PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

JUDICIAL REVIEW AND COURTS BILL

Third Sitting

Thursday 4 November 2021

(Morning)

CONTENTS

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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

(Morning)

[Sir Mark Hendrick *in the Chair*]

Judicial Review and Courts Bill

11.30 am

The Chair: I have some preliminary announcements. I remind Members that they are expected to wear a face covering, except when speaking or if they are exempt. That is in line with the House of Commission's recommendations. Please also give each other and staff space when seated and when entering and leaving the room.

I remind Members that they are asked by the House to have a covid lateral flow test twice a week if coming on to the parliamentary estate. That can be done either at the testing centre on the estate or at home.

Observing the Members present, on the Government Benches at least, only the payroll vote are wearing a mask, although a couple more are putting on masks now as a result of my recommendation. I hope that during the course of today's proceedings, Government Members give serious consideration to wearing a mask. Obviously, I am not wearing one, because I am chairing the event, and officials either side are at a safe distance.

Hansard colleagues will be grateful if Members could email their speaking notes to hansardnotes@parliament.uk. Please switch electronic devices to silent. Tea, coffee and other beverages, apart from water, are not allowed during sittings, so I recommend Members comply with that, otherwise they might not be called to speak.

We now begin line-by-line consideration of the Bill. The selection list for today's sitting is available in the room. It shows how selected amendments have been grouped together for debate. Amendments grouped together are generally on the same or similar issues. Please note that decisions on amendments do not take place in the order in which they are debated, but in the order in which they appear on the amendment paper. The selection and grouping list shows the order of debates. Decisions on each amendment takes place when we come to the clause to which the amendment relates.

The Member who has put their name to the lead amendment in the group is called first. Other Members are then free to catch my eye to speak on any or all the amendments within that group. A Member may speak more than once in a single debate. At the end of the debate on a group of amendments, I shall again call the Member who moved the lead amendment. Before they sit down, they will need to indicate whether they wish to withdraw the amendment or to seek a decision. If any Member wishes to press any other amendment in a group to a vote, they need to let me know, please.

Clause 1

Quashing orders

Andy Slaughter (Hammersmith) (Lab): I beg to move amendment 12, in clause 1, page 1, line 8, leave out from "order" to the end of line 9.

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.

The Chair: With this it will be convenient to discuss 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.

Andy Slaughter: It is a pleasure to be here under your chairmanship this morning, Sir Mark. I hope that we will have some interesting debates over the next few weeks. I also welcome the Minister to the first Bill he is to take through the House. I will also mention—*[Interruption.]* I was going to mention my own side, but they seem to have temporarily left the room for urgent Chamber business. I will not take that personally—not at this stage. In his absence, however, I am grateful to my hon. Friend the Member for Stockton North, who as shadow Courts Minister will lead for the Opposition on much of part 2 of the Bill. Like most Justice and Home Office Bills, this is a bit of a Christmas tree Bill—we are getting near to Christmas—so while I will lead on part 1, on coroners and employment tribunals, I am grateful for his expertise. I am also grateful to my hon. Friends the Members for Lewisham East and for Liverpool, Wavertree, who are current or former members of the Select Committee on Justice, and to my hon. Friend the Member for Blaydon, who keeps us all in order.

The Conservative members of the Committee are all here, I think, except for the right hon. Member for South Holland and The Deepings. I am wearing my intermediate glasses, which means I cannot see anything close up or far away. We did not hear a great deal from the Conservatives in the evidence sessions. Other than the right hon. Gentleman, they kept their powder fairly dry, but I will try and provoke them to more animation today.

Amendment 12 seeks to excise the most obnoxious proposal in part 1 of the Bill: prospective-only quashing orders. To give some context, the Government will present the Bill as a moderate, reasonable adjustment to the art of judicial review—no more than a rebalancing. The right hon. Member for South Holland and The Deepings gave some cover to that in his questions and comments in the evidence sessions. I do not want to put words into his mouth, but he suggested that it was a rather milk-and-water Bill and could go much further in reigning in judges to allow Parliament freer expression, if I understood him correctly. I disagree. I think that the Bill is a misreading of the purpose of judicial review and has an unhealthy focus on the constitutional periphery of its operation, rather than the practical effect it has on asserting the rights of the citizen against the state.

Antony Higginbotham (Burnley) (Con): Would the hon. Member not accept, however, that in the 2019 election those of us on this side of the House stood on

our manifesto that said we would look to reform judicial review? The Bill has not just been brought forward; my electorate in Burnley explicitly voted for it because they had seen the chaos in the 2017 to 2019 Parliament.

Andy Slaughter: I always defer to the electorate of Burnley, all of whom, I am sure, had a copy of the Conservative manifesto. I will come back to the hon. Member's question, because I first want to give some context around the recent history of how we got to this Bill.

We took evidence from a large number of very senior experts. Even the Government-invited experts, if I may call them that, did not really agree with the Government's view either—not even Professor Ekins, who had innumerable suggestions for other interventions by the legislature to reverse individual decisions but did not suggest codification or enshrining judicial review in statute, which this Bill does not seek to do. We disagree that the Government have been restrained or that the Bill needs more heft, either around the doctrine or individual case examples. We think it already goes too far.

We will argue today in Committee that prospective-only quashing orders strip claimants of their right to remedy and make the unlawful lawful. That presumption is in favour of suspended quashing orders, prospective-only quashing orders, fettered judicial discretion, and, in effect, a judicial process with heavy-footed statutory direction. The collateral damage caused by this interfering with a well-understood process of defining the legal limits of state actors will cause unintended victims and create more uncertainty and satellite litigation.

On clause 2, we will also argue that the use of ouster in Cart/Eba cases will not only leave very vulnerable persons in danger, but will open the door to more frequent incidents of legislation ousting the jurisdiction of the High Court, using the Bill as, in the Government's own words, a template for further ouster clauses.

I am extremely grateful for the help and suggestions on how to structure these comments—from the Clerks for the way they group and help perfect the amendments, to the House of Commons Library for its excellent briefings and the many organisations for who sent us their thoughts. They are too numerous to name them all, but I must mention those that gave evidence on Tuesday: Liberty, Justice, Public Law Project, The Law Society and Amnesty International UK—all well known in the field of administrative law and human rights. We also received briefs from environmental, educational, equality and immigration non-governmental organisations and charities.

I mention that because the thrust of many of the arguments against the Bill are that it limits the ability of civil society in all its forms and of the individual to challenge the state. That is important because the attempt to characterise judicial review as the creature of lawyers and lefties, which to this Government appear to be two sides of the same coin, could not be further from the truth.

Judicial review is simply the modern name for the centuries-old common-law supervisory jurisdiction of the superior courts to ensure that decisions of public authorities, including statutory tribunals, respect the limits on their powers that are imposed by law. The existence of the courts' common-law jurisdiction makes it possible for a person to go to court and argue that a decision or action of the state was unlawful. The court can rule that the decision or action was unlawful if it was illegal, irrational, tainted by procedural impropriety or a disproportionate interference with a fundamental right. It is one of the most fundamental checks and balances within the UK constitution to ensure that public authorities act fairly and in accordance with the law. It also gives individuals a route to challenge officialdom where it may have overstepped its powers.

To quote the right hon. Member for Haltemprice and Howden (Mr Davis), as I may do on more than one occasion:

> "Judicial review is a cornerstone of British democracy. It empowers everyday people to challenge decisions made by public bodies. Whether it be central government or local authorities, rule makers are held accountable by ordinary people. This is a small, but important, check on the balance of powers in our democracy."

Some of the framework rules for judicial review are set out in the Senior Courts Act 1981, but it is important to appreciate that the courts' power of judicial review is not something judges have been given by Parliament, but an inherent common-law jurisdiction dating back centuries to when the courts first began holding power to account. Therefore, much of the content of these rules are spread across these different cases.

If a court finds that the decision or action was unlawful, it will make a declaration to that effect if it is just and convenient to do so. It has the power to make three specific orders: a mandatory order, which orders the state to do something; a prohibiting order, which prohibits the state from doing something; or—relevant to these discussions—a quashing order, which rules that a thing done by the state is void and has no legal effect. On the other hand, a declaration is simply a formal statement setting out the legal state of affairs. We will see the importance of that when we talk about suspended quashing orders later on. A declaration is non-executory in the sense that it does not command anyone to do anything; it simply declares what the legal position is.

A quashing order is different as it is executory: it orders something concrete and has legal consequences. A quashing order rules that a decision was void and therefore has no effect. Rather than simply declaring, for example, that a planning decision was unlawful, a quashing order would quash that decision meaning it has no continuing effect and has never had any effect from the moment it was made.

The long-established default position in judicial review cases is that where unlawfulness has been established, for example because a public authority has acted beyond its powers, a declaration is insufficient and one of the specific orders must be given. According to Lord Bingham, speaking in a judicial capacity, under the rule of law

> "the discretion of the court to do other than quash the relevant order or action where such excessive… power is shown is very narrow."

The Bill is not the first time in recent years that a Conservative or coalition Government have sought to rein in judicial review. Between 2010 and 2015, various proposals were consulted on and legislated for. In particular, in 2013, changes to the civil procedural laws reduced time limits for bringing claims in planning and procurement cases, introduced new fees and denied some renewed hearings. The Criminal Justice and Courts Act 2015 introduced provisions on leapfrog appeals, wasted costs orders and the refusal of some remedies.

[Andy Slaughter]

However—interestingly—the most controversial proposals on legal aid and standing originally designed to be in that Act were not pursued. It was a case of rhetoric meeting the practice of the courts and the former withering in the gaze of the latter. Perhaps that will happen again with these proceedings—in the other place if not here—because we are again in the territory of crowd-pleasing rhetoric, or Back Bencher-pleasing rhetoric, coming under scrutiny.

11.45 am

The 2019 Conservative party manifesto made a commitment to "update…administrative law" to find the correct balance

"between the rights of individuals…and effective government."

I think it none-too-softly meant, "Those pesky judges are getting in the way again." I have never knocked on a door to be met by someone concerned about judges off the leash as opposed to delays in proceedings and getting to court or a lack of access to legal help or legal aid—they come up all the time. I rather assume that the Conservative party itself was the audience for the promise in that passage.

That promise forms part of a basket of promises to restrict civil liberties, many of which have led or are leading to legislation. The Bill constitutes just one part of the Government's broader programme of constitutional reform, which includes: an independent review of the Human Rights Act 1998, which is under way; a review of the Constitutional Reform Act 2005 promised by the previous Lord Chancellor, although I do not know whether the current one intends to take that forward; and a succession of coercive pieces of legislation such as the Elections Bill, the Police, Crime, Sentencing and Courts Bill, and the Nationality and Borders Bill, which is currently in Committee.

Each of those should be seen as parts of a whole: a concerted attempt to shut down potential routes of accountability and exert the power of the Executive over Parliament, the courts and the public. I am concerned that the Bill forms part of a broader drive to increase Executive power, limit and control oversight mechanisms and reduce the ability of individuals, the courts and Parliament to hold the Government to account.

The Government claim that the Bill will

"ensure that Judicial Review is available to protect the rights of the individuals against an overbearing state".

Regrettably, it will have quite the opposite effect. The Bill risks significantly reducing judicial review's impact and allowing public authorities to dodge the consequences when they act unlawfully.

Alex Cunningham (Stockton North) (Lab): Can my hon. Friend think of any reason why a Government or any other body should be afraid of the judicial review process if they think that they got it right in the first place?

Andy Slaughter: I am grateful to my hon. Friend, who makes exactly the right point. He did not hear me paying tribute to him when he was temporarily detained elsewhere. I am pleased that, as an experienced shadow Minister, he is on the Committee.

People in charge of public authorities should welcome judicial review, which, like many court and tribunal processes, is a way to scrutinise and improve decision making either directly through a challenge or because they want to avoid such a challenge. In my humble way, I remember the 10 years or so when I was running a local authority, and unless other members of the Committee were also in that position—there may well have been—I have probably been subject to more judicial reviews than anyone on the Committee. I must say that while we can take a view on the merits of an individual case, the process is generally beneficial for the authority. As my hon. Friend said, what have they got to hide?

Janet Daby (Lewisham East) (Lab): Does my hon. Friend agree that judicial reviews are a part of the checks and balances on Government?

Andy Slaughter: I absolutely agree. It is an important part of those constitutional checks and balances, and it has become more important. In a country without a written constitution, it is totally appropriate that a common-law process such as judicial review should develop as it has. I do not mean that it is excessive or that it has grown out of control; it has simply moved with the times in a way in which our senior courts in particular are able to do. As I say, the Bill is a clear attempt to reduce proper accountability for state actions.

Antony Higginbotham: The hon. Gentleman seems to be putting forward a narrative whereby people listening to these proceedings, who do not know what is going on, might think that judicial review is going away somehow. Actually, that is not what will happen as a result of the Bill; it seeks to continue the evolution in ensuring that judicial review is used proportionately. Will the he confirm my understanding that judicial review will still be available for people who want to challenge Government decisions? It is really important that the general public do not think that a potential remedy is disappearing.

Andy Slaughter: The hon. Gentleman is being very sharp this morning, because he is always one point ahead of me. I am coming to exactly that in discussing how these provisions were formulated, and I accept entirely what he says. The Bill could have gone a lot further, and there were proposals to go further in the Government's consultation, but that does not mean that there are not significant changes in the Bill. I do not agree that it simply tidies things up or that the changes are a logical progression, and I will try to persuade him of that slowly but surely.

Under the Bill, claimants and others affected by unlawful decisions made by the state could find that they win their case but get no proper remedy and see no real impact on their lives, or on the lives of anyone else who has been negatively affected. If I am right about that, it is a significant change. On the hon. Gentleman's point, we were promised—I think in the same 2019 Conservative manifesto—overarching constitutional reviews of criminal law and democracy, but they have not materialised. It may be that wiser heads have prevailed, but it may also be that rather more quick and dirty results are being demanded.

The Government have opted instead for a series of reviews. In this discipline, the independent review of administrative law was established under Lord Faulks.

It asked whether judicial review was being abused by creating needless delays and allowing political matters to be litigated through the courts. There was concern from many in the legal community that the review would lead to the courts being sidelined and the Executive being granted too much power without enough accountability. However, IRAL's recommendations were mainly practical and incremental, and they did not contain the radical proposals that some had feared.

The panel was against codifying the grounds for judicial review. It thought that ouster clauses were appropriate only in limited circumstances, and it disapproved of prospective-only quashing orders. Perhaps for that reason, the then Lord Chancellor took the two IRAL recommendations that he liked—on suspended quashing orders and on reversing Cart—and conducted his own consultation. The consequences of that second bite, or some of them, are in the Bill, though it still has too little red meat for some people. The Bill proposes a range of further reforms that risk weakening the rule of law and narrowing access to justice for vulnerable people.

Clauses 1 and 2 seek to limit the vital check on Executive action and create a statutory presumption that remedies available in judicial review should be suspended or made prospective-only. Clause 1 gives judges the power to issue suspended and prospective-only quashing orders, the latter of which would prohibit future unlawful decisions without invalidating any prior actions based on that decision. The Bill undermines accountability and creates additional and unnecessary barriers to individuals seeking redress when they are affected by unlawful actions of public authorities.

Paula Barker (Liverpool, Wavertree) (Lab): Does my hon. Friend agree that removing retrospection could mean illegal acts are thus made legal, and that there is very little remedy for those who seek recompense?

Andy Slaughter: My hon. Friend has put her finger on the main objection, but it is not the only objection. It will cause a great deal of confusion, and I do not think the courts will like it. They will therefore try to find ways around it, as courts tend to do in such circumstances, and there will be uncertainty over whether something was lawful, and whether it was lawful for all purposes. Again, I will come on to those issues, but this just opens cans of worms. The Government also assert that this is a simplifying and clarifying measure, but it will have exactly the opposite effect.

Marco Longhi (Dudley North) (Con): I take issue with the hon. Member's characterisation of how the courts may work under the new jurisdiction of the Bill, when it is enacted. He also mentioned the expert advice that we heard the other day. Jason Varuhas, professor of law at the University of Melbourne, stated:

"I think these remedies are welcome, because they provide for a greater remedial flexibility for courts—for courts to tailor remedies in their discretion, to the exigencies of the particular facts of the case. It is important to bear in mind that these remedies will be discretionary and the courts will take into account a range of relevant considerations in exercising that discretion. Courts are well versed in exercising remedial discretion—courts can be expected to respond to the justice of the particular case. What the Bill does is to give the courts more options."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 10, Q6.]

Andy Slaughter: I am not persuaded by that. I do not want to disagree with the eminent professor, but I am tempted to say, "Two professors, three opinions", and we had at least six professors. I thought it interesting that they did not all say what I expected them to say. There was some disagreement. The civil liberty organisations did not agree on everything—some supported the suspended order and some did not. I thought the openness of the first panel on that was quite refreshing. It is true that there are views on both sides, and that will always be true.

In the passage that the hon. Gentleman read out, I specifically disagreed with the idea that the Bill gives judges more power and discretion. In a literal sense, if we give someone a new type of order, we could say, "That has given them a wider range of options". If we constrain how they can use those orders or we give them orders that they have not sought, however, it has exactly the opposite effect. We should be securing fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect this country's international reputation for upholding and promoting the rule of law, not precluding practical access to public law remedies.

Unless the Bill is amended as we suggest, it will negatively affect the ability of ordinary people to hold the Executive to account and safeguard their own rights. That is the other side of the coin. We are, of course, interested in the respective powers and the balance between Government and the courts, but we are also very concerned—sometimes more so—about the individual citizen's rights and their ability to get redress. Our laws and legal processes allow ordinary people to challenge Governments and public authorities when they get it wrong. They help us stand up to people in power. We all deserve effective access to justice and a fair hearing. Judicial review is a vital and necessary tool for good, effective and accountable policy making by Government and public bodies, and it is hobbled by this Bill.

Currently, if a claimant wins their case and succeeds in showing that a decision was unlawful, there will be consequences for the public authority. If the claimant was directly affected, that also means justice, in some form, for them and potentially for others affected by the decision. They benefit because when the court delivers its judgment that the decision that is being challenged was unlawful, it means that the decision was invalid and will need to be remade. The normal outcome of a successful claim that the state has acted unlawfully is that the court will confirm its conclusion by issuing an order stating that the state's decision is quashed. That is a normal remedy for the wrong that has been done. The public authority must face the consequences of its unlawful actions, such as by retaking the decision or deciding it differently, and the claimant benefits from that happening. Sometimes they may also get some other form of remedy, as a result of the recognition that what happened should not have happened.

If the claimant was not affected by the unlawfulness themselves, others will usually have been, and they may also benefit from the judgment and the order. If the policy is found to be unlawful, anyone affected by it will benefit from that finding. The use of our judicial review powers has helped to ensure that equality and human rights law are respected, prompting positive changes in policies and practices. Many public bodies are subject

[Andy Slaughter]

to judicial review claims, and the prospect does not hinder good work, but rather helps to ensure that compliance with the law and good practice are at the forefront of decisions.

Under clause 1, the outcome could be that even when a claimant wins their case, they will not get any benefit; they will be in the same position as when they brought the case. The same will apply to anyone else who has been negatively affected—nothing will change for them.

12 noon

That is because the Bill provides for—and, as we will see later, tries to create a presumption for, in certain circumstances—prospective-only or limited retrospective effect orders. Those are different kinds of quashing order, to be made after the claimant wins their case, that would insulate the Government from any consequences for past injustice before the judgment. These orders would say that although the decision was unlawful, the judicial finding has only limited retrospective effect, or none at all. The remedy would be prospective-only. This risks enormous injustice. Despite having gone to all the effort of going to court, and despite having won, the claimant would get no real redress and no proper remedy for the injustice they have suffered. It is hard to see what the point would be of bringing a case. The Government will be let off the hook for their past actions, with the judge conferring validity on something that they had already concluded was invalid.

That injustice could be further compounded by the other kind of quashing order that the Bill provides for, the effect of which is suspended. This would suspend any effect of the quashing order until a particular date, and that would expose the claimant and others to the same unlawful decision making for an ongoing period. In some cases, both types of order could be made, and a claimant who wins their case could see virtually no past or future benefit from bringing the case, and neither would anyone else. This would, in short, have a chilling effect.

The impact of these clauses could even be that human rights violations are left unchecked and carry on, while individuals are left without an effective remedy, in violation of the European convention on human rights. They could have a significant chilling effect on the entire judicial review system by deterring claimants from bringing a challenge in the first place because they do not think they are likely to benefit from one, or because they cannot show those in charge of legal aid that they will, and therefore they will not be granted legal aid. Moreover, the clauses are likely also to reduce the deterrent effect of the possibility of judicial review on those in Government, who will no longer need to be so concerned about potential challenges to their decision or worry so much about the possibility of consequences if they act unlawfully. That is deeply concerning.

Alex Cunningham: In his evidence to the Committee, Sir Stephen Laws said:

"In my submission to the independent review of administrative law I drew attention to what I thought were the beginnings of a breakdown in trust between the political world and the judiciary, and the political salience of the issues around judicial review is evidence of that."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 14, Q8.]

Does my hon. Friend agree that it is lamentable that even those who were called by the Government to give evidence have reservations about current relationships between the courts and politicians, and how they could be worsened in future?

Andy Slaughter: It is not unique to this Government to be found wanting or to be challenged by the courts in such a way. Other Governments have not found favour with the courts and may have resented their intervention, but on the whole those Governments have sucked it up, if I can put it that way. However, this Government seem to take the view—we have recent evidence of this—that if they do not like the way that proceedings are going or tribunals are conducted, they can simply change the rules or change the tribunal.

I agree with my hon. Friend. I do not want to be overly dramatic, but these are worrying times. The Ekins view, which I described in the evidence sessions as tit for tat—a decision is taken and if the Government do not like it, they have a ready-made power to change it—is bad enough, but tinkering with the court process is worse.

Alex Cunningham: There was much discussion in the evidence sessions about tit for tat, or whichever expression one wishes to use, and it is lamentable. Surely the Government have always been able to address issues that have embarrassed them, and they do not have to take this broad-brush approach to negate that possibility in the future.

Andy Slaughter: Much of the evidence suggests that the public are quite sophisticated about this. They see that all Governments make mistakes, get caught out and have to change their minds. In the end, the public make a judgment about a Government's overall record. It is quite wrong for Governments to be, as this one is, so thin skinned that any criticism requires not just a response but, effectively, a punishment of the person or body who does the criticising.

What are the consequences of the changes that clause 1 of the Bill makes to the Senior Courts Act 1981, to provide for quashing orders either not to take effect until a specified date or to come into force without any retrospective effect? As has been said, the usual practice is that the quashing order comes into force immediately and operates as if the decision that has been ruled unlawful had always been null and void. Remedies in judicial review are discretionary and will often result in a declaration that the act was unlawful, with remedial action left to the public body. However, when a court decides to issue a quashing order, it is right that the unlawful decision should stand no longer and that those affected should have proper redress. Because a court can make this remedy after finding that a public body acted unlawfully, the quashing order renders the unlawful act null and void; the act never had any legal effect, and therefore its consequences must be unwound.

Whereas quashing orders have hitherto been made by the courts to confirm that a decision by a public body is of no legal effect, the Bill provides that the effect of such orders may be suspended until a prescribed time, potentially subject to conditions—temporarily validating a decision that has been judged unlawful. In deciding whether to suspend an order or make it prospective-only, the courts must have regard to a range of factors,

including any detriment to good administration that may arise from its decision. The Bill requires a court that has decided to make a quashing order to suspend the order or to limit its retrospective effect if doing so offers

"adequate redress in relation to the relevant defect",

unless the court

"sees good reason not to do so."

Thus clause 1 would limit the effectiveness of quashing orders.

The quashing order is a powerful tool that ensures that unlawful Government decisions can be overturned, and that those who have suffered the consequences can obtain real redress. The courts have the power to suspend the effect of quashing orders, although the power is rarely exercised. Although the case law on this is not absolutely certain, it is reasonable to argue that courts already have this power. Suspension operates like a time lock on the unlawful action, meaning that the court can delay the effect of its ruling and give the public authority time to sort out its mistake. Limiting the retrospective effect ensures that the remedy has effect only on the date that it is made, rather than affecting things that have already been done. If the court suspends the quashing order or makes it prospective-only, things done before the suspension or things done in the past are treated as if they are valid. The current law strikes the right balance in reserving this remedy for exceptionally rare cases.

As I have said, it is important to remember that all remedies in judicial review are discretionary. In exercising their remedial discretion, the courts will consider a range of factors and will take into account the impact of quashing on certainty and the needs of good public administration. Where significant administrative disruption or chaos could result from a quashing order, the courts have the power to issue a declaration instead, and they often do. Often, the court will simply make a finding that a public body has acted unlawfully and leave it to the public body to determine what action should be taken in response to that finding.

Research by the Public Law Project shows that, in challenges to statutory instruments, a declaration rather than a quashing order is the most common remedy following a successful judicial review. That practice shows that the courts deal very well at the moment with all those circumstances, and it calls into question the need for clause 1. In any event, there are already limitations on a court's ability to grant quashing orders. For example, section 31(2A) of the Senior Courts Act 1981 requires the High Court to refuse a remedy if it appears

"highly likely that the outcome for the applicant would not have been substantially different"

if the public authority had not acted unlawfully, unless there are

"reasons of exceptional public interest."

Section 31(6) of the same Act also allows the Court to refuse relief on the grounds of undue delay

"if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Claimants' access to quashing orders is therefore already strongly regulated. However, an immediate and retrospective quashing order is an important tool for righting injustice and ensuring that the Executive acts only within its legal powers. Combined with the existing controls on quashing orders, the proposed reforms weigh the scales of justice too heavily in favour of the Executive. Prospective-only quashing orders would invalidate an unlawful act only from the point of the court order onward, leaving past conduct, including conduct complained of by the claimant, untouched.

Clause 1 goes significantly further than the recommendations made by IRAL. The IRAL panel recommended legislating for a discretion to make suspended-only quashing orders. It did not recommend legislating for prospective-only quashing orders, and it recommended against a presumption of limiting the effects of a quashing order in this way. Subsection (9) of proposed new section 29A, inserted by clause 1, creates a presumption that these weakened quashing orders "must" be made where to do so would provide "adequate redress"—absent good reasons. Such a presumption not only goes against the Government's stated intention to provide flexibility for judges, but risks encouraging the use of these new orders in circumstances where it would be unjust and unfair to do so. As the Government acknowledge in their consultation response,

"Presumptions were not recommended by the IRAL Panel and generally met with scepticism from respondents to the consultation."

However, it does not appear to have had any effect.

Suspended and prospective-only quashing orders undermine the rule of law, which requires that no person should be subject to unlawful action and that individuals have access to an effective judicial remedy against unlawful measures. Article 13 of the European Convention of Human Rights further protects people's rights to an effective remedy. Although the Bill requires that the court considers whether a provision offers adequate redress before making a suspended or prospective-only quashing order, it does not preclude the possibility of an order being made without adequate redress. We are concerned about the potential for suspended or prospective-only quashing orders to impact third parties affected by an impugned human rights or equality decision and the implications for their ability to access legal aid. It is unclear whether cases likely to result in suspended or prospective-only orders would meet the test of sufficient benefit to the individual, and therefore justify a grant of legal aid.

Most concerning of all is the prospect that either or both types of orders could be mandatory for the judge, as the clause contains an apparent presumption that they will be made where there is "adequate redress". The Bill does not specify who for, but one of our amendments deals with that. The Bill as it stands will reduce judicial discretion to give an appropriate remedy. I will say more about that later.

Clause 1 risks undermining individuals' ability to hold the Government to account. The provision could also mean that individuals are found guilty of offences made under unlawful regulation or are unable to be compensated for the impacts of unlawful state action. The point of judicial review is to ensure good decision making by public bodies. It is concerned not with the result in itself, but that the right procedures are followed and that the body is operating within the law. Within the separation of powers that forms our political system, it is an important check by one branch on another, acting in the interests of the public. The Bill does nothing to improve the decision making of public bodies;

[Andy Slaughter]

in many ways it will have the opposite effect. Making challenges harder to bring and remedies less effective may make things easier for Government, but at a cost to the general public.

I will give two or three examples of previous cases. I remind the Committee that the Government's own election manifesto promised to

"ensure that judicial review is available to protect the rights of the individuals against an overbearing state"

and to secure access to justice for ordinary people—laudable aims. These new remedies will not, however, uphold that promise. I will demonstrate that with a short synopsis of some case studies.

In the case of the British Medical Association, the Health Secretary issued the National Health Service Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019, which tried to introduce a power to suspend or withhold payments of NHS pensions, where an employee had been charged with an offence. There was no right of appeal from that power, and the suspension did not come to an end when the employee was acquitted or where proceedings were withdrawn.

At the time of the case, that power had never been exercised. The British Medical Association brought the case as a matter of principle: that potentially innocent medical staff could be denied a pension simply for being charged with an offence that they did not commit. Finding the regulations to be unlawful, the judge granted a quashing order.

Given that the case did not relate to an actual use of the power or an individual who was a victim of the power, the judge might have regarded a suspended or prospective-only order as adequate, meaning that under the Bill, the judge would have been expected to suspend the effect of the order or make it prospective-only. However, in the time that it took the Health Secretary to consult on the draft and lay new regulations, there would have been nothing to prevent Ministers from exercising the unlawful powers, as doing so would have been valid under proposed new section 29A(3) to (5) of the 1981 Act, which makes otherwise illegal uses of power legal.

12.15 pm

In the case of Adath Yisroel Burial Society and Ita Cymerman, the senior coroner for inner north London had a policy that deceased persons would not be prioritised for burial on religious grounds, despite some religions, such as Orthodox Judaism, requiring burial within 24 hours. Instead, all deceased were treated on a "first come, first served" basis. The first claimant was a charity representing the Orthodox Jewish community on burial rights, and the second claimant was an Orthodox Jewish woman who was 79 years old but was not at risk of dying in the immediate term. In that case, there was no claimant representing a deceased against whom the policy had actually been exercised. The judge determined that the coroner's policy was unlawful under the Human Rights Act 1988 and the Equality Act 2010, and the policy was quashed.

The policy was not being applied directly to anyone in the case. Therefore, a court might have regarded it as adequate to require future actions and amendment by the coroner, but no immediate action in the form of an instant quashing order. That would have engaged the presumption in proposed new section 29A(9) of the 1981 Act. Had Mrs Cymerman died in the meantime, however, the policy would have been applied to her and all others in the Orthodox Jewish community under the coroner's jurisdiction, because proposed new section 29A(3) to (5) would make the unlawful policy valid.

I mentioned the case of RF. Despite having been diagnosed with a severe mental health impairment that limited her ability to leave her home, the claimant was unable to claim the mobility component of the personal independence payment, which was vital for her independence. That was due to guidelines introduced by the Department for Work and Pensions in March 2017. The claimant's challenge to the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 was successful, and the court found that they unlawfully discriminated against people with mental health problems. The regulations were quashed. The Government's initial assessment was that 1.6 million of the main disability benefit claims would need to be reviewed, with around 220,000 people expected to receive more money.

An important feature of the case is that the claimant's individual circumstances had not yet been impacted on by the regulations and did not

"add anything to the issue of principle"

that the judge had to decide. That means the presumption in clause 1 would have been applied, given that a prospective or suspended quashing order would have been adequate redress for the claimant. That would have been problematic for the broader class of PIP claimants with mental health conditions, most of whom will have been unable to bring a claim. A suspended or prospective-only order will have caused systematic unfairness, even if it would have offered adequate redress for the individual in question.

In the case of Gureckis, a Home Office policy to remove EU rough sleepers was ruled unlawful by the High Court in December 2017. The policy was that rough sleeping could be considered an "abuse of rights" by European citizens, making them liable for deportation. The Court determined that rough sleeping was not an abuse of rights and that the policy discriminated against the homeless. The policy was quashed. Prior to the case, however, at least one of the claimants had already had the removal action against him withdrawn by the Home Office. The judge said the case was more generally about the legality of the policy, not the individual claimants. Given that the impact on some of the claimants was minimal, a suspended quashing order could have been made, leaving the wider pool of homeless EU citizens at risk of being issued with a removal notice in the period of time when the quashing order was suspended. They would have been liable to deportation merely for being homeless. If a prospective-only quashing order had been issued, it would not have assisted any homeless EU citizens who had already faced removal action in the past.

Also, significant concern has been expressed to me, and I am sure to other members of the Committee, from an environmental justice perspective. Although environmental judicial review is a difficult, costly and uncertain process, it remains the most important domestic legal mechanism to obtain redress for unlawful decisions by those in power. It is imperative that it works effectively for that reason alone, and also so that public trust and confidence in the system is maintained. That reforms do

not undermine the ability to bring public interest environmental litigation, nor access to effective remedies where claims of illegality are made out, is very important in a democratic society.

Article 9.4 of the Aarhus convention provides that environmental JR shall

"provide adequate and effective remedies, including injunctive relief as appropriate",

and must be

"fair, equitable, timely and not prohibitively expensive."

The UK is already in breach of article 9.4 of the convention in relation to the costs of legal review. The Bill, as currently formulated, moves the UK further away from compliance with the convention. The Bill reduces access to justice for people and organisations with regard to effective remedies. It does not ensure effective remedies for the claimant. It ensures only

"adequate redress in relation to the relevant defect."

That could fall short of an effective, practical outcome for the claimant. The two concepts are not obviously the same and could diverge. The very nature of suspended relief or forward-only relief conflicts with the requirements of the convention—delay is not timely, and the grant of no remedy for previously unlawful conduct is not fair or effective.

I have mentioned the briefing sent to us and the case of Preston *v.* Cumbria County Council. The council's planning authority had made the decision to permit the installation of a temporary sewage outfall—very topical—and extending the period for which it would be permitted was rendered unlawful by its failure to obtain a screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and an appropriate assessment under the Conservation of Habitats and Species Regulations 2017 for the newly located polluting discharge. Permission was therefore quashed.

Under the proposed new scheme in the Bill, it is possible that a court would consider the balance of convenience to be with the public utility in allowing the unlawful development rather than forcing it to make disruptive and expensive alternative arrangements, which could be seen as disproportionate to the potential impact on the environment and loss of amenity to a local fishing club, which was the claimant. Applying a suspended and a prospective-only quashing order to facilitate the discharge until remedial works on the original outfall were completed, rather than alternative arrangements, would have left a period of years during which time the plant was able to discharge effluent unlawfully into a new part of the river, and in this case directly into a prime salmon fishing area.

The angling association, which has exclusive fishing rights, but of course is not the only party with an interest, may have wished to bring a claim for damages due to any impact of the discharge into the area of its fishing. It might want compensation to remediate the ecology that it depends on, or to prevent the discharge. That could be blocked or made much harder by the judge's upholding the unlawful decision under the new quashing orders.

Alex Cunningham: My hon. Friend is giving a series of good examples as to why the Government's proposals are flawed. In his evidence to the Committee on Tuesday, Dr Morgan said:

"I would take the presumption out altogether. I think what this clause is doing—certainly what it should be doing—is enlarging the power of the courts to tailor relief in a way that they see fit, and removing the obstacle that the Supreme Court laid in their path in Ahmed *v.* HM Treasury (No. 2). Thus, I just do not see why it is there. The Government say that it is to encourage the courts to use this remedy, but I do not see why we should try and push the courts in a particular direction."

He went on:

"I also think, if subsection (9) is taken out, subsection (8) could be taken out as well."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 24, Q23.]

So there is clearly support for the line that my hon. Friend is taking.

Andy Slaughter: I am grateful for that quote from Dr Morgan, which is far more learned and eloquent than anything I can come up with. His evidence was very measured and showed nothing other than looking at the Bill with a fresh pair of eyes. On some of the decisions he supported the Government, and in some cases he could not see any point or purpose.

There is grave concern about the impact of any changes to the law of judicial review on children and young people with special educational needs and their families. Children and young people with special educational needs often rely on legal remedies such as judicial review to ensure that they receive the special educational provision and wider support to which they are legally entitled. Judicial review is an essential remedy in cases where there is no other way that a complaint can be resolved—for example, by complaining directly to the public body concerned or the local government and social care ombudsman. Any changes to the law on judicial review should take account of the particular factors relating to children and young people with special educational needs.

I will give a few examples of situations that arise quite commonly; Members may well have been involved in some such cases. Local authorities may fail to comply with statutory timescales for issuing or amending an education, health and care plan for a child or young person, resulting in the child or young person missing special educational provision or schooling. A local authority may fail to make the provision set out in a child or young person's EHC plan, resulting in the child or young person missing education; fail to comply with the order of the first-tier tribunal; or decide to stop providing the home-to-school transport to which a child or young person is entitled, meaning that they cannot get to their place of learning. A school governing body may refuse to admit a child or young person despite the school's being named in the child's EHC plan, where there has been no formal exclusion. Those are just a few examples of how judicial review can be used to ensure that children and young people receive the special educational provision and support to which they are entitled by law. It is essential that it remains a meaningful option for them and their families.

The measures, if enacted, will weaken the effectiveness of the remedies available to the courts and will deny an essential remedy to children and young people with SEND and their families. The Bill will deter people from using judicial review as a way of righting unlawful decisions by public bodies. Any change to judicial review should encourage access to justice, not limit it. It will also limit claimants' access to legal redress for unlawful

[Andy Slaughter]

actions, which will take away any accountability of Government or agencies for unlawful action that has already taken place.

I will make some very specific comments on the first group of amendments. The lead amendment is amendment 12, which is the only one I will press to a vote. Amendments 40 and 41 are contingent on amendment 12.

Proposed new section 29A(1)(b) of the Senior Courts Act 1981 allows for quashing orders to be made including provision

"removing or limiting any retrospective effect of the quashing"—

in other words, a prospective-only remedy. For prospective-only orders, despite a state decision or action's being found unlawful, the order quashing it would be forward-looking, leaving the individual who brought the case without proper redress for what has already happened to them and, potentially, with no change in their circumstances at all.

Proposed new subsections 29A(4) and (5) set out the implications of that change. The decision or act in question is to be treated as valid and

"unimpaired by the relevant defect",

for all purposes, for the period of time before the prospective effect of the quashing order. As has been expounded countless times by the courts, the rule of law requires that those exercising public power should do so lawfully. However, the Government would be under absolutely no legal duty to address the injustices caused by the unlawful measure, and there would be no scrutiny as to the effectiveness of such remedies. We do not consider that to be an appropriate or principled solution.

In issuing a prospective-only quashing order, the courts would be determining that an unlawful measure should be treated as if it were lawful retrospectively, which is problematic for many reasons. First, it undermines the rule of law, which at its core dictates that all are subject to the law, that no person should be subject to unlawful action, and that individuals have access to an effective judicial remedy against unlawful measures. Prospective-only orders entail a direct rejection of those principles, allowing unlawful executive acts to stand and, therefore, preventing individuals who were previously impacted by them from challenging them. As recognised by the consultation, that could lead to severe unjust outcomes. By introducing prospective-only remedies, the Government are making another concerted effort to insulate themselves from accountability at the cost of those who have been let down by a public body and anybody who may be in the future.

Prospective-only remedies have the potential to create opportunities for injustice in individual cases, to weaken the rule of law and to introduce unnecessary layers of complexity into an already functioning system. This is another example of the Government wasting time and resources on fiddling with an area that works well, while many other areas of the justice system cry out for attention.

12.30 pm

The imposition of a prospective-only remedy would result in halting only the future effects of an unlawful decision or secondary legislative provision, with its previous effect being treated as if it had been valid. This creates a situation in which two otherwise identical cases are treated entirely differently depending on whether they were affected before or after a court judgment. Those who were impacted by the unlawful decision before the judgment would have been just as wronged as those impacted after, but would not have recourse to any remedy. This means that an individual claimant bringing a case may help to overturn an unjust decision, but would not improve their own situation.

If we are talking about a hypothetical situation, an example would be a challenge to the eligibility for welfare benefits. A successful challenge followed by the imposition of a prospective-only remedy could see a claimant acknowledged as having been treated unfairly, but still coming out without the benefit that the court recognised they were owed.

Alternatively, to give an actual and very recent example, there was the review of the Secretary of State for Transport by a campaign group, Save Stonehenge World Heritage Site in July this year. The High Court ruled that the Transport Secretary's decision to approve the A303 Stonehenge dual carriageway, which included a cutting and tunnel entrance to the western part of the world heritage site, was unlawful. The Transport Secretary allowed the scheme under the national planning policy statement for national networks, which was against the advice of a panel of expert planning inspectors, who had concluded that the scheme would cause significant harm to the integrity of the world heritage site.

The judge agreed that, in breach of rules in the regulation and the Planning Act 2008, the Transport Secretary had not properly assessed the risk of harm to each heritage asset. The judicial review was brought by Save Stonehenge World Heritage Site, which

"could not be more pleased"

about the quashing of the development consent order. Applying a prospective-only quashing order remedy, it would be unclear whether ultimately the building works would go forward; probably they would, but we do not know that. However, the court may be obliged to make this order if it prevented the continuation of building works, as that might provide "adequate redress" for the claimant.

Janet Daby: Does my hon. Friend agree that all sorts of consequences arise from the proposed measures? They are likely to make things much more complicated and less clear, and to provoke further litigation.

Andy Slaughter: Yes, and I am grateful for that reminder. I have a little more to say on the Stonehenge case and I will mention one other case that is familiar to Members. However, my hon. Friend makes exactly the point: there is mischief caused here. However many times the Government say, "This is designed to simplify and extend the powers," the less credible that seems when one looks at the actual nature and type of decisions that would be affected, and at how they would be affected.

In the Stonehenge case, the likely effect of the order would be to remove the possibility for collateral claims for compensation against the Government for their unlawful decision up to the date of the prospective order. All preceding activity, including expense in performance of any contracts that the judicial review court may not be fully aware of, if at all, are reliant on the unlawful decision would be considered lawful to the date of the order, even though the full contracts could

not be completed. This could cause significant loss to contractors who were not present to make representations during the hearing, as they could potentially only claim for losses thereafter.

The other case I will mention is the Unison case, which is another important real-world example. It is worth considering the impact that prospective-only remedies could have had if they had applied in that case, which concerned, as I think all Members know, fees to access employment tribunals. Having found that Parliament could never have intended a clear derogation from the right of access to justice, the Supreme Court quashed the order that required individuals to pay to use the employment tribunal.

The remedial consequence of the quashing order was that the Government were required to retrospectively refund the claimants who had been charged fees. A prospective-only remedy in this scenario would have denied the claimants this refund and therefore would have been a serious injustice to the claimants, whose fundamental right to access to justice had been found to have been violated.

Liz Twist (Blaydon) (Lab): I refer to the evidence submitted by the Independent Provider of Special Education Advice on the impact of the changes on those with special educational needs, highlighting the importance of the ability to appeal at that level. When we look at the effects on individuals and organisations, rather than the dry words, does my hon. Friend agree that this change could have a significant impact on those people who feel that they are not getting justice and are seeking redress?

Andy Slaughter: I am grateful for my hon. Friend's intervention, and I think she is following my argument. What I am trying to do through a series of case studies—some hypothetical, some that are likely, and some that have actually happened—is look at how those cases could have been different had this piece of legislation been in effect, specifically looking at the effect on individuals. That may be hundreds or thousands of individuals, or it may be one individual, but these are often people for whom this is the only form of redress, and it is hard to see how a prospective-only remedy would provide a just outcome to an individual claimant.

Turning back to the Unison case, it arbitrarily distinguishes between people who have been impacted by the unlawful measure before and after the court judgment, undermining certainty, consistency and equal treatment under the law, which was the point of my hon. Friend the Member for Lewisham East. Individuals who have not litigated but who are impacted by an unlawful measure have just as much need of the law's protection as those individuals who will potentially be impacted in the future. Some unfortunate people would be denied justice, with no proper remedy even when the court said they were right.

Looking at the position in other jurisdictions, it is notable that courts are usually prepared to hand down a prospective remedy only in cases of constitutional importance, or cases that would have serious economic repercussions for a large number of good-faith relationships. In practice, that happens extremely rarely, and those are very limited categories that have been carefully contained on the basis of subtle judicial reasoning and incremental developments.

The European Court of Human Rights has also held in a very clear judgment that certain remedies which have prospective-only effect cannot be regarded as effective, and therefore would be a violation of article 13 of the European convention on human rights. Judges already have discretion over what remedy to give, but this Bill will increase their focus and attention on limiting the use of full quashing orders and mandate the consideration of factors that undermine successful claimants' legitimate interests. It will embolden defendants who are found to be on the wrong side of the law to argue that they should not suffer the full consequences of their unlawful actions. Public trust in the system will be undermined where judges are seen to validate or immunise previous unlawful conduct through prospective-only remedies. That, in turn, may disincentivise legal compliance by those in power.

The Government line is that judges are sensible and will strike the correct balance in practice, but that is cold comfort for individual claimants and is not in compliance with international law. In creating a statutory presumption and mandating consideration of these new remedies, judges are being clearly signalled to, and may well be less likely to—and, in fact, may be required not to—award effective remedies for claimants against any common-sense understanding of justice.

The result of limiting retrospective effect would be that a claimant could have the court agree that the decision made by the Government or public body was unlawful, but would not have recourse to a retrospective remedy. That would allow the Government to avoid having to compensate people who are victims of its previous unlawful behaviour. If claimants know at the outset that it is likely that they could win but nothing would happen, why bother going for judicial review at all?

The group that trades under the name Equally Ours, which briefed us, has significant concerns about the likely effect of deterring people from seeking judicial reviews if this clause is unamended. If prospective-only remedies are applied, the effect would be that unlawful decisions or actions would be treated as lawful until the quashing order came into effect. Retrospective quashing orders recognise the unlawful decision or action and provide a remedy.

Bringing a judicial review has many disadvantages to applicants, not least the cost, uncertainty and length of the process. The key motivation for many applicants—for the impact on them to be remedied—will be lost if a prospective-only order is made. With that in mind, it appears likely that the introduction of prospective-only remedies would have a chilling effect upon future potential claimants. With their use not only allowed but encouraged, that sends a strong signal to an individual who has been wronged by a public body that their actions are not worth challenging: even if they win, their situation may not improve.

Paula Barker: I would like to draw my hon. Friend's attention to the evidence of Louise Whitfield, who stated:

"If you go down the road of these reforms and make remedies harder to get, and there is more opportunity for public bodies to put off the day of giving in—or to know that even if what they have done is found to be unlawful, they will not have to address the wrongs that people have suffered previously—that will just make it harder for individuals to use judicial review effectively.

[Paula Barker]

That can only be a bad thing."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 51, Q72.]

Does my hon. Friend agree that clause 1 seeks to stifle people's access to justice?

Andy Slaughter: I am grateful for that intervention, and I hope from what I have said, and from many of the interventions by hon. Friends, that it is clear that what we are most concerned about here is the impact on an individual claimant.

Bringing judicial review is not an easy thing to do; it is not a common remedy. Funding it, finding representation and getting into court are all difficult. I hope when the Minister responds—I do not have much more to say before I will allow him to—he will address some of those points, particularly in relation to what he thinks the effect of the measures in clause 1 of the Bill will be on individuals who currently have the ability to bring a successful claim.

As I said, a chilling effect seems likely. If these measures are not only allowed but encouraged, that sends a strong signal to an individual who has been wronged that the actions are not worth challenging. Even if a prospective-only quashing order is not used in a particular case, its mere availability would serve as a serious disincentive to claimants seeking to bring a judicial review if a claimant cannot be sure that they will benefit from the judicial review even if it is successful.

A further financial hurdle could be placed in front of potential claimants as legal aid would likely become even harder to obtain. Applicants for legal aid must be able to demonstrate that there would be a tangible benefit to the litigant if successful. It may become difficult to satisfy this requirement where the litigant stands a high chance of being awarded a prospective-only remedy, meaning that more prospective applicants could be denied legal aid, forcing them to abandon their claim.

With no legal aid and little prospect of benefiting even if successful, there is seemingly little incentive for someone who has been negatively affected by unlawful action to bring a case. Prospective-only remedies would therefore have a serious chilling effect on the system of judicial review, disincentivising bringing a case in such a way. Moreover, they would have a damaging effect on good governance; the threat of judicial review is a powerful tool in encouraging good decision making by public bodies.

As well as depriving proper redress for individual claimants and others who may have been wronged by unlawful decisions, prospective-only remedies also have the potential to cause more general harm. The impact of a prospective-only quashing order and the transition between a measure being valid and then quashed going forward will be difficult and unwieldy to navigate, including for public bodies.

By way of example, it is unclear whether proceedings to pay a penalty notice could be brought against an individual for breach of an unlawful byelaw if the events occurred prior to the byelaw being quashed prospectively but the charges and/or proceedings are brought afterwards. The introduction of prospective-only quashing orders removes the certainty provided by the position that a measure if found to be unlawful will then be treated as such. Laws should be able to guide conduct to enable persons to be able to act in accordance with the law. A position where a measure is both recognised as being unlawful but is also to be treated as if it were lawful is contrary to this.

As one Department said in its submissions to IRAL—from those that we have been able to see—

"the rule of law requires predictable rules around which citizens, businesses and government can plan their activities and lives".

Prospective-only remedies weaken the rule of law because they allow the Government and public authorities to act without fear of meaningful repercussions. The Government are effectively encouraged to take risks and act unlawfully, and the only consequence is that the decision will eventually be reversed should it be successfully challenged in the future. That undermines Government accountability, and in turn undermines the quality and effectiveness of decision making.

12.45 pm

Prospective-only orders could allow the Executive to act unchecked, safe in the knowledge that were the act to be unlawful, the implications would be limited. Ensuring Government accountability through the courts is in the interests of all. Effective and good governance must be lawful governance. Good decision making is the foundation of effective administration; and, as a significant number of the public bodies that made submissions to IRAL acknowledged, the potential of being challenged via a claim for judicial review leads to better decision making. The possibility of judicial review and its consequences motivates public bodies to maintain high standards in their administration and to ensure that it is lawful.

Ultimately, as the summary of Government submissions to IRAL states:

"Judicial Review does ensure that care is taken to ensure that decisions are robust",

which "improves the decision". Limiting the consequences for public bodies of making unlawful decisions will lead only to poorer decision making. Alongside the harm that prospective-only remedies stand to do to individual claimants, to the public more broadly, and to the Government and public authorities, their introduction also stands to have a deleterious effect on the courts. Although the previous Lord Chancellor, who introduced the Bill, repeatedly spoke of his duty to prevent the judiciary from being dragged into politics, prospective-only remedies stand to have the opposite effect and force courts to create new law.

There is a significant risk that the use of prospective-only rulings could unravel the carefully constructed constitutional balance between the judiciary and Parliament. Lord Nicholls pointed out in the Spectrum case:

"The essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function."

It lies outside those constitutional limits because, as Tom Hickman QC has pointed out, prospective-only remedies

"would permit courts to exercise a quasi-legislative power including to override primary legislation".

In making a quashing order that has only prospective effect, the judge is essentially ruling that the decision had been lawful up until that point, even if it had conflicted with the will of Parliament. Hickman further states:

"This would allow Judges permanently to cancel the invalidity of unlawful decisions or instruments insofar as they pre-date the court's ruling. Again, it is not proposed that such a power would be limited to procedural or technical defects in the impugned act: it could be used even where the decision, act or instrument is found to be contrary to the express words of a statute",

which would, in effect, confer upon the courts

"a power to legislate to change Acts of Parliament and alter private rights".

Taken together, the situation that arises from the introduction of prospective-only remedies is one of uncertainty and complexity in its practical application, concerning constitutional implications, the weakening of Government accountability, and great potential injustice for people wronged by the decisions of public bodies. The Law Society of England and Wales has said:

"We oppose prospective-only remedies which leave the door open for righting a future wrong but do nothing for injustices from the past. Removing or limiting the retrospective effect of an order would mean that nobody who has been a victim of an unlawful state action—not even the person who brought the challenge—would benefit from a ruling that the government had behaved unlawfully.

This would have a chilling effect on justice by deterring people from bringing legal challenges, in the knowledge that they might gain no redress, and might also mean people would be less likely to get legal aid to bring cases where a prospective-only remedy was the likely outcome."

I believe that prospective-only remedies could have a chilling effect on potential claimants and hinder their access to justice. There certainly must be no presumption in favour of such remedies—we are coming on to that next—and collateral challenges must be expressly preserved.

The power to make prospective-only remedies should be excised from the Bill entirely. I remind the Committee that IRAL made no recommendation for their introduction. Where clause 1 introduces prospective-only remedies in judicial review, it risks undermining individuals' ability to hold the Government to account, erasing legal rights and creating significant uncertainty in practice. It is difficult to see what there is to recommend the measure.

There will be more to say, including on clause stand part, but I make this distinction in moving amendment 12. There are issues about suspended orders. There are arguments for and against; I accept that. I do not accept that it is necessary to codify them, to put them into statute, in the way in which that is done in the Bill. But they certainly cause less mischief than prospective-only orders. Therefore, the purpose of the first group of amendments is to identify, as the main villain of the piece in clause 1, the introduction of prospective-only orders.

I hope that I have answered in that explanation some of the points that were put by Government Members at the beginning of the debate. These are serious matters to be dealt with. I do not accept that these are only minor modifications. I think they will have a transformative effect on the way in which judicial review works. There may well be pushback from judges. This may well evolve over time. But how unnecessary to do this, given the damage that it will obviously cause. With that, I will end my comments on the first group of amendments, see what other hon. Members and the Minister have to say, and reply; and then, unless the Minister intends to concede or make a reasoned offer or proposal, it is likely that we will press amendment 12 to a vote.

Marco Longhi: It is a pleasure to be able to follow the hon. Member. Colleagues will be pleased to know that I will be trying to hold their attention for only about three or four minutes.

I am certain that the hon. Member will have regard for the assertion by the shadow Secretary of State, the right hon. Member for Tottenham (Mr Lammy), that the Bill is a power grab by Government. Would he not agree that that is an odd thing to say, given that the Bill provides the courts with additional powers around remedies in a way that ensures practicality and efficiency, and enables courts to give consideration to the effect of remedies in a way that is not readily applied in the current framework? That surely serves to evidence the shadow Secretary of State's lack of understanding of what our courts actually need and of the flexibilities built into the Bill. As the Minister said on Second Reading, far from weakening quashing orders, as the shadow Secretary of State said, these new remedies

"strengthen quashing orders and thereby strengthen judicial review."—[*Official Report*, 26 October 2021; Vol. 702, c. 233.]

On prospective remedies, I would like to give two examples that show that this concept is not new but has precedence in our legal system. Judges have limited the retrospective effect of quashing orders in some instances in the past, such as in R (British Academy of Songwriters, Composers and Authors, Musicians' Union & Ors) *v.* Secretary of State for Business, Innovation and Skills & Anor in 2015. Therefore, these remedies do not change the position of judges but act to encourage a wider use of the new quashing order modifications.

It is important to state that these remedial modifications are not being pursued to bypass Parliament but are in fact focused on resolving practical issues that arise during judicial review cases. The concept of prospective-only orders is not novel or unique. Under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, courts in the devolved Administrations have a power to make such orders where decisions are outside devolved competence. The Government wish a similar concept to be available in all cases of judicial review in England and Wales.

Anne McLaughlin (Glasgow North East) (SNP): May I point out that there is no presumption in any of the devolved legislation, and that is primarily what we are arguing about here? It is not about having the ability to do this; it is about the presumption that it has to be a default position.

Marco Longhi: Courts will none the less still have discretion, as I understand it, so they can decide, case by case, what framework they intend to follow.

These are discretionary quashing order modifications, and courts will have regard to the constitutional separation of powers. It is not foreseen that the Government will stop having to work with Parliament to pass retrospective legislation in future.

Dr Caroline Johnson (Sleaford and North Hykeham) (Con): It is a pleasure to serve under your chairmanship, Sir Mark. I will—necessarily, since we are almost at the end of this sitting—keep my remarks extremely short.

I do not think anybody in this room would not trust our judiciary's knowledge, its significant experience, or its wisdom to make sensible, measured judgments in

[Dr Caroline Johnson]

each case. At present, a finding of an error of law nullifies the decision completely. I will give one example—there are many, but we are short of time—in which a suspended quashing order could have been useful. Despite what the shadow Minister says, it was applied for by the then Labour Government under Gordon Brown. That case, which has already been mentioned, is Ahmed *v.* HM Treasury (No. 2).

In that case, a number of individuals had their assets frozen because they were believed to be terrorists. The court decided that the decision to freeze those assets was unlawful, which left the Government in an invidious position, because they were concerned about the use of those assets for security. Indeed, over five days, Gordon Brown's Government passed a law to retrospectively make that asset freezing lawful, before then passing more definitive legislation.

We do not want the Government to be put in that sort of position. Had the judiciary then been able to pass a suspended order, as the Bill proposes, it would have been able to say that the effect of the asset freezing was lawful for a period, allowing the Government to take appropriate national security measures. As others have said, the addition of a suspended quashing order means extra tools in the judges' toolbox. It is an opportunity for our esteemed and extremely expert judges to make sensible decisions—the right decisions at the right time—for the cases before them.

Anne McLaughlin: If the Minister simply wants to put more in the judges' toolkit, and does not expect a presumption in favour—or a default position, as I said earlier—will the hon. Lady support one of the upcoming amendments to stop that presumption?

Dr Johnson: I am talking here of a suspended order specifically. Personally, I would trust the judges to have the discretion to look at the case in front of them, the law as it stands and the situation in which they find themselves, and make a measured judgment. Under this clause, they have the discretion to use the orders as they see fit and proper, and I have absolute trust in our judiciary to use them properly.

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

12.59 pm

Adjourned till this day at Two o'clock.