example before—if a quashing order means that the rules on entitlement to social security benefit would be void, the court may suspend the quashing order to allow the Government time to make new rules that do not break the law.

Quashing orders give teeth to the court's power to vindicate the rights of citizens. The ability to suspend a quashing order is helpful, as it makes a more nuanced remedy available. This avoids a binary choice between simply refusing a remedy and opposing a remedy, which causes administrative problems. Any uncertainties can be clarified by future decisions and not via primary legislation.

We have said already, and I will not go back over old ground, that in any event we are against any presumption in favour of a suspended quashing order. Proposed new section 29A(9) says that if it appears to the court that a suspended quashing order was a matter of substance, offering adequate redress in relation to the relevant

[Andy Slaughter]

case, then it must make one. Again, as has been said before, that was not recommended by IRAL. Imposing a presumption is not handing the judge additional tools, despite what Government Members say; it has the potential to hinder them from making use of the rest of their toolkit, even when it may be more appropriate to do so.

The imposition of the list of factors to which the court must have regard in proposed new section 29A(8) likewise serves to hinder flexibility and discretion still further. It should be noted, that while IRAL did not suggest a presumption, a list of factors also goes against the panel's report, which said that

"it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded".

While undermining the "flexibility" that the Ministry of Justice has held up as a justification for this measure, suspended quashing orders also have the potential to introduce greater complexity and uncertainty into the currently simple system of quashing orders, and they are likely to give rise to satellite litigation. If the Government are determined to legislate to clarify that courts may suspend the effects of a quashing order, there must not be any presumption in favour of their use.

It is useful to illustrate examples of injustices that might not have been addressed if this clause were in place. In 2015, new Government guidance said that non-religious beliefs could be excluded from religious education curriculums in secondary schools. Three humanist families successfully challenged the guidance, in a groundbreaking judgment that established that non-religious beliefs such as humanism should be treated with equal respect in the curriculum. Had these reforms been in place then, it could have meant that the curriculum would not have had to change for the pupils affected, and justice would not have been served.

To give one other example, in the case of Save Our Surgery Ltd, the claimant was a group dedicated to preventing the closure of a clinic in Leeds that provided surgery to children with serious cardiac problems. The court held that the NHS committee's decision to authorise the closure was unlawful due to procedural unfairness and omissions of key considerations in the consultation leading to the closure. The decision to close the clinic was quashed and paediatric heart surgeries resumed at the Leeds clinic in early 2013, shortly after the quashing order was granted. In the span of just 12 days in which the clinic was shut for surgeries due to the closure, it was reported by the BBC that 10 seriously ill children were forced to be transferred to other hospitals as far away as Newcastle and Birmingham, causing considerable difficulty to children and parents.

A suspended order could have been granted in this case for two reasons. First, at the time, the Health Secretary was already conducting a full merits test review into the faulty consultation process, which was considering the issues afresh and was set to make new recommendations regarding clinic closures. Given that that second review might still have recommended the closure of the clinic, a suspended order might have been thought appropriate at the time of the report. Secondly, the claimant was neither the actual Leeds clinic, nor a child denied surgery there, so a suspended order might have been adequate redress for the claimant. If a suspended order had been granted, the clinic closure would have been far longer than 12 days, putting more families through those difficulties.

In his speech on Second Reading, the Minister stated that the Bill supports

"very important principle of judicial review",

namely

"better public administration of the law in the best interests of our constituents."—[*Official Report*, 26 October 2021; Vol. 702, c. 233.]

Judicial review is indeed extremely important in upholding high standards of public administration. It is an excellent incentive for public bodies to make decisions lawfully. As the Government submission to IRAL acknowledges, judicial review ensures that

"care is taken to ensure that decisions are robust",

which "improves the decision". If claimants are discouraged from bringing legitimate cases, there is a risk that standards of decision making may be lowered as a consequence of these changes.

When deciding whether to issue a weakened remedy or to grant an ordinary quashing order, judges would have to consider the likely future actions of a public body and would have to speculate on what administrative consequences the order would have. It is difficult to see how those judicial assessments are within the judicial expertise and experience. Indeed, some judges have previously described these assessments as a job they are ill-equipped to undertake. That would be especially regrettable and ironic, given the Government's aim with this Bill.

Despite the Government's reference to political cases, these remedies will harm the role of individual judges in judicial review, which is to uphold the will of Parliament, ensuring that the public bodies and Government Ministers exercise their powers within the four walls of the empowering statute. If the court issues a prospective-only quashing order, it is effectively saying, "Even though the public authority acted outside the powers granted it, we must pretend that its past action was lawful and we are only going to do something about it going forward." The power to issue quashing orders that have only prospective effect, or that have limited retrospective effect, is a power that goes well beyond what IRAL recommended. The Government have yet meaningfully to justify with evidence why that additional and more radical proposal was needed.

3.45 pm

Although even a suspended quashing order will at some future stage apply to past conduct that was unlawful, a prospective-only order will enable a court to declare that unlawful past conduct could not be quashed and remedied. An individual claimant who has suffered harm will have no remedy on the facts of their case. The Government's frequent assertion that there is an increase in litigation that crosses over into political terrain has not been evidenced. There are relatively few judicial reviews brought every year. Around 1,000 claims are granted permission. In fact, the number of judicial reviews is declining in the Government's own statistics. There are a handful of cases that the Government refer to as having transgressed boundaries between law and politics. There is no logical connection between mitigating the impact of those cases and the measures in the Bill.

In its review, IRAL found no evidence of judges stepping into the political realm, asserting that

"the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers."

Prospective-only remedies would have a chilling effect on claimants bringing judicial review claims. The huge cost of judicial review and the lack of availability of legal aid already act as a barrier for many, discouraging them from bringing claims. Individuals who have suffered as a result of unlawful Government decision making will be further discouraged from seeking justice if they know that even if they win their claim an effective remedy may be denied them if a judge must make a presumption in favour of using prospective-only quashing orders.

All of that is concerning for a number of reasons. The arbitrariness and clear prospect of injustice in individual cases undermines the rule of law. What is more, the policy appears to breach article 6.1 of the European convention on human rights, the right to a fair trial, which requires an effective judicial remedy. The most obvious effect will be the denial of redress to those who were adversely affected by the impugned act prior to its being found to be unlawful. Perversely, among those unable to benefit from the use of a prospective-only quashing order would be the claimant in the successful judicial review. That would invert the principle underpinning our justice system that someone who has been harmed as a result of an unlawful action by a public body should be able to secure a remedy through the courts.

To demonstrate the issue by way of example, if a person who has been deemed ineligible for a welfare benefit successfully challenges the eligibility criteria but a prospective-only order is applied, the person will not receive back payments. That is possibly the clearest and most obviously unjust case that we can cite. It is likely that the successful claimant would have made a new application and be waiting for another decision to be made, during which time they will receive no benefit entitlement or a lower rate. Furthermore, they would not receive back payments for the benefit to which they would otherwise have been entitled, resulting in only a partial remedy. Such a scenario would see a claimant denied the full remedy to which they ought to be entitled. In the context of human rights cases, it is far from clear that prospective-only remedies would withstand a challenge before the European Court of Human Rights for failure to provide an effective remedy.

I have tried to be fair in my summation, particularly in relation to suspended quashing orders. I have put the arguments on both sides. I take the point on certainty, and that in some cases they may be a better option than a declaration. However, the majority of the clause, as I have just indicated, is obnoxious. Prospective-only orders, presumptions, and the clutter, if I can put it that way, of matters to be taken into account and conditions to be applied in that way really leave very little to be supported here. The courts are well used to modifying and tapering their jurisdiction, and that can apply to suspended quashing orders. We have heard that there are ways around it through applying a suspended order, and where administrative chaos may be caused, applying a declaration only.

I cannot in all honesty support the clause just on the basis of the arguable case for suspended quashing orders. Therefore, subject to what the Minister has to say, we will not be supporting clause 1 and will vote against it at the end of this stand part debate.

Anne McLaughlin: As I said earlier, suspended quashing orders and prospective-only remedies do not apply in Scottish courts, and will not apply, but because these are UK-wide laws to which the people of Scotland are subject, they will be affected. Because Scottish courts can hear cases of UK-wide law, there will inevitably be an increase in the number choosing to be heard in the Scottish courts. After all, if someone knows that they are more likely to get some remedy for winning their case, why would they not choose the court system offering that? I am always happy to showcase all things Scottish, including our legal system, but who will pay for the increased capacity that the courts in Scotland will need if our system is to be clogged up with UK-wide hearings?

I have already explained why we are concerned about statutory presumption, and the hon. Member for Hammersmith has been very clear, so I will not take up time repeating him or myself. I do not imagine that any Bill Committee has a massive audience at home listening to us—although the hon. Member seemed to think differently earlier—but I think this is something that we should be encouraging people to tune into. After all, it is their lives we are talking about. While I do not think we can rival "Loose Women", I do know that a number of people will be watching, and I think it is always worth explaining, in language that is as accessible as we can make it, what is going on.

So what do suspended quashing orders mean and why are we so opposed to them? On Second Reading, others and I raised the landmark judicial review that took place in 2017, which I think is worth talking about again. The Supreme Court found that Parliament could never have intended to limit people's right to access justice by charging them fees to use the employment tribunal. It found in favour of the claimants and the quashing order had immediate effect. That meant that the fees were immediately abolished and the Government were required retrospectively to refund anyone who had paid in the past—and quite right. People had been charged up to £1,200 to access this form of justice. The Supreme Court ruled that they should not have been and they were rightly refunded.

However, if clause 1 had been in place, those extortionate fees could have stayed in place until a date determined by the court, so that everyone who required to ask for an employment tribunal between the date of the ruling and the date decided by the court—say, six months hence—would have to pay those unlawful fees of up to £1,200. The Government would then be given the time to rectify the unlawful policy, although this legislation allows the deadline to be varied if they do not rectify it on time; however, the rectification is the interesting bit.

What that means is that the Government would in effect be able to change the law so that the thing that had just been judged to be unlawful—in this case by the

[Anne McLaughlin]

Supreme Court—was suddenly lawful. How can that possibly be? The effect in that case is that everyone who had paid the unlawful fee would be out of pocket, never to be refunded. Everyone who then paid in the intervening six months, or however long the Government were given to make the changes, would also be out pocket, never to be refunded. The Government would then change the law so that everyone in future is required to pay those fees of up to £1,200 or miss out on their access to justice, which is most likely the outcome for many people. We are talking about people losing their jobs, possibly wrongly, and being unlawfully dismissed, losing their entire income, and losing their right to access benefits—people who are sacked do not get support for the long term, because it is deemed to be their own fault.

Angela Crawley (Lanark and Hamilton East) (SNP): My hon. Friend is making a compelling case. Thus far throughout our proceedings, on Tuesday and today, we have heard much discussion about "three bites of the cherry" and the notion that people are enjoying some advantageous aspect of the process. What we have not heard about is real cases where individuals have had the right to take cases to this stage and have them challenged, and where the Government have been held to account for their policy. The case that my hon. Friend has raised is a prime example, so does she agree taking away this mechanism will only further inhibit those who need that protection from the Government's policies?

Anne McLaughlin: Yes, and that is what we are talking about—ordinary people who ordinarily do not have the access to justice that people with perhaps a little more money do. The tribunal system, which we will come on to later, is primarily about more vulnerable people, I would say. We have been talking about the people who had the landmark ruling, whom it affected. Even if they had managed finally to access benefits after losing their job unfairly and waiting to access justice, we all know that benefits are not enough to live on. They do not even cover things like the mortgage. Being wrongfully dismissed has a massive impact on someone's life. Thank goodness for the Supreme Court judgment and thank goodness it happened in 2017 and not 2022, because if it happened in 2022, it would not make a blind bit of difference to anyone's life, regardless of the outcome. Despite the effort and cost of going to court, a victim is left without an effective remedy, and the Government or public body, although acting unlawfully, faces no real consequences. We must not underestimate the chilling effect that this will have. For that daytime TV audience not used to legalese, what that means is that it will put people off attempting to access justice in the first place, because who would put themselves through all this for no tangible outcome?

The clause creates a perfect storm, with claimants having no incentive to challenge the Government or other public bodies, while said public bodies and Government proceed safe in the knowledge that they can do what they like. It is the risk of being held to account, the potential for challenge, that drives good decision and policy making. That point was made by a number of Opposition colleagues, at least, earlier today.

The measure also undermines judicial discretion. I know that we have already argued about this today, but it is imposing a statutory presumption in favour of suspended quashing orders. The Minister, in trying to reassure us that the statutory presumption does not mean, "This is what judges must do," while ruling out removing the provision that says, "This is what judges must do," did nothing to reassure us.

As Liberty points out in its evidence, IRAL considered prospective-only remedies and chose not to recommend them. It also chose not to recommend a statutory presumption for suspended quashing orders. What was the point of the independent review if the Government were simply going to ignore its conclusions? Therefore, we will vote against clause 1 standing part of the Bill.

James Cartlidge: It is an interesting thought that the way we are going to measure the success of our debates is whether we can compete with "Loose Women" on the viewing figures front. I think that that is highly unlikely, no matter how wonderful our language and discourse, but if there is someone who has watched all the way through—good luck to them—I think that it would be hard for them to refute the idea that we have had a pretty thorough debate on the key issues of clause 1, which is very important.

I will answer one point from the hon. Member for Glasgow North East, and this is really where the disagreement, to which the hon. Member for Hammersmith was referring, exists about the extent to which we put our faith in judicial discretion. Yes, there is the point about the presumption, but as I said, that is about jurisprudence, from our point of view. To go back to what the hon. Member for Glasgow North East said about, I think, the case to do with tribunal fees, she was arguing in effect, "They would not have been refunded if these remedies had existed, because they would have applied prospectively," but that would be only if the judge chose to use that remedy. That point is absolutely fundamental. There would be absolutely no requirement for them to do so.

Anne McLaughlin: The Minister keeps saying that, and I keep saying this, so I will just keep saying it. The legislation says that judges must—they must—use those orders unless they can demonstrate otherwise. Why not just say that they "may" do this, and give them the opportunity to do it? Otherwise, they will have to dig deep and find lots of reasons that are acceptable to the Government for not using it.

James Cartlidge: I did address that point in some detail in my speech on the last batch of amendments but one, but I will repeat the point. We want there to be certainty that judges should be considering these remedies, but that does not mean they have to use them. Rather, they should state the reasons, whether they do or do not, so that we build up that log of jurisprudence, which, as I said, is very important in a common-law system.

There has been an in-depth debate on this clause, so I do not intend to go much further. I just want to make one more important point. As far as Government Members are concerned, these measures strengthen quashing orders by giving judges more flexibility and more tools in the

judicial toolbox, and thereby strengthen judicial review. On the question of whether they should be used, of course that is a discretionary matter.

Perhaps the issue is this: we see the glass as half full. We do not feel that the new measures would be used detrimentally for our constituents. On the contrary, we think that they would be used in ways that support better public administration while still protecting the right of the claimant to obtain their justice, but ensuring that quashing orders do not have detrimental side effects when used. That is why I say that we are not forcing the judges' hands.

4 pm

Andy Slaughter: Will the Minister give way?

James Cartlidge: For one last wafer-thin intervention.

Andy Slaughter: I have been very restrained with the Minister. He puts his case in a moderate and reasonable way: he believes that the clause will improve not just the armoury of the courts, but their performance. Why does he think that, in bringing judicial review claims, almost every claimant, organisation and practitioner does not think that, but thinks it will hamper them? Would it not be quite perverse if they were saying that without actually believing it from their own experience?

James Cartlidge: I am grateful to the hon. Gentleman. He obviously was not listening to the same experts as I was on Tuesday, when we heard some strong support for the remedies. There is recognition from the experts that the remedies give more flexibility. I have explained the sorts of circumstances in which they may be used, but if they are not appropriate, they will not be used. However, we would at least understand the reasoning. I do not want to put the horse before the Cart, which we are about to come to. *[Laughter.]* It is a very important matter on which I am sure colleagues want to speak.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 8, Noes 5.

Division No. 4]

AYES

Cartlidge, James	Longhi, Marco
Hayes, rh Sir John	Mann, Scott
Higginbotham, Antony	Marson, Julie
Hunt, Tom	Moore, Damien

NOES

Crawley, Angela	Slaughter, Andy
Cunningham, Alex	
McLaughlin, Anne	Twist, Liz

Question accordingly agreed to.

Clause 1 ordered to stand part of the Bill.

Clause 2

Exclusion of review of Upper Tribunal's permission-to-appeal decisions

Andy Slaughter: I beg to move amendment 43, in clause 2, page 3, line 19, at end insert—

"(1A) Notwithstanding subsection (1), subsections (2) and (3) shall not apply where the party refused permission (or leave) to appeal by the Upper Tribunal was the appellant before the First-tier Tribunal and—

(a) that party was without legal representation and the appeal before the First-tier Tribunal was not within legal aid scope;

(b) that party was not of full age or capacity;

(c) the appeal before the First-tier Tribunal was not an in-country appeal;

(d) the appeal before the First-tier Tribunal was subject to any accelerated procedure;

(e) the decision of the First-tier Tribunal was subject to any statutory restriction or direction concerning how that tribunal was to evaluate the credibility of the appellant or the evidence before it; or

(f) the application to the Upper Tribunal raises a point of law concerning the construction of any statutory provision for interpretation of an international agreement."

This amendment is contingent on the interpretative provisions in Amendment 44. This amendment would provide a further list of exceptions to the ousting of the High Court's jurisdiction that is proposed by Clause 2.

The Chair: With this it will be convenient to discuss the following:

Amendment 42, in clause 2, page 3, leave out lines 34 to 37 and insert—

"(c) that decision or the decision against which the Upper Tribunal has refused permission (or leave) to appeal is vitiated by any—

(i) bad faith, or

(ii) fundamental breach of the principles of natural justice."

This amendment would expand the current exception in Clause 2 to ensure it applies to any bad faith or fundamental breach of natural justice.

Amendment 44, in clause 2, page 4, line 8, at end insert—

"'accelerated procedure' means any procedure for which procedure rules permit or require that less time is provided than is the case for another party before the tribunal bringing an appeal under the same statutory right of appeal; and includes an accelerated detained appeal under section 106A(1) of the Nationality, Immigration and Asylum Act 2002;

an appeal is 'not an in-country appeal' if the appellant is only permitted to bring or continue the appeal from outside the United Kingdom;

a party is 'not of full age or capacity' if that party is—

(a) a child, or

(b) requires the assistance of a third party to understand the procedure or decision of, or issues before, the First-tier Tribunal and communicate effectively with that tribunal (whether or not that assistance is provided save to the extent to which the person requires an interpreter and one is provided)

an appeal is 'not within legal scope' if representation before the First-tier Tribunal does not fall within civil legal services under section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

'interpreter' means a person whose sole function in proceedings before the tribunal is to translate between the English language and another language spoken by the appellant;

[The Chair]

'legally represented' means having legal services as defined by section 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which services must be provided by a person who is not prohibited from providing them by any statute, court order or decision of any relevant professional standards body;

'relevant professional standards body' means a designated professional body as defined by section 86 of the Immigration and Asylum Act 1999 or such other body in England and Wales as may be designated by the Lord Chancellor, in Scotland as may be designated by the Scottish Ministers or in Northern Ireland as may be designated by the Department of Justice in Northern Ireland;

'an international agreement' includes the 1951 UN Convention relating to the Status of Refugees."

This amendment is contingent on Amendment 43. This amendment would provide interpretative provisions for Amendment 43.

Andy Slaughter: We are making splendid progress. I will again disappoint those who like cliff-hangers by saying right at the beginning what our attitude is towards clause 2. We find it concerning, both of itself and on its own merits. We believe that reversing decisions in Cart, and subjecting Cart judicial reviews to ouster, is wrong on its own merits. We also think, as the Government have perhaps unwisely said, that the clause may serve as a template for further or wider use of the ouster, possibly including in more controversial areas further on. We have an issue of practicality and an issue of principle, and are therefore very likely to vote against the clause.

This short group of amendments is an attempt to improve, ameliorate and mitigate clause 2. Frankly, we found it very difficult. There is very little to recommend in clause 2, unlike in clause 1, where we at least sought to find some imaginative ways of improving it. It is difficult; nevertheless, I will in a little while speak specifically to the amendments that we have tabled. However, I will start as I did with clause 1 by setting the background so that it is clear where we are coming from on the amendments and on the clause as a whole.

An ouster clause is a clause in legislation that seeks to oust the jurisdiction of the courts. The desired effect is that the subject matter of the ouster clause cannot be challenged in the courts. If given effect by the court, this would mean that the decision or action of an official in relation to that subject matter is final and cannot be challenged legally.

Rule of law objections to ouster clauses have often been made in Parliament. For example, in relation to the Justice and Security (Northern Ireland) Act 2007, the Constitution Committee of the House of Lords objected to an ouster clause, stating that

"the Rule of Law is diminished if an aggrieved citizen is barred from challenging an allegedly unlawful decision taken by a public authority."

It is reasonable to say that ouster clauses are at odds with the rule of law. The orthodox view is therefore that courts will give effect to them only if the statutory language introducing them is absolutely clear. The courts have said:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

In reality, courts are adept at reading even very clear words which purport to establish an ouster clause as not actually having the effect of creating an ouster clause.

The Tribunals, Courts and Enforcement Act 2007 contained an ouster clause relating to decisions of the upper tribunal. The upper tribunal deals with appeals from the administrative appeals chamber, the immigration and asylum chamber, the lands chamber and the tax and chancery chamber. In the case of Cart, the Court of Appeal stated that

"the supervisory jurisdiction of the High Court, well known to Parliament as one of the great historic artefacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language."

There is no such language in the 2007 Act. The Supreme Court confirmed this approach. This has led to what are known as Cart judicial reviews, whereby a decision of the upper tribunal can be judicially reviewed.

There has been an on-going debate about how effective Cart judicial reviews are in catching errors of law made by the upper tribunal. The Independent Review of Administrative Law panel found that there were errors of law in only 0.22% of cases. The Public Law Project has questioned the empirical evidence for that and suggested that Cart judicial reviews are much more effective, with an actual figure between 2.3% and 9.2%. It is difficult to know what the true figure is, but it is conceded that the 0.22% figure is a significant underestimate. I will say more about this later. However, I felt that that there was a degree of consensus around some of the evidence we heard on Tuesday that the figure was certainly about 3%, and possibly around 5%. I will come on to what I think the significance of figures of that kind may be.

Tom Hunt (Ipswich) (Con): Whether it is 0.2%, 3% or 5%, we are still talking about a figure at least 10 times lower than the average success for other types of judicial review, which is 40% or 50%. Surely that is a significant point to consider?

Andy Slaughter: I thank the hon. Gentleman for his point. We did hear a number of different figures. I am now stretching my memory to recall exactly who said what. Was it Professor Feldman who said 30% to 50%, and Dr Morgan who posited 5%? I cannot quite remember. However, yes, there are different success rates for different types of judicial review. The point is that, even if the figure is small, Cart judicial reviews are important—I will come on to that more fully. However, if it is 5%, that is not a negligible figure. One in 20 is still a lot of cases. I am going to give some case examples to show the type of case that we are dealing with here. Perhaps the hon. Gentleman will be persuaded that there are sufficient by way of number and variety or that the compelling facts of the cases are such that he would want to retain Cart reviews. We will see.

The Government said they would introduce legislation to reverse the law on Cart judicial reviews. They said that they would seek to widen ouster clauses to other areas, although accepting that they would be rare. They also said they would legislate for modifying quashing orders so that they could be suspended or have limited effect. The proposals announced by the Government appear to be more radical than those envisaged by the independent panel—I think that is true.

The Lord Chancellor recently suggested that there may be more reforms to come on judicial review. His view was that judicial review meant that public money was being squandered, as courts are overturning Government decisions. However, as the commentator Joshua Rozenberg recently put it, commenting on a decision of the Transport Secretary on the Stonehenge case, which I have already referred to today, if the Transport Secretary

"had got it right the first time, taxpayers' money would not have been squandered."

Rather than a Minister complaining about a court rectifying unlawful decisions, it would be better to make lawful decisions in the first place.

The clause would take away proper, full judicial oversight in a specific area of public decision making, leaving vulnerable individuals affected by decisions more at risk of injustice. It does so in a way that the Government explicitly state is a test run for other ouster clauses—trying to get rid of judicial oversight in other policy areas. We have been left with a Bill that is bad for claimants bringing cases, disincentivises others who have been wronged bringing their own, fetters discretion while dragging courts into matters of policy, and jettisons a vital safeguard for very little gain. There is nothing in this part of the Bill to help improve the quality of decision making. It simply risks making it worse. The judicial review aspects make up only a small amount of the Bill, but there is very little that we think can be salvaged.

Clause 2 introduces the ouster in respect of decisions of the upper tribunal. That means that some decisions will now be final and cannot be appealed to another court, because the clause would abolish the Cart judicial review. The upper tribunal deals with a host of appeals from various tribunals. The context is the importance of scrutiny and accountability mechanisms to hold public authorities to account.

Cart judicial review is used in cases where no other right to appeal exists. This type of judicial review is a crucial safeguard against errors in the tribunal system in decisions of significant importance for the people concerned, which often involve the most fundamental rights.

Antony Higginbotham (Burnley) (Con): The hon. Member is making some interesting points about why we need to keep the system as it is, which allows for three bites of the cherry. Will he set out whether he thinks that process should extend to lots of other areas, and has he considered how much that would cost and how much judicial time would be taken up?

Andy Slaughter: I am not sure I have bought into that. I know it has become a mantra in the Bill, but I am not sure I have bought into the cherry analogy. I would rather say it is horses for courses.

James Cartlidge: Back to the Cart. *[Laughter.]*

Andy Slaughter: Bolting the stable door—whatever. If the hon. Member for Burnley gives me a few more moments, he will see that my argument is that the way the Supreme Court has configured this is sensible, because it works. There is a problem with Cart and Cart cases. Far from being otiose or an extravagance, the ability to review these cases is very necessary.

Antony Higginbotham: I do not think anyone is saying that it does not work. What we are saying is that it is a different process, and we are talking about whether it is efficient and fair for this one cohort of cases to be treated in a very different way. It is not about whether it works or does not work; it is about whether it is the right process and whether we should operate on a consistent basis.

Andy Slaughter: I have said, and I am coming back to the issue, that it is right and just to maintain Cart judicial reviews, but I will come on to the issue of cost shortly and whether that is appropriate. I hope that will answer the hon. Gentleman's question.

4.15 pm

Alex Cunningham: I am glad my hon. Friend is going to get on to costs. In the evidence session earlier this week, the Minister spoke about having the privilege of attending the Lord Chancellor's swearing in. He said:

"One of the things he swears is that he will ensure that resources are provided to the judiciary. This is not just about public money per se; it is about time".—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 30, Q32.]

Should cash get in the way of justice, as it is here?

Andy Slaughter: Everything has a cost—it is a question of whether it is a reasonable cost. Unfortunately, we have seen the justice system of this country and every aspect of the budget of the Ministry of Justice cut more than any other Department in the last few years. Even the much heralded uplifts over the next few years will take us not much further than restoring half of the money that has been cut. I think it sits rather ill in the Government's mouth to start talking about money, having done so much damage.

There is not an infinite amount of money, although the Government seem to discover various money trees around the place, and it is a legitimate factor to consider. What I am going on to look at is whether, in the case of Cart, the cost is a justifiable cost, either because of the remedy it provides or per se.

As I have said, Cart judicial reviews are used in cases where no other right to appeal exists. This type of judicial review is a crucial safeguard against errors in the tribunal system in decisions of significant importance for the people concerned, which often involve the most fundamental rights. It is usually used in asylum and human rights cases, in which the stakes are extremely high. In many cases, these are life-or-death decisions. It is unacceptable to insulate such decisions from judicial scrutiny.

In most cases, it is true that these are asylum and human rights cases, but not all of them are. One of our witnesses—Dr Morgan, perhaps—mentioned that Cart itself was not an asylum and immigration case. It would be wrong to categorise Cart judicial reviews as being for asylum and human rights cases. There are others as well.

[Andy Slaughter]

Clause 2 would severely restrict Cart judicial review. The Government have not made the case for removing this vital safeguard against serious errors in the tribunal system in cases of the utmost importance. With this clause, the Bill would set a precedent for removing certain cases or areas from the scope of judicial review.

The desire to get rid of judicial oversight in any area should be of the utmost concern to those who care about the rule of law and the separation of powers. There is simply no evidence that judicial review is currently so prejudicial to good administration that it needs to be significantly restricted, and there was no conclusion to that effect in the Government-sponsored independent review. That is wholly unsurprising. That Governments find judicial review at times to be inconvenient is no justification for attempting to avoid judicial scrutiny, in this or other areas. It is particularly concerning in this specific instance.

The Bill will largely extinguish the power of the High Court to oversee decisions of the upper tribunal relating to permission to appeal first-tier tribunal decisions. This will affect all four chambers of the upper tribunal, and individuals will no longer be able to apply to the High Court. The removal of this safeguard is likely to impact some of the most vulnerable people in the system, taking away their protection from errors made by public authorities. These include refusals of asylum and, where human rights are engaged, decisions to deport someone, including where that person may have lived in this country for much, most or even all of their life.

It is important to understand that removing the normal supervision of the High Court in this area is particularly problematic given the existing constraints in the asylum and immigration system for the tribunal, and in the context of the Nationality and Borders Bill, which threatens to exacerbate those constraints. The danger is that those passing through this system will be at heightened risk of failing to receive a fair and full hearing of any appeal whatsoever. If so, the administrative decision to refuse asylum to, or deport, a person will go without any effective or independent oversight. That will be exponentially harmful, because it will tend to insulate the original administrative decision making from the degree of scrutiny that is necessary to have any prospect of improving and maintaining its quality.

The purpose of judicial review is to ensure that public bodies make lawful decisions. The provisions in this Bill would do nothing to improve that, such as by ensuring access to high-quality legal representation from an early stage in proceedings, or by improving guidance. Instead of reducing need, the Bill simply removes access to Cart judicial review, which allows individuals to challenge decisions to refuse them a right of appeal where those decisions are made unlawfully. Doing so narrows access to justice and means that people who are subject to unlawful decisions have less opportunity for redress. Cart judicial review is a vital remedy of last resort for people subject to unlawful decision making, and should be defended.

Turning to the statistics and costings, unlike prospective-only remedies or a presumption in favour of suspended quashing orders, it is right to say that reversing Cart was a recommendation of the independent review of administrative law. The counter-argument in favour of clause 2 is primarily said to be the cost of Cart cases and the use of valuable judicial resources. The costs of Cart JRs are described as a "disproportionate and unjustified burden" on the system. The Bill's impact assessment estimates that between 173 and 180 High Court and upper tribunal sitting days will be freed up each year through clause 2, representing savings of between £364,000 and £402,000 a year. That figure is not high—it is less than some Members can pick up in their alternative jobs over a period of a few years—especially when considering the important role of Cart JRs in preventing serious injustice and ensuring that key decisions of the upper tribunal are not insulated from challenge.

A High Court judge can consider at least five applications for Cart judicial review in a single sitting day, an assumption that may be overstating the time taken to consider a single case. That figure of £364,000 to £402,000 is also inflated, because it considers the costs of the upper tribunal rehearing the case. That will occur because an unlawful upper tribunal permission decision has been identified by the High Court, so including those costs in the impact assessment is to include savings that result from allowing unlawful decisions to stand. That position cannot be acceptable.

Further, the average number of hours per Cart judicial review in the High Court that the impact assessment provides is 1.3 hours—again, that means up to five Cart JRs per day, which could easily be overestimating the time it takes a High Court judge to consider a single Cart judicial review case. That is especially true because there is a specific streamlined procedure for Cart JRs, which includes that if permission for the Cart JR is granted, unless a substantive hearing on that judicial review is requested, the court will automatically quash the upper tribunal's refusal of permission. Moreover, that figure is inflated because it includes the cost of the upper tribunal rehearing the appeal in a successful case. That would constitute a cost saving resulting from allowing unlawful decisions to stand: those costs would only be saved because the upper tribunal's unlawful refusal of permission to appeal was immunised from challenge.

There is already a high threshold for the use of Cart judicial reviews. In order for permission to be granted, the case must be shown to be arguable with a reasonable prospect of success. Lawyers must also show that there is an important point of principle under consideration, or another compelling reason for the appeal to be heard. Applications for Cart judicial review of a decision must be submitted within 16 days of the initial decision having been sent, instead of the usual three months available in other types of judicial review. Unlike other judicial reviews, there is no right to an oral hearing: Cart judicial reviews are dealt with by paper application only, thus requiring minimal judicial resources.

As we have already touched on, IRAL's recommendation to reverse Cart judicial review was based on the 0.22% figure, but I think it is now generally accepted that that figure was seriously flawed. The criticism of that figure attracted the support of the Office for Statistics Regulation, and the Government have now accepted it: their own analysis suggests that at least 3.4% of cases are successful, a figure 15 times higher than IRAL originally estimated. However, that figure is also not universally accepted, with the Public Law Project estimating that success

rates for Cart JR are considerably higher. I know that there are a number of figures flying around, but I think quite a persuasive case was made for the figure of around 5%. I think the variation stems from IRAL's misunderstanding of how to calculate success in Cart JRs, as well as procedural complexities that mean that they are rarely accurately reported.

Further, the Government's definition of success does not reflect the purpose of Cart JRs and is unduly narrow. The analysis in the consultation response and impact assessment adopts an unduly narrow definition of success, which artificially deflates the success rate and artificially increases the projected cost savings. The Government define success as not only success in a judicial review, but also a finding in favour of the claimant at a subsequent substantive appeal in the upper tribunal. That is because the Ministry of Justice assumes that a Cart JR is successful if not only the upper tribunal's refusal of permission to appeal is overturned, but permission to appeal is granted and the appeal against the first-tier tribunal's decision is allowed.

That excludes all the cases in which Cart judicial review played a vital role in correcting an error of law in the upper tribunal's refusal of permission to appeal, but the subsequent appeal was dismissed. That is not the normal approach to defining success in judicial review. It ignores the benefit that flows from a case that meets the Cart criteria being heard in the upper tribunal, allowing that more senior tribunal to consider important points of principle or practice and opening up the possibility of appeal to the Court of Appeal, thus preventing the upper tribunal from being insulated from the general courts system.

A Cart judicial review should be regarded as successful if it results in the refusal of permission to appeal being overturned. If we adopt that definition, the success rate is more like 5.5% or 6%, which is some 25 times higher than the IRAL panel thought and means that more than one in 20 cases are successful. That might be regarded as a reasonable and appropriate success rate for challenges to decisions by a senior tribunal, but that view is surely fortified by the nature of the issues at stake.

In any full assessment of the proportionate use of judicial resource, account needs to be taken of the weight of the interests. In the administrative appeals chamber, many appeals concern access to benefits that are designed to prevent destitution and homelessness, or to meet the additional living costs of disabled people. In the immigration and asylum chamber, almost all cases involve asylum and human rights appeals. The potential injustices at stake concern the most fundamental rights and may literally be a matter of life and death. The cases that succeed in a Cart judicial review will also, by definition, involve important points of law or practice, which would otherwise not be considered, or compelling reasons such as the complete breakdown of fair procedure.

Cart JRs have several purposes, including the identification of errors of law in upper tribunal permission decisions where important issues of principle or practice are raised. That will be achieved if the upper tribunal's refusal of permission to appeal is quashed. The impact assessment states that of a total of 92 cases, out of 1,249 applications, 48 were remitted to the upper tribunal for permission to appeal decisions. That is in the context of immigration Cart JRs for 2018-19, minus cases pending an appeal decision in the upper tribunal. Therefore, based on those figures and a more accurate definition of success, which still does not account for settlement, the success rate is 7.37%—more than double the 3.4% that the Government now rely on, and more than 30 times the original figure cited by IRAL. In addition, there is required to be an arguable case that has a reasonable prospect of success.

In short, the streamlined procedure for Cart judicial reviews, together with the high test for permission in Cart cases, provides a proportionate means of achieving the aim, which the Government commend, of ensuring some overall judicial supervision of the decisions of the upper tribunal in order to guard against the risk that errors of law of real significance slip through the system. An entirely appropriate and proportionate amount of judicial resource is used in identifying and correcting errors of law that would have potentially catastrophic consequences for the individuals concerned.

As I have said, it is not just the number of cases but their nature that is concerning. Many relate to immigration and asylum. Many of the remainder concern access to benefits for the disabled and others facing destitution. The result of these appeals may decide whether someone has the means to live and to be housed, or whether they may be deported, separated from their family and face potential mistreatment, and the Government are not unaware of that.

4.30 pm

The Bill's impact assessment states that the majority of Cart cases relate to immigration and asylum, and therefore

"those who lose out are more likely to have particular protected characteristics, for example in respect of race and/or religion or belief."

That is seen as acceptable, as it will

"will reduce the number of High Court Judge and Upper Tribunal Judge sitting days required, so saving judicial time and allowing Judges to focus on other matters."

I just do not follow the logic of that. How, on the one hand, can they can say that, effectively, this will prejudice groups with protected characteristics and affect people in extremis, but, on the other, go on in the next, non-sequitur, paragraph and say, "Nevertheless, we believe…". Given the amount of money involved, which is not a huge amount of money, and given the success rate, I think that that is a rather glib response from the Government in that document.

In its response to the Government consultation, the Immigration Law Practitioners Association provided an illustration of what the Government intend to jettison to free up time for "other matters". It listed 57 case studies of successful Cart JRs omitted from IRAL's report, including that of a Ugandan lesbian whose initial appeal had been sabotaged by a false letter to the court from a homophobic acquaintance, and a victim of trafficking who had originally been deemed to have voluntarily come to work despite having been trafficked into the country as a child. The cases, ILPA wrote, demonstrate how removing Cart would have

"extremely serious consequences for the people affected".

It went on to say:

"These are all cases where a person's fundamental rights were engaged, many of them asylum claims, and where the Upper Tribunal made the wrong decision in refusing to grant permission to appeal. These examples demonstrate a significant risk if changes

are made to Cart JRs which mean that challenges to unlawful decisions are not permitted to proceed beyond Upper Tribunal stage."

The experience of the Joint Council for the Welfare of Immigrants shows that

"the availability of Judicial Review in and of itself helps to ensure effective decision making. Knowing that decisions are subject to independent judicial scrutiny is integral to ensuring good quality decision-making."

Anyone allowing any actor free rein to exercise a power without the possibility of scrutiny is alien to the democratic principles under which we are governed. More important than the precise success rates of Cart JRs are the nature of those successful cases. As mentioned above, cases in which a wrongful decision by the upper tribunal is overturned by way of Cart JRs are ones with grave consequences.

Alex Cunningham: As we are looking at this whole issue of scrutiny, which is so important, I cannot quite understand why the Government or anybody else would not want greater scrutiny of what they do on a day-to-day basis. Does my hon. Friend understand my feelings on that?

Andy Slaughter: I do understand, and I think that quite a lot of our witnesses understood that as well and could balance the relatively small numbers and the particular provision for Cart, which the Supreme Court upheld, against the very serious nature of these cases. I will go on to outline some cases. I will not do all 57, but I will give a handful of cases that will perhaps indicate the variety and the seriousness of the cases that we are dealing with here. It is very easy to deal with the law in the abstract, but we need to look at the type of individual who is affected and at the profound effect that it has on their life.

In addition to the equality implications, the fact that Cart JRs primarily relate to immigration and asylum decisions means that the human rights consequences may be particularly severe, impacting the right to life and the absolute right to freedom from torture, inhuman and degrading treatment, which are protected by articles 2 and 3 of the European convention on human rights, as well as the right against return to persecution, which is protected by the refugee convention. An unchallenged, erroneous tribunal decision could also lead to long-term family separation, engaging article 8 of the ECHR, on the right to respect for a private and family life. Cart JRs prevent serious injustices. The Government recognised in the consultation that the removal of Cart JRs "may cause some injustice". Almost all the cases in the immigration and asylum chamber of the first-tier tribunal relate to asylum and human rights appeals, which engage the most fundamental rights, including, in some cases, the difference between life and death.

I mentioned the 57 cases that were cited by ILPA, and there were also 10 cases identified by IRAL. Each involved a person's fundamental rights and the upper tribunal incorrectly applying the law. Those examples included: parents' applications for their child to be reunited with them; a child's application to remain in the UK to receive life-saving treatment; the asylum claim of a victim of human trafficking and female genital mutilation; and many other deportation and asylum decisions where, if deported, the individuals faced persecution, their lives were at risk and/or they would be separated from their families. So let me briefly go through a handful of the cases that were cited.

In one case, the right to a Cart appeal saved a humanist asylum seeker who would have been wrongfully deported to Egypt to face state-sponsored persecution and vigilante violence. He relied on Cart to demonstrate that the tribunal judge erred in his case. It is also worth noting that the Home Office conceded his claim before it went to a full hearing at the Court of Appeal, which meant that his case will not show up on official statistics regarding Cart. Then we have the case of Nadeem, a young Afghan man who came to the UK as an unaccompanied minor and was in the care of social services. He was tortured by the Taliban as a child. His case was dismissed because, even though it was accepted that he was at risk in his home area, no medical evidence had been obtained to show that he was traumatised as a result of that torture. The trauma he had experienced and its impact on him made it unreasonable for him to relocate to Kabul. His brother, who had come here in the same circumstances, had that medical report, and his appeal was allowed. The day after Nadeem's appeal decision was sent out, the country guidance showing that it was possible to safely relocate to Kabul was ruled unlawful by the Court of Appeal. Nadeem was urgently referred to the Joint Council for the Welfare of Immigrants, which used Cart JR to enable him to bring his appeal. This appeal was subsequently allowed on the basis that the original decision was irrational. He was then recognised as a refugee and is starting to build his life in the UK with his brother, safe from the Taliban.

Then we have the case of Tania, who was a child victim of trafficking. Her asylum appeal was dismissed by the first-tier tribunal, which found that she was not trafficked and would not be at risk on return. She was 15 years old when she was transported to the United Kingdom to work with the family in question. Permission to appeal to the upper tribunal was sought, because, as a question of law, she could not "voluntarily" undertake such work as a minor. As a victim of trafficking, and given her profile, the objective evidence demonstrated that she would be at risk of persecution on return. Permission to appeal was refused by both the first-tier tribunal and the upper tribunal, but a Cart JR of this decision was successful, with the judge finding that the tribunals had failed to address the fact that Tania was a child victim of trafficking in their reasoning. The decision of the upper tribunal to refuse permission to appeal was quashed and permission to appeal to the upper tribunal was granted. Tania was subsequently recognised as a refugee and is no longer at risk of trafficking and forced labour, thanks to the successful intervention by way of Cart JR.

Sir John Hayes: The hon. Gentleman must know that only about 3% of these kinds of judicial review succeed, and that the huge number of them, 750 or so a year, are taking up enormous amounts of time. It would be good to have a debate in the House, perhaps even urgently, on the backlog of court cases, as then we can hear him say that he supports our attempt to clear that backlog. Why not have a debate about it on Monday? We can talk about why the Bill is so helpful in dealing with that problem.

Andy Slaughter: I am going to disappoint the right hon. Gentleman by not taking responsibility for this Government's court backlog, which is continuing, in the Crown court at least, to grow and to which we have precious little solution at the moment. Nor am I going to put the burden of that on to this type of case. The reason why I am going through a few of these case summaries is to show, on their facts, that these are compelling cases.

The right hon. Gentleman could possibly have said 0.22%, which was the figure that the Government sought to rely on. That was a very low figure. I think he said 3.4%, but I think it is higher than that. I think this is a significant number of cases. I also think they are very compelling cases. He may not want to hear the facts of these cases, but to rebut that with the current Crown court backlog—I will put it politely, I think there is an element of non sequitur there. I do not want to get into a big debate about the MOJ's finances, but I did mention that any extra money that has been put into the MOJ, or will be over the next three years, is a recognition of the ridiculous levels of cuts that have been made since 2010 and does not begin to address them

Sir John Hayes: But by definition, given the success rate, these changes will take out considerably more than 700 cases. That may create room for others, I do not deny that, but it is pretty hard for someone to argue that they want to free up more resources for the courts and then to argue against provisions that do just that.

Andy Slaughter: With respect, it is not. We are talking about a sum of between £300,000 and £400,000. I do not think that will make a material difference to the Crown court backlog. That is partly—mainly—a result of underfunding, but also of mismanagement by this and previous Governments since 2010. Those listening to the debate can make up their own mind about whether that was a sensible rebuttal of the type of cases that, as a result of getting rid of Cart judicial review, will no longer have a remedy—will no longer be able to come before the courts. It is not unique; it does happen and it can be justified, but it is a very serious step to engage an ouster clause. It is for the Government to make that case, and I am sure that, when I finish today, or when we resume next Tuesday, the Minister will try to make the case. To put the onus on the Opposition is, shall we say, chutzpah.

Let me, in the time I have left, go through perhaps just half a dozen cases. I do not want to take up Members' time, but I do want to put these cases on the record, because I think that this type of case is exactly what we are dealing with and when one hears about the victims and the potential litigants in Cart reviews, that makes a difference to how we regard them.

Jared is a Tamil who had supported the Liberation Tigers of Tamil Eelam as a teenager and was tortured by the Sri Lankan state as a result. His body was covered in more than 100 scars typical of torture methods used by the regime. Despite that, and a country expert report, his appeal was dismissed. Despite his trauma and the risk that he faced on return, he was detained pending removal. He lodged a Cart judicial review challenging how the tribunal had treated the expert evidence supplied in his case. The case was successful before the Court of Appeal, and he was then recognised as a refugee. It was accepted by the Court that he would have been at real risk of further torture and persecution if returned.

SR, a Sri Lankan national, feared persecution, in part because of his involvement in diaspora activities in the UK. His appeal was dismissed by the first-tier tribunal, and he was refused permission to appeal. Following his application for a Cart judicial review, the refusal of permission to appeal was quashed on the grounds that the first-tier tribunal had failed to consider the evidence of the applicant's diaspora activities in the UK and whether, in light of the evidence and the arguable change in conditions in Sri Lanka since 2013 when the upper tribunal had given country guidance, he would be at risk on return. The upper tribunal found that the first-tier tribunal had made an error of law and decided to hear the case to give new guidance on risk on return for those involved in diaspora activities. Before the hearing in the upper tribunal, the Home Office conceded the appeal, accepting that SR was a refugee. Without the possibility of a Cart judicial review, SR could have been sent to Sri Lanka, where he had a well-founded fear of persecution.

4.45 pm

Michael had a serious and enduring mental health condition. He had been sectioned several times under the Mental Health Act 1983 and diagnosed with bipolar affective disorder. The first-tier tribunal rejected his appeal against a decision to return him to Nigeria, despite finding that Michael is vulnerable, requires ongoing support and would be at significant risk of relapse if returned. He would not be able to fund healthcare on return to Nigeria, and even if he could, would not be able to access it. He did not have any material support in Nigeria. Nevertheless, it was found that there were no very significant obstacles to his reintegration on return. Permission to apply for judicial review was subsequently granted on the basis that the first-tier tribunal failed to take into account Michael's mental illness. The refusal was quashed, and Michael was granted permission to appeal to the upper tribunal, which found that the first-tier tribunal judge had made a material error of law.

A claimant was in a relationship with a British citizen and had two children by them, who were also British citizens. The claimant's partner suffered from serious health conditions. The claimant's argument that removal would breach their right to respect for their family life was dismissed by the first-tier tribunal and permission to appeal was refused. Following a Cart judicial review, the decision of the first-tier tribunal was overturned. The upper tribunal allowed the appeal under article 8. Without a Cart judicial review, the family would have been separated.

CL had been trafficked for the purposes of domestic servitude in a diplomatic household. Her appeal was dismissed by the first-tier tribunal and she was refused permission to appeal. CL brought a Cart judicial review in which she argued that her case raised not only compelling reasons of risk on return but important points of legal principle and practice. After permission was granted for a Cart judicial review, the refusal of permission was quashed and the case eventually remitted to the first-tier tribunal. The Home Office conceded the appeal and granted CL refugee status before the rehearing in the first-tier tribunal.

Lord Dyson explained in the case of Cart:

"The High Court's supervisory jurisdiction to correct any error of law in unappealable decisions of the predecessors of the UT has been beneficial for the rule of law. There is a real risk that the exclusion of judicial review will lead to the fossilisation of bad law...There are also risks in restricting the judicial review jurisdiction in relation to errors of law in unappealable decisions of tribunals in cases involving fundamental rights and EU law. In such cases, if the UT makes an error of law in refusing permission to appeal, the consequences for the individual concerned may be extremely grave…In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture."

I will refer to two more cases. One is the case of a trafficking victim who was trafficked to the UK from her home country of Nigeria. Traffickers in both countries had brutally mistreated her and subjected her to serious physical and sexual abuse. While in the UK she gave birth to a child, who she looked after alone. There was no question that she was a genuine trafficking victim. The Government did not dispute this. A tribunal was convened to decide what support and protection she ought to receive; but when it came to the hearing, the tribunal went beyond the statements of the parties and decided that she was not, in fact, a victim of any trafficking or exploitation. As such, she did not attract protection and could be removed from the UK. This would have resulted in her falling back into her trafficker's hands and undoubtedly led to her being seriously mistreated and perhaps killed. The fate that would have befallen her child is difficult to even contemplate.

The Cart procedure was used to re-evaluate this decision before the High Court. The Court found that the tribunal had made a litany of errors leading to

"elementary and serious breaches of the principles of procedural fairness"

and, as such, its decision could not stand. The errors included going beyond the Government's case and making unsupported findings against her without giving her a chance to defence herself, and departing from country guidance without good reason. On the evidence, she was clearly a victim of trafficking, and the High Court ruled that she should be treated as such. In fact, it ruled not only that the case was arguable and should have proceeded, but that it was bound to succeed, based on the strength of her claim. Without the oversight of the High Court, the tribunal's original, fundamentally flawed ruling would not only have established a position that was wrong in law, but seriously risked putting the person in question in grave danger. The Cart jurisdiction was vital for correcting the error.

Finally, there is the case of a claimant who had suffered a tragic life in his home country. He is 12 years old and his family was tracked down, shot and killed in front of him. He drifted between states before moving to the UK. After some time, the UK sought to remove him to Palestine. This would not only have put him in great danger of being targeted and killed; medical experts confirmed that he was suffering from a serious mental health problem and that removal would likely cause serious harm to him or others. Although the tribunal dismissed the claim, the High Court was able to intervene. The High Court, and then the Court of Appeal, assessed his Cart application and found that the tribunal had been applying an outdated understanding of the law. Thanks to Cart, the senior courts were able to ensure that the correct law was applied. The relevant evidence was considered properly, and the serious medical concerns about physical and mental health were taken seriously. Were it not for the Cart jurisdiction, a seriously vulnerable man may have been sent to a country where he faced a significant risk of being killed and may have posed a serious risk to himself and others.

As those case studies and numerous others illustrate, people who benefit from the last-resort safety net of Cart judicial review are some of the most vulnerable in our society: children, survivors of torture and trafficking, and mentally unwell and traumatised people who have been subject to irrational and poorly reasoned decision making. Cart judicial reviews are used because no other legal remedy is available. As well as the risks posed to those bringing immigration cases for review, users of the tribunal service bringing cases on grounds of mental health, social security or special educational needs may also be affected by provisions that remove access to Cart judicial reviews. Cart JR cases that succeed involve either an important point of principle or practice that would not otherwise be considered, or some other compelling reason. Some 5,870 judicial review applications since 2012 are labelled "Cart immigration" in the Ministry of Justice data on civil justice and judicial review for 2020, and 423 judicial review applications are labelled "Cart other". The Government accept that there may be a disproportionate impact on those sharing certain protected characteristics, such as disability, but they have not collected the data necessary to analyse these equality impacts.

The need for judicial review could be reduced by introducing measures that would increase the quality of decision making by public bodies through better resourcing of the courts and legal aid sector. The clause represents a misdirected attack on access to justice, instead of taking steps to improve outcomes before they reach the point of needing to rely on judicial review. It will not solve any of the problems in our justice system and may instead deny vulnerable members of our society the legal protection that they need. There is also a wider point about public interest at stake, because judicial reviews prevent the upper tribunal from becoming insulated from review by ensuring that there is a means by which errors of law, which could have significant and ongoing impacts across the tribunal system, can be identified and corrected. As Lord Phillips said, Cart judicial reviews

"guard against the risk that errors of law of real significance slip through the system."

Upper tribunal judges will be specialists in their field. As Lady Hale recognised, however, "no one is infallible." Cart judicial reviews mitigate the risk of erroneous or outmoded constructions being perpetuated within the tribunal system, with the upper tribunal continuing to follow an erroneous precedent that it or a higher court has set. As Lord Dyson said:

"In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture."

Clause 2 intends to remove a vital safeguard against life-altering decisions being forced on people due to mistakes based on faulty statistical reasoning. The reversal of Cart will lead to people who would otherwise have won their cases being deported or made homeless, entirely because of the Bill.

James Cartlidge: Will the hon. Gentleman give way?

Andy Slaughter: I will in a moment. Under clause 2, that crucial and focused review will be lost, and with it the potential for fundamental injustices to be prevented. I am coming on to talk briefly about amendments 43, 42 and 44, but I will give way.

James Cartlidge: The hon. Gentleman used the phrase "faulty statistical reasoning". In 2004, when the current shadow Justice Secretary, the right hon. Member for Tottenham (Mr Lammy), was a Minister, he tried to bring forward a similar measure. Can the hon. Member for Hammersmith remind us of the percentage reasoning used to justify that measure at the time?

Andy Slaughter: Along with "bites of the cherry", I cannot comment on the shadow Justice Secretary's activities before I was elected to the House. It might be approaching lèse-majesté for me to intrude on that, particularly given that he dealt with it effectively on Second Reading.

James Cartlidge: I am happy to help the hon. Gentleman.

Andy Slaughter: I would never refuse an intervention.

James Cartlidge: In a Bill Committee, the statistic that the right hon. Member for Tottenham, as Constitutional Affairs Minister, used to justify getting rid of Cart JR was 3.6%—an incredibly similar statistic, which suggests that there is some merit in that figure.

Andy Slaughter: We have heard every figure from 0.22% up to 9.6%, and some of the experts made the case for it being substantially above 3%. I am making a separate case, however, which is why I wanted to read into the record some of those case summaries of complex cases. They indicate: first, that they are compelling cases; secondly, that there are a significant number, even if they are a minority; and thirdly, that the figures that we are talking about—I wish we could get more accurate figures; perhaps the Minister could go away and help us with that—are likely to be substantially above 3.6%. I know that the Government have moved only that far at the moment, but perhaps they can be persuaded to move a little further.

I fear that I will not finish today, but hon. Members will be pleased to hear that I am near finishing. I will say a few words on what are essentially probing amendments 43, 42 and 44. As I said at the beginning, they are our way of making the best fist of improving clause 2—they are not our finest hour.

We would like to understand why it is proposed to exclude the supervisory jurisdiction of the High Court to consider upper tribunal decisions to refuse permission to appeal, where it is arguable that the statutory appellate process is tainted by bad faith or fundamental breach of natural justice, unless that question is one of bad faith or breach of natural justice by an act of the upper tribunal itself. Clause 2 permits very limited exceptions to the ouster of the High Court's supervisory jurisdiction over the statutory tribunal appeals system.

Proposed new section 11A(4) of the Tribunals, Courts and Enforcement Act 2007 sets out the limited exceptions. Proposed new section 11A(4)(c) provides for an exception where a question arises as to whether

"the Upper Tribunal is acting or has acted…in bad faith, or…in fundamental breach of the principles of natural justice."

That restricts the jurisdiction of the High Court when the bad faith or a breach of natural justice is on the part of the upper tribunal in refusing permission to appeal. If, however, the statutory tribunal appellate process has been otherwise tainted by bad faith or a fundamental breach of natural justice, whether before the upper tribunal or in the first-tier tribunal, the High Court's jurisdiction would continue to be excluded. That might, for example, be on the part of the tribunal below or on the part of a party to the appeal.

Any appeal that is tainted by bad faith or a fundamental breach of natural justice would therefore not fulfil Parliament's purpose in establishing a statutory appellate tribunal. Therefore, in the interests of both justice and parliamentary sovereignty, any appeal tainted by either of those factors should not be excluded from the supervisory jurisdiction of the High Court. The amendment could expand the current exception in clause 2 to ensure that it applies to any bad faith or fundamental breach of natural justice.

I pause to catch my breath before I go on to amendments 43 and 44, just in case the Chair was about to interrupt me. If not, I will begin. It is unclear what is proposed by clause 2 having regard to the existing and pending limitations of the tribunal system in securing access to justice for appellants before it, particularly in relation to the function of that system as guarantor of the safety and fairness of administrative decisions. The Bill could be amended to provide a further list of exceptions to the ousting of the High Court's jurisdiction proposed by clause 2. I propose an amendment that gives examples of circumstances in which there must be special concern about the capacity of the first-tier tribunal to deliver an effective appeal for the appellant for reasons beyond the control of the tribunal.

5 pm

Several of the circumstances listed in the amendment, which proposes new paragraph (1A), place a specific constraint on that tribunal to reduce its capacity to deliver justice. Some go directly to the tribunal's independence, while others go to the safety of the process imposed on the tribunal for the performance of its function. There are two fundamental aspects to concern relating to clause 2, both of which need full consideration. The first relates to the constitutional role of the High Court in guaranteeing justice by a tribunal system. This arises directly from the clause, since the purpose is to oust the jurisdiction of the High Court to perform such a role. The second relates to the constitutional role of the High Court as the guarantor of the lawfulness of acts by public bodies. That is because the tribunal system has been introduced by Parliament to increase access to justice and relieve the High Court of the weight of this role by providing an alternative and more accessible remedy to judicial review in relation to a range of administrative decisions.

Such decisions concern specified matters, including entitlement to social welfare support, taxation, entitlement to asylum, and deprivation of British citizenship. Those are matters of huge importance to the individuals concerned. They are also matters whereby error and unfairness could have devastating consequences both for the individual and for wider public confidence in justice and Government.

The dangers of clause 2 are emphasised by what has happened and what is intended to happen to the immigration and asylum chamber of the tribunal system since the Supreme Court's Cart decision in 2011. For example, following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid is no longer generally available for non-asylum appeals, or for the few non-asylum immigration applications in which an appeal remains. Where legal aid is available, as it is for asylum claims and appeals, the rates at which it is paid have remained unchanged for years, stretching back even before the Cart decision. The impact is that appellants in complex non-asylum claims and appeals may be without any legal assistance, and the quality of any assistance provided to those claimants and appellants who remain legally assisted is at significantly greater risk due to increased pressures of time and cost arising in what is left of the legal aid scheme.

Since the Cart decision, the Immigration Acts 2014 and 2016 introduced powers to prevent such appeals—those that could still be brought after those Acts—from being pursued while the appellant remained in the UK. That means that some appellants are unable to appear in person for their appeals or to instruct legal representatives, which significantly reduces their capacity to participate effectively in the appeal.

The Nationality and Borders Bill currently before Parliament includes provisions to direct or require judges of the tribunal system as to the findings that they may or may not make on the evidence presented to them. That Bill also seeks to constrain the judges in their interpretation and application of the definition of a refugee in the 1951 United Nations convention relating to the status of refugees. These measures interfere with and undermine the role of the tribunal and judiciary to act independently on the basis of the material before them and in accordance with the law that is applicable to the jurisdiction that they exercise.

All those matters show that the safety of the tribunal system is, in several respects, dependent on the willingness of the Government to respect the independence of that system, including to review their own decisions, whether of Ministers or officials. That willingness has been lacking in the immigration and asylum field over several years, and there is no guarantee that other areas concerning Government decision making will be immune to that. Amending this Bill will provide an opportunity to show how exclusion of the High Court's supervisory jurisdiction risks serious failure in relation to each of the fundamental aspects identified: that justice is secured in the tribunal system and, directly related to that, that justice is secured in relation to Government decisions.

That is all I have to say in relation to those amendments. With those amendments, we seek to widen the exemptions or flexibility in Cart. I would be interested to hear what the Minister has to say, whether he has any rebuttal to that or whether he is susceptible to it. However, my feeling, anticipating that, is that we will not press the amendment to a vote today. I have said almost everything I want to say on clause 2, but I wish to briefly—I do mean briefly—explain as part of the clause stand part debate why we will be voting against clause 2.

Ordered, That the debate be now adjourned.—*(Scott Mann.)*

5.7 pm

Adjourned till Tuesday 9 November at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

JRCB05 Assistant Professor Samuel Beswick, Assistant Professor of Law at the University of British Columbia in Vancouver, Canada

JRCB06 Amnesty International UK

JRCB07 Amnesty International UK (supplementary)