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Our Ref: 3127
Your Ref: Judicial Review and Courts Bill

29 October 2021

The Rt Hon Dominic Raab MP
Lord Chancellor and Secretary of State for Justice
102 Petty France
London
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United Kingdom

BY POST AND EMAIL: dominic.raab.mp@parliament.uk

Dear Sirs,

Clause 1, Judicial Review and Courts Bill; Quashing orders and amendments to s 29 SCA 1981

We write regarding the proposed changes under the Judicial Review and Courts Bill.

Fish Legal (FL) is a not-for-profit environmental angling organisation that has been working since 1948 to protect fisheries in the UK against pollution and the decisions of public bodies that it believes threaten the integrity of the aquatic environment.

FL is concerned that changes to the Senior Courts Act 1981 would seriously compromise the ability for FL and its members to protect the environment and receive adequate remedy in administrative law cases.

Our judicial reviews and remedies

FL has taken a number of judicial reviews to court, most recently: *Fish Legal v Information Commissioner & Others [2015] UKUT 0052 (AAC), Seiont, Gwyrfai & Llyfni Angling Society v Natural Resources Wales and others* (C1/2015/4362); *R (oao Preston) v Cumbria County Council and United Utilities [2019] EWHC 1362 (Admin*); *WWF, AT and FL v SOSEFRA & EA [2021] EWHC 1870 (Admin).*

A high number of our judicial reviews are settled before going to trial resulting in a quashing order by consent - which we estimate to be a further 6 in the last 5 years.

Some of these cases have been planning cases challenging decisions to grant planning permission for schemes that affect the aquatic environment. Others have been challenges

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to environmental permitting decisions, the provision of environmental information and obligations of the UK under international law.

S 31 Senior Courts Act 1981

Currently, s31 of the Senior Courts Act 1981 allows, *inter alia*, for *"mandatory,* prohibiting or quashing order" or a "a declaration or injunction". However, the Independent Review of Administrative Law panel recommended that section 31 be amended to give the courts the option of making a "suspended quashing order" i.e. a quashing order which would take effect if after a certain period of time certain specified conditions were not met. The suggestion was that this would be a further remedy *option* left to the discretion of the judge.

The Judicial Review and Courts Bill

Clause I of the Bill is intended to create a presumption for the Administrative Court to use two new remedies via an amendment to s 29 of the Senior Courts Act 1981.

In summary, the amendments have gone way beyond anything the panel had suggested and include that there would be a new *presumption* that a judge would use either a *prospective-only* or a *suspended* quashing order rather than a full quashing order.

Prospective quashing orders (new s. 29 (1) (b))

This new remedy would remove or limit any retrospective effect of the quashing. In practice this means that if the *"impugned"* decision led to a particular situation or secondary events after the decision were made, and which preceded the judgment, the remedy would not cover those effects. Only future effects which flowed from the original decision would be covered. The result would be that previous uses of the decision before the court's judgment, would be upheld – even if the originating decision had been found to be unlawful.

The example used by the government in its explanatory notes is for the

> *"decision by a public body to authorise and set in motion a process for assessing and developing potential sites for spaceports, to be unlawful. The court has the power to suspend or make prospective the relief it grants. Immediate and retrospective quashing would mean actions pursuant and ongoing to the decision would be invalid. . .The decisions based off the impugned decision are thus permanently treated as lawful for that period and for the past. This means the public body does not have to undo any actions already taken and is afforded the opportunity to re-make its decision in a lawful way and put in place any other arrangements necessary."*

But of course, these theoretical "spaceports", born of the defective authorisations, may have given rise to any number of "*decisions based off the impugned decision*" – like permissions granted on the basis of a defective policy. All of these decisions between the

authorisation and the judgment would therefore be lawful. On the basis of the *presumption* that a prospective quashing order should be used "*unless it sees good reason not to"* (proposed s 29 (9)), such a situation would be unlikely to merit an effective remedy.

There are real concerns that this would mean there would be a lack of redress, for instance, where we had challenged the lawfulness of guidance or policy which had led to permitting decisions being made that we believed would lead to serious damage to the environment. Permits issued before the judgment would be inviolable, despite a finding of unlawfulness.

There is also the question of planning cases in the circumstances where the resolution of a planning committee is challenged rather than the decision notice that follows. If the resolution is successfully challenged, a court could in theory grant a prospective quashing order which would mean the decision notice stands.

Or a developer could begin to build on land before the case is heard and such activity could not then be impugned, even if the decision or resolution to grant planning permission was held to be defective.

Such a remedy would have a chilling effect on legal action due to the increasing difficulty for a bona fide claimant to achieve a just outcome and for administrative mistakes to be corrected.

Suspended quashing orders (amended s 29 (1) (a) SCA 1981)

A suspended quashing order is an order which effectively suspends the remedy to a future time which gives the public authority the opportunity to correct the error of law in the challenged decision.

On the face of it, a suspended quashing order would add to the potential remedies available to the court – especially where the High Court is reluctant to quash a decision and has been constrained to grant only a declaration of unlawfulness (see *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*). For instance, the court may decide to make a declaratory order due to concerns at the consequences of quashing a decision completely or where there is a potential argument that the court has overstretched its powers by using a full quashing order.

However, we believe that the *presumption* that such an order should be used rather than a full quashing of a decision *("unless [the court] sees good reason not to*") is counter-productive and makes the proposal for the suspended quashing order untenable.

For instance, if a planning decision is found to have been unlawful on the basis that an impact assessment had not been fully undertaken, the court could order a suspended quashing order so that the impact statement would be revised and the decision left untouched.

But this raises significant questions as to whether an order which suspends the remedy, pending the correction of a defective document or decision sitting behind the impugned decision, would be an adequate remedy. For instance, a local planning authority or the secretary of state may have been led into error in basing a decision on a defective document such as an Environmental Impact Assessment (EIA). That would mean that the decision was infected by the error of law. So the EIA and the decision could not be separated in that way.

In our case of *R (oao Preston) v Cumbria County Council and United Utilities [2019] EWHC 1362 (Admin),* there had been clear breaches of the EIA process and a full quashing order meant that the decision needed to be taken again. The presumption in favour of a suspended quashing order would have meant the decision to grant planning permission for a sewage outfall discharging into a river without assessing its impact of a Special Area of Conservation and Site of Scientific Interest would have been left in situ.

More broadly, even the potential for there to be a suspended quashing order or a prospective order rather than a full quashing order would mean that defendants would be unlikely to settle a claim by way of a consent order before the case reached trial; it would be more efficacious for the Defendant to simply fight on, knowing that there would be a good chance of avoiding a full quashing order, with the likelihood that a suspended quashing order would effectively leave the original impugned decision intact.

The presumption

Clause 1 introduces a presumption in favour of suspended quashing orders and the limiting of the retrospective effect of orders. That is instead of allowing judicial discretion as to whether to use a full quashing order or any of the alternatives. It also means that instead of using a remedy which suits the case, the long-standing principle of judicial discretion would be constrained with unsatisfactory and unjust outcomes.

General points

Overall, the amendments already made to statute and rules over the past decade have curtailed the rights of claimants in judicial review – including a plethora of changes to timing rules and the uncertainties over costs capping. In particular, the introduction of s 31 (2) A where the High Court— "*must refuse to grant relief on an application for judicial review. .*

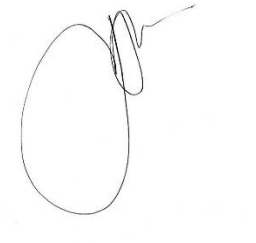
.if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" has already impeded access to a fair remedy in judicial review; it is frequently pleaded by Defendants and has put an extra onus on judges to throw out otherwise meritorious claims but where the defendants have effectively argued before the judge that the challenge is technical only.

That, added to the increasing expense of taking legal cases and the uncertainty over costs protection has already led to a cooling effect on judicial review. Tampering with the remedies to protect decision makers merely adds to the likelihood that this important legal check on the decision making of public bodies will be further compromised.

Further steps

FL therefore believes that clause 1 of the Bill should be removed or, at the very least, amended to omit prospective-only quashing orders and the statutory presumption. If these sections do withstand our objections, further clear statutory guidance must be provided to explain how the amendments are to be interpreted and applied, particularly in planning and environmental cases.

Yours faithfully



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