

Quashing orders

The current government's 2019 Manifesto included a commitment to look afresh at judicial review. In July 2020, an expert panel was established to conduct the Independent Review of Administrative Law (IRAL).

19 April 2022

The current government's 2019 Manifesto included a commitment to look afresh at judicial review. In July 2020, an expert panel was established to conduct the Independent Review of Administrative Law (IRAL).

As well as the panel being established, a public consultation was conducted. The aim of this was said to spark a debate about the purpose of judicial review and the reforms that might be needed. A driving force behind the review was a perceived adverse effect on government departments due to the increase in applications for judicial review.

The panel's task was to consider how the legitimate interest of the citizen in being able to challenge the lawfulness of executive action can be properly balanced with the role of the executive to govern effectively under the law.

The panel recommended two reforms to substantive civil law – reversing the Cart judgments in immigration tribunal matters and introducing suspended quashing orders as an additional remedy.

The panel pointed out several instances where the courts have not had remedies at their disposal that provide the flexibility they need; as such, the bill was drafted providing additional remedial powers to suspend, remove or limit the retrospective effect of quashing orders.

The provision would require the court to suspend a quashing order if a decision under judicial review was found to be made ultra vires or in breach of natural justice. The government would then get the opportunity to modify its initial decision during the period of suspension. A prospective-only quashing order means that the unlawful action by the public authority is only treated as unlawful from the point of the court order.

The aim of this provision was to provide administrative flexibility.

Critics of the provision have expressed concern for the rule of law, namely lack of restraint on government power. This is due to the government's indication, in its consultation paper, that an erroneous decision could be corrected by proposing to Parliament a piece of primary legislation which would render a decision labelled by the court as unlawful as lawful during the period of suspension.

In earlier stages of the draft bill, it was intended that there would be a presumption in favour of the suspended quashing order in all cases where the court had ruled in favour of the claimant. This part of the bill was amended by the House of Lords, removing the presumption in favour of using suspended and prospective-only quashing orders, with the Lords arguing that this presumption would have limited the effectiveness of remedies of the court when it finds that a decision is unlawful, and would ultimately interfere with a judge's discretion.

The Lords also voted in favour of amendment 1, which removes the power to include provision in quashing orders removing or limiting their retrospective effect.

The bill is currently in its final stages — consideration of the Lords amendments — having been through all readings in both houses.



Brooke Toon

Associate

Brooke.Toon@brownejacobson.com

+44 (0)330 045 2228

Related expertise

Government