Consultation Response

From a group of Oxford University public lawyers to the Ministry of Justice, *Judicial Review Reform*

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Some Preliminary Comments

2. We respond in this document to a number of the specific questions on which the Ministry of Justice (MoJ), in its response to the thoughtful and balanced report from the Independent Review of Administrative Law (IRAL)[1], seeks further consultation. The MOJ's consultation paper[2] (henceforth MOJ Response) has an introductory section in which it sets out more generally its view of judicial review and the UK constitution. We do not intend to respond in any detail to this material, and the MoJ does not seek any such response. It is, however, fitting to make four brief comments in this regard.

3. First, judicial review is not about contestation between individuals and the executive, wherein the balance is between the rule of law and executive efficiency. Judicial review is there to ensure, *inter alia*, that the executive complies with the limits to its authority that flow from the enabling legislation enacted by Parliament, and from the broader system of parliamentary governance. The overarching precept ensured by judicial review is the accountability of the executive. Unlawful administrative action forms no part of the business of government, and the grounds of review as to what constitutes such unlawful action in the UK generally cohere, as seen below, with those in other common law and civil law regimes. There is no countervailing public interest in letting unlawful administrative action go unchallenged, or in making otherwise triable issues non-justiciable.

4. Secondly, there is no empirical foundation for the suggestion that there is any systemic judicial overreach, or substitution of judgment on the merits. To the contrary, the number of controversial cases is very small when viewed against the overall fabric of judicial review.[3] Judicial review of discretionary power commonly entails the courts taking some view of the merits of the contested decision. This is distinct from courts substituting their view of the merits for that of the decision-maker.[4] What distinguishes different tests is

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[1] IRAL, Independent Review of Administrative Law – Report (CP 407, March 2021).

[2] MoJ, *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* (CP 408).

[3] Paul Craig, 'Judicial Review, Reform and Methodology', forthcoming.

[4] Paul Craig, 'The Independent Review of Administrative Law-The Government Response' (OxHRH Blog, 20 March 2021) http://ohrh.law.ox.ac.uk/the-independent-review-of-administrative-law-the-government-response

the intensity of such review. There can perforce be diverse views as to the intensity of review that is warranted in a particular case. The conclusions of a particular commentator that review has been too far-reaching are not, therefore, canonical.

5. Thirdly, courts do not equate the rule of law with rule by judges, in the sense in which this language is used in the MoJ Response. There is abundant case law that attests to the contrary. Courts are clear as to the limits of the role that they play via judicial review. This is exemplified by the respect courts accord to the executive and the legislature in cases concerned with ordinary judicial review, and those dealing with the Human Rights Act 1998 (HRA).

6. Fourthly, the heads of review developed by the UK courts do not differ in significant respects from those in other common law or civil law jurisdictions. This is not fortuitous, since the grounds of review cover core features required for legal control in any regime of administrative law, including law, fact, discretion, process, and the like. Nor is there evidence to suggest that UK courts generally deploy such heads of review with greater intensity than in other countries. To the contrary, when viewed from a comparative perspective that includes civil law jurisdictions, UK courts would be regarded as relatively restrained and cautious. This is not to suggest that the UK approach should change. It is merely to provide a sense of perspective on what can otherwise be an unduly narrow vision.

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

7. The introduction of suspended quashing orders would be a welcome reform to the existing law of remedies. It would enable the court to quash a decision, while at the same time being cognizant of the legal and practical consequences of making the quashing order immediately effective. The optimal legislative strategy would be to provide the courts with a discretion to issue such an order, without overly prescriptive conditions or criteria as to when it should be used.

8. There is, moreover, existing case law in which the courts have in effect suspended the quashing of an order. This is exemplified by *Fishermen & Friends of the Sea v Minister of Planning, Housing and the Environment*,[5] the key passages of which are as follows.

> 52. The consequence is that, as far as relates to the prescribed fee for an application for a permit, the 2006 regulations are unlawful. However, this is clearly not a case where it would be appropriate to quash the regulations, or to declare them invalid. Nor, as the Board understands, is that the remedy sought by the appellants - understandably so. Such an order could create great uncertainty as to the status of the permits issued since the Rules were first applied in 2007, and any enforcement action taken in respect of them. It might even lead to claims for return of the fees already paid.
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> 53. Accordingly, in the Board's view, subject to any further representations from the parties, the appropriate order is a simple declaration as to the unlawfulness of the permit fee as prescribed by the 2006 regulations, combined with an order of mandamus directed to the Minister to reconsider on the proper basis the fee to be prescribed and to make amended regulations accordingly. That is to be done as soon as practicable and in any event within a time to be fixed by the order. Subject to any representations, the Board would be minded to set a limit of three months from the date of this judgment. For the avoidance of doubt the order should indicate in terms that it is made without prejudice to the validity of anything previously done or fees collected under the Rules, or to their continuing operation pending the taking effect of amended regulations. Again, subject to any representations, the Board is minded to order that the Minister pay the appellant's costs here and below. Any representations on the matters mentioned in this paragraph should be made within three weeks of this judgment, and a further week allowed for any response

9. Scotland Act 1998, s 102, can clearly be drawn on by way of analogy in framing legislative guidance to courts as to when a suspended quashing order should be preferred,

[5] [2017] UKPC 37. See also, *Martin v Her Majesty's Advocate* [2010] UKSC 10, [43].

although it should also be noted that according this discretion in the context of a devolved legislature is not the same as rendering it applicable in the context of ordinary administrative action. One consideration to bear in mind is that the formulation proposed by the IRAL contains an important ambiguity.[6] It is unclear from this formulation whether the High Court is required, wherever it suspends a quashing order, to specify conditions effectively enabling the unlawful measure to be 'saved', or whether it may suspend without specifying such conditions. The former would considerably narrow the circumstances in which a suspended quashing order may be useful. For example, a suspended quashing order with no conditions may be a valuable way of affording public authorities a grace period to make practical arrangements in cases where a measure needs to be replaced, but is capable of operating lawfully in individual cases in the interim.[7]

10. The salient issue, as duly noted in [55]-[56] of the MoJ Response, is the more precise list of factors that should be considered when deciding whether to issue the suspended quashing order.

11. We think that the optimal legislative strategy would be to provide the courts with a discretion to issue such an order, without overly prescriptive conditions or criteria as to when it should be used. There is a danger in attempting to be too detailed or specific in the factors that the courts should consider.

12. If the government wishes to denominate such factors, the following considerations are important in this regard:

    12.1. The nature of the defect and the nature of the conditions imposed by the High Court: the IRAL proposal[8] is framed so as to accord the High Court discretion to issue a suspended quashing order, such that the order will not take effect if certain conditions are met within a certain time frame. This formulation provides the essential starting point, but further clarification is required.

[6] The IRAL formulation reads as follows: 'on an application for Judicial Review the High Court may suspend any quashing order that it makes, and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period', IRAL, (n 1), [3.68].

[7] See, e.g., *R (Tigere) v Secretary of State for Innovation and Skills* [2015] UKSC 57, [49] and *TN (Vietnam) v Secretary of State for the Home Department* [2018] EWCA Civ 2838 (provisions in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 found to be unlawful in *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 are nonetheless capable of operating lawfully in some individual cases and are not necessarily nullities. Note *TN (Vietnam)* has been appealed to the UK Supreme Court).

[8] IRAL, (n 1), [3.68].

12.1.1. The suspended quashing order could, in principle, be properly used to deal with a situation in which there has, for example, been a failure to consult, or take account of relevant considerations. Here the effect of the suspended quashing order is to give the government time to reconsider the matter, having consulted or taken those considerations into account. It is, however, important to bear in mind that provision is already made for instances where it is 'highly likely' that defects of this kind made 'no substantial difference to the outcome'. Post-2015, the courts have been directed to refuse any relief in such cases, in the absence of overriding public interest.[9] This provision in the Senior Courts Act 1981, s.31(2A), will limit the circumstances in which it is appropriate for courts to suspend an order. Take a case where a measure has been preceded by defective consultation. Let it be assumed that the failure in this respect might make a substantial difference. Suspending the quashing of the measure, and putting in place conditions which enable the public authority to 'save' the measure if they complete the consultation process properly may undermine the fundamental public law principle that consultation must be done with an open mind.[10] Judicial orders should not create incentives to conclude a consultation process in any particular way.

12.1.2. It would, furthermore, be far more controversial if the proposed suspended quashing order was deployed where there had, for example, been an error of law as to the application of the statutory scheme by a government agency. The claimant in the instant case, and those in a similar position, should not be denied relief by affording the government the opportunity to change the relevant legislation to make it accord with their preferred meaning of the statutory term. It is perforce open to Parliament to do this for the future, and it is also open to Parliament, subject to any HRA claim, to render the relevant legislation retrospective, and to pay the 'political cost' of doing so. This latter consequence should not, however, be reached

[9] Senior Courts Act 1981, s 31(2A) (as amended by Criminal Justice and Courts Act 2015, s 84).

[10] *R v Brent LBC ex parte Gunning* [1985] Lexis Citation 944; *R (Moseley) v Haringey LBC* [2014] UKSC 39, [2014] 1 WLR 3847.

indirectly through the instrumentality of the court issuing a suspended quashing order of the kind adumbrated above.

12.2. The impact on third parties of issuing an ordinary quashing order: this is taken into account in the Scotland Act 1998, s 102(3). It enables the court to consider the extent to which an order that is immediately applicable could have disadvantageous consequences for third parties.

12.3. The impact on third parties of not issuing an ordinary quashing order: there could, however, be circumstances where third-party interests weigh in the opposite direction. Thus, failure to issue a quashing order with immediate effect could prejudice the interests of parties who are not before the court, but who will nonetheless be affected by the outcome of the litigation, where the delay in the issuance of the order could be harmful to the relevant interests.

12.4. Cost considerations: the MoJ Response raises the possibility that cost considerations should be considered by the court in deciding whether to issue a suspended quashing order. Two such types of consideration are juxtaposed: whether remedial action to comply with a suspended order would be particularly onerous/complex/costly; and whether the cost of compensation for remedying quashed provisions would be excessive.

12.4.1. There are practical quantification difficulties with both dimensions identified in the MoJ Response. The proposed provision would seemingly direct the courts to address questions concerning the adequacy of a public authority's estimates of the financial consequences of a court decision and whether those consequences might be described as 'excessive'. The courts lack the institutional competence to consider such questions.

12.4.2. There are, moreover, principled difficulties with the second limb. The assumption is that an unlawful act has occurred, but that a court should consider whether the cost of remedying it would be excessive. If it were felt that the cost would be excessive, the consequence would then be that compensation should be denied, through the instrumentality of a suspended quashing order. It should be noted that social security authorities are already protected from the requirement to make back payments of lawfully due benefits by the controversial 'anti test case

rule'.[11] Many cases in which compensation is due, following a determination that a public authority has acted unlawfully, will also engage human rights.[12] It is therefore important to bear in mind the requirement to ensure effective remedies under ECHR, Article 13, in cases of a human rights breach.

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

A. THE WEAKNESSES IN THE CASE AGAINST *CART*

13. The MoJ Response proposes to 'remove the avenue of lodging Cart Judicial Reviews, effectively reversing the outcome of' the *Cart* decision.[13] Two arguments are offered for this reform. The first, associated with IRAL analysis, is based on judicial-resource-allocation considerations. The MoJ Response explains:

> The Review analysed 5,502 Cart Judicial Reviews (all the Cart Judicial Reviews since this avenue became available) and found that in only 12 instances (ranging between 0-3 per year) had an error of law been found – a rate of only 0.22%.[14]

14. The MoJ should be very cautious about placing this statistic at the centre of any future case for reform. The 12 instances of a First-tier Tribunal decision being overturned uncovered by the IRAL panel encompass only those detailed on the BAILII database (of

[11] See, e.g., Social Security Act 1998, s 27. The effect of the rule is broadly that following a judicial determination that a benefits decision has been taken unlawfully, the Secretary of State in taking later similar decisions is required only to make back-payments to the date of the judicial determination, and not before. The rule has been criticised for operating harshly on recipients of benefits who have been unlawfully treated, and for undermining the principle that the courts are the arbiters of the meaning of legislation.

[12] The social security context is a good example. There have been numerous examples in recent years of social security measures being found to have violated European Convention of Human Rights (ECHR) Article 14 and other anti-discrimination measures. See, e.g., *R (TP, AR & SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37; *R (TD, AD and Patricia Reynolds) v Secretary of State for the Home Department* [2020] EWCA Civ 618. Another illustration is false imprisonment claims relating to immigration detention, which often overlap with ECHR Article 5: see broadly the discussion in *R (Jalloh) v SSHD* [2020] UKSC 4.

[13] MoJ Response, (n 2), [52], referring to *Cart v The Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663

[14] MoJ Response, (n 2), [51].

which the panel found only 45 in total) and are highly unlikely to be exhaustive.[15] By way of indication, the MoJ's own publicly available data suggests the following:[16]

- between 2012 and 2020, 6,293 applications for judicial review labelled either 'Cart – immigration' or 'Cart – other' were lodged with the Administrative Court. This constitutes 11.42% of the total number of challenges dealt with by the Administrative Court (55,804) in this same period;
- 330 of the 6,293 so-called '*Cart* judicial reviews' resulted in a grant of permission by the Administrative Court, the usual effect of which is to quash the permission refusal decision and thereby to remit the case back to the Upper Tribunal (UT)[17];
- a further 36 cases were the subject of a successful substantive hearing in the Administrative Court (9), granted permission by the Court of Appeal (26) or allowed at a Court of Appeal hearing (1);
- 5,481 of the 6,293 '*Cart* judicial review' applications were refused permission by the Administrative Court;
- the outcome of 446 applications was something 'other' than a grant or refusal of permission at the permission stage.

15. According to this data, applicants in '*Cart* judicial review' applications (which can be made by either party in a tribunal appeal) therefore obtained some sort of positive outcome in 366 (5.34%) of 6,293 cases. It is not possible (at least on publicly available information) to know which of those cases resulted in an overturning of a First-tier Tribunal decision, but it seems highly unlikely the number is as low as 12. The 446 cases which had some 'other' outcome are also noteworthy. It seems likely that these are applications which were withdrawn. If so, these cases presumably did not consume much in the way of resources and may well reflect mutually agreeable negotiated outcomes.

[15] Joe Tomlinson and Alison Pickup, 'Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews', UK Const L Blog (29th March 2021) (available at https://ukconstitutionallaw.org/).

[16] Joanna Bell, 'Digging for Information about Cart JRs', UK Constit L Blog (1st April 2021) (available at https://ukconstitutionallaw.org).

[17] Civil Procedure Rules, 54.7A(9).

16. While therefore the prospects of success in a '*Cart* judicial review' are not high (87.10% seemingly do not get past the permission stage), they are probably considerably higher than the much publicised 0.22% figure.

17. The second argument offered for reform is that:

> … rendering Upper Tribunal decisions justiciable by Judicial Review is contrary to the intention of Parliament. This is because the Upper Tribunal was originally intended to be broadly equal to the High Court… In declaring Upper Tribunal decisions amenable to Judicial Review, the Supreme Court effectively downgraded the intended status of the Upper Tribunal.[18]

18. Again, this argument masks some complexity. Most importantly, the Tribunals, Court and Enforcement Act 2007 says nothing explicitly about the (non-)availability of judicial review of permission refusal decisions. Parliament, in other words, had not communicated a clear intention on the issue. The argument that the designation of the Upper Tribunal as a 'superior court of record' meant that judicial review was unavailable was also not pursued before the Supreme Court.

B. IN PLACE OF *CART*

19. Removing the prospect of a '*Cart* judicial review' will have a significant impact which is not well understood. Parliament should therefore not rush to enact an ouster clause. Not only would an ouster clause exceed anything advised by the IRAL, it would disrupt one of the central historic components of the rule of law in the UK.

20. Reform, if it is to take place at all, should be informed by the following two matters.

21. First, it is essential that any reform is guided by a full understanding of how '*Cart* judicial reviews' have operated in practice. The prospects of success in a '*Cart* judicial review' may be small (though, as emphasised above, not as small as 0.22%). However there have been cases where the '*Cart* judicial review' process has played in an integral role in reversing legally flawed decisions.[19] Some of these are cases involving claims by individuals that they would face persecution if removed – cases where the stakes could not be higher. This makes it imperative that 'remov[al of] the avenue of lodging Cart Judicial Reviews' is done only with a full understanding of the legal errors the process

[18] MoJ Response, (n 2), [51].

[19] See the discussion of cases in our response to Questions 18 & 19.

has been integral in catching, and with detailed thought being given to the various plausible ways of safeguarding against these errors in future.

22. More particularly, for reasons given in our response to Questions 18 and 19, any proposal to remove '*Cart* judicial reviews' should be subjected to a full equality impact assessment.

23. Second, consideration should be given to whether improvements could be made to existing tribunal processes in order to provide better safeguards against legal error. For instance, presently there are different processes for requesting permission from the Upper Tribunal to appeal to it. Appellants seeking to challenge decisions by the tax, health, education and social care and general regulatory chambers, have two shots: if refused permission on the papers, they may submit a renewed application to be dealt with by oral hearing.[20] In contrast, appellants from other chambers – including most notably the immigration and asylum chamber – have only one shot.[21] This stands in contrast to judicial review where, ordinarily,[22] a claimant refused permission on the papers is entitled to submit a renewed request dealt with by way of oral hearing, and has further avenues to seek permission from the Court of Appeal.[23] Extension of the right to renew an application for permission to appeal beyond its current scope would provide a further check, and help to safeguard against legal errors currently caught by the '*Cart* judicial review' process.

24. To summarise, removing the prospect of '*Cart* judicial reviews' will have a significant impact which is not well understood. The government and Parliament therefore should not rush to enact an ouster or to alter the second-tier appeals criteria. A careful inquiry should be undertaken into the operation of '*Cart* judicial reviews' in practice, including a full equality impact assessment of any proposals for reform. It should also be considered whether adjustments could be made to tribunal processes in order to provide better safeguards against legal error.

[20] Upper Tribunal Rules, rule 22(3)-(4).

[21] Ibid. Note also that Tribunal, Courts and Enforcement Act 2007, s.13(8)(c), excludes permission-refusal decisions from the right of appeal to the Court of Appeal.

[22] Exceptions include the 'bespoke' regime which applies to Cart Judicial Reviews where there is no right to renew an application for leave (Civil Procedure Rules, 54.7A(8) and see discussion in James Maurici QC, '"Totally without Merit" and Judicial Review' [2014] JR 258) and paper applications determined to be 'totally without merit' (see discussion below).

[23] Civil Procedure Rules, 54.12 and 52.8.

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

25. There is a sound argument for further reform to the Senior Courts Act 1981, s 31, whereby the court is accorded discretion to issue a remedy that is only prospective.[24] The discretion can be used, where the court thinks fit, to ensure legal certainty and to avoid injustice. It should, however, only be used sparingly where there really are concerns of legal certainty or injustice that would arise if the remedy were not made prospective.
26. It should be made clear at the outset that the answer to this question is intimately related to the answer to Question 7 set out below. The reason is readily apparent: if the MoJ persists with the idea that in the great majority of instances a finding of invalidity would only be voidable, this would in effect mean that it only had effect for the future, from the date on which the decision was 'avoided'. This would mean that prospective only remedies would become the norm. We do not believe that this is warranted for the reasons given in response to Question 7. The remainder of the discussion in this section proceeds independently of the answer to Question 7.
27. The subject of prospective remedies is a complex one, and common law courts have traditionally been reluctant to use this remedial technique. The arguments deployed in this respect include, inter alia, concerns about the rule of law, judicial discretion and the very nature of common law adjudication. This is not the place to engage in detail with such arguments. Suffice it to say the following in this respect.
28. The rational place from which to begin is with the nature of the problem as it pertains in a public law context. The paradigm situation is one in which a decision, statutory instrument, or rule is successfully challenged, where the consequences in terms of legal certainty or injustice could be very severe if the remedy were not prospective. Statutory authorization that legitimates exceptional use of a prospective remedy would be beneficial in this regard.
29. To deny the possibility of ever issuing such a prospective order does not mean that the problem as presented in the previous paragraph would disappear. To the contrary, it would have to be dealt with in a different way. The salient point for present purposes is

[24] MoJ Response, (n 2), [60]-[64].

that insofar as there are concerns about the use of prospective only remedies, these concerns would also be present, and arguably to a greater degree, if other methods were chosen to deal with the problem. This is readily apparent if one briefly considers the other ways in which the problem could be addressed.

30. The first option would be judicial discretion: the courts would decide on an ad hoc basis the legal second-order consequences of finding that the rule etc was invalid. The courts would be forced to deploy language to the effect that invalidity does not entail denial that the measure ever existed, with judicial determination of which second-order consequences could still be sustained, notwithstanding the invalidation of the rule, statutory instrument etc that was the foundation for the other measures. It is, however, difficult to see why, judged by the criteria in paragraph 27 (above), this is preferable to the more open and straightforward use of a prospective remedy.

31. The second option would be judicial abnegation: the court would refuse to take account of the problems of legal certainty or injustice, with the consequence that the issue would have to be resolved by the legislature. The consequences in terms of the rule of law would, however, be severe. This is in part because any such legislation would have to be retroactive, in order to address the very problems that the court declined to address. It is in part also because drafting legislation that would actually meet such problems will often be difficult. Reflect on the examples set out below from EU law, and consider the problems that would have to be met in drafting legislation in such instances if the court had not tailored the remedy to render it prospective.

32. The third option is for the court to manipulate the terms ‘void’ and ‘voidable’ to achieve the desired end: the court would decide that even though the type of defect would commonly lead to the decision being retroactively void, in this instance the very same defect would only be voidable, and hence only have a prospective impact. It is difficult to see how this way of addressing the problem would be better as judged by the criteria in paragraph 27 than issuance of a prospective remedy. It is surely better not to manipulate the terms ‘void’ and ‘voidable’ on an ad hoc basis, since this conceals the reality of what has transpired and generates confusion for the future as concerns the consequences of a certain type of defect.

33. Courts in other jurisdictions have such discretion, as exemplified by the Court of Justice of the European Union (CJEU). Article 264 Treaty of the Functioning of the European Union (TFEU) provides that if the action under Article 263 TFEU is well-founded, the CJEU shall declare the act void. This is modified by the second paragraph of Article 264,

which provides that the CJEU or General Court (GC) shall, if it considers it necessary, state which of the effects of the act declared void shall be considered as definitive. The general principle is, therefore, that the remedy is retroactive: once the act is annulled under Article 263 it is void, but this is qualified by Article 264, para 2, which has been used by the EU courts to limit the temporal impact of their rulings.

34. The CJEU case law is also indicative of the circumstances in which such discretion is exercised. Considerations of legal certainty will normally be paramount in this respect. The CJEU is inclined to apply the second paragraph of Article 264 to retain in force the contested measure until a new measure can be adopted, to avoid the drastic consequences that may flow from retroactive voidness.[25] The effect is to render the remedy prospective, as evident from the following examples.

    34.1. In *Commission v Council*,[26] the Court annulled part of a regulation concerning staff salaries. However, if the regulation had been annulled retroactively then the staff would not have been entitled to any salary increases until a new regulation had been adopted. The Court therefore ruled that the regulation should continue to have effect until a new regulation had been promulgated. When this occurred the old regulation lapsed, but this did not affect the legality of salaries paid/increased prior to the introduction of the new regulation, thereby rendering the remedy prospective.

    34.2. In *European Parliament v Council*,[27] the Court found illegalities in relation to the budget for a particular financial year, but this decision was made when most of the period had elapsed. The need to ensure continuity in the public service of the EU, combined with legal certainty, led the Court to invoke the second paragraph of Article 264 and declare those parts of the budget that should nonetheless be regarded as definitive.

    34.3. In *Commission v European Parliament and Council*,[28] the Court annulled the application of the regulatory committee procedure to an environmental regulation

[25] Case 51/87 *Commission v Council (Generalized Tariff Preferences)* [1988] ECR 5459, [21]-[22]; Case C-392/95 *European Parliament v Council* [1997] ECR I-3213, [25]-[27]; Case C-1159/96 *Portugal v Commission* [1998] ECR I-7379, [52]-[53]; Case C-445/00 *Austria v Council* [2003] ECR I-8549, [103]-[106]; Case C-93/00, *European Parliament v Council* [2001] ECR I-10119, [47]-[48].

[26] Case 81/72 [1973] ECR 575.

[27] Case C-41/95 [1995] ECR I-4411, [43]-[45]; Case C-166/07 *European Parliament v Council* [2009] ECR I-7135, [72], [74]-[75].

[28] Case C-378/00 [2003] ECR I-937, [73]-[77].

on the ground that it should *prima facie* have been the management committee procedure, and the Council had not given adequate reasons for use of the former. The Commission, which had sought the annulment, argued that the effects of the regulation should, for reasons of legal certainty, be maintained in force until its amendment. This was in order to protect measures passed pursuant to the regulatory committee procedure prior to this action. The Court accepted the imperative of legal certainty.

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

35. There are, as noted in the MoJ Response,[29] strong arguments for invoking such novel remedial discretion in relation to statutory instruments, given that the related considerations of legal certainty and third-party interests are especially prominent in this context. The EU courts have exercised such remedial discretion in analogous circumstances, as seen from the discussion concerning Question 4. We do not, however, think that the presumptive or mandatory approaches are required. It would, for reasons set out below, be preferable to accord the courts discretion without framing this in either presumptive or mandatory terms. This is so for the following reasons.

36. First, it can be questioned whether there should be distinctive treatment for statutory instruments as a group. The MoJ Response explains that 'acts of a legislative nature (including secondary legislation) are inherently different from other exercises of power. Such legislation is intended, and considered to be, valid and relied on by others.'[30] However, the same thing could be said of many forms of policy, guidance, strategy or framework documents, etc. Furthermore, not all statutory instruments are of a general 'legislative' nature.[31] The formulation of Question 5 also refers to statutory instruments being 'scrutinised by Parliament'. However, this overlooks long-standing concerns about the degree of meaningful influence Parliament can exercise over the content of many

[29] MoJ Response, (n 2), [67]-[68].

[30] Ibid, [67].

[31] Consider, e.g., the order challenged in *Bank Mellat v Treasury* [2013] UKSC 39 which was enacted as a statutory instrument.

statutory instruments,[32] given that most such measures are either laid in draft or subject to the negative resolution procedure, with the consequence that Parliamentary oversight is exiguous.

37. Secondly, the circumstances in which statutory instruments can be challenged are varied. In at least some cases, there simply will be no conceivable benefit in a prospective quashing order.[33] For instance, the challenge may (indeed, due to the tight time limits which apply in a judicial review claim, often will) follow closely upon enactment of the contested measure, such that detriment to third party interests and the like is not an issue. In others, prospective quashing might be inappropriate, because, for instance, it impinges on the ability of third parties to pursue private law claims. Because of the variety of circumstances which may arise, it is not sensible to look for a 'default' remedial response. There is, therefore, no necessity for the remedial discretion to be framed in the terms suggested by the MoJ Response. It would be perfectly possible to leave this to the discretion of the courts, with no further specification couched in terms of presumption, or the stronger prima facie mandatory formulation. This is what the IRAL envisages and is the preferable option.

38. We consider that if some further specification is felt to be desirable, with the choice being between the presumption that the remedy should be prospective (MoJ Response [68a]) or the stronger prima facie mandatory formulation (MoJ Response [68b]), the former is to be preferred on the basis that it provides more scope for the exercise of remedial discretion. However, given the considerations set out in the preceding paragraph, the presumption may add little in practice and is based on the false premise that there should be a 'default' remedy in such cases. The MoJ proposal formulated in Question 5 is also highly ambiguous. It is unclear whether the presumption in favour of prospective quashing would apply in any case in which a statutory instrument is found to be unlawful, or in cases where the applicant requests a quashing order. Finally, the proposal overlooks the point that statutory instruments *as a whole* are rarely quashed. More commonly, judicial orders are directed to particular provisions in statutory instruments.

[32] Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (HL Paper 225, 2018).

[33] See, e.g. *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 where, at the time of the challenge, the unlawful provisions had been replaced and there was no evidence that they had been relied on by the relevant authorities.

39. The mandatory formulation option [68b] is deeply problematic and would risk directing the courts to make prospective-only quashing orders in cases where it is inappropriate. A particular concern is that the proposed test for departing from the mandatory starting point – 'exceptional *public* interest' – overlooks the fact that a fundamentally important reason why it may be inappropriate to limit the retrospective impact of an order is that it will result in injustice to *individuals* whose private law or other claims are at stake.

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

40. We do not think that suspended quashing orders should be required in relation to powers more generally. This would be a retrograde and unwarranted step for which there is no precedent in the UK, or in other legal systems, and would be detrimental to the rule of law.

41. The scope of Question 6 is not clear. The MoJ Response states that:

> For quashing orders, the Government is considering a wider use of a requirement, whereby the default use of a quashing order in relation to any impugned power is that it is suspended. There would be merit in having a requirement over a discretionary power because there is a considerable time lag in understanding how and when a discretionary power will be applied by the courts, and to what extent.[34]

42. The preceding quote gives the impression that the government is thinking of making suspended quashing orders the norm in relation to 'any impugned power'. There is uncertainty because the concept of 'impugned power' is then equated with 'discretionary power'. There is further uncertainty because the remainder of the MoJ Response[35] is framed in terms of judicial review that impacts on policy choices, with suspended quashing orders said to be justified because of the impact of such review on delivery of the policy.

[34] MoJ Response, (n 2), [69].

[35] Ibid, [69].

43. The MoJ Response seeks views as to whether there should be a presumption that any quashing order should be suspended, with the nature of the rebuttal to be left to the courts to decide. The alternative is that it would be mandatory that quashing orders should be suspended, unless there is an exceptional public interest. [36]

44. The ambiguity noted above is crucial in assessing this proposal. If the MoJ's proposal is that all quashing orders should be subject to the presumption that they should be suspended, or the stronger mandatory formulation, it should not be taken forward. There are four points to be borne in mind in this respect.

45. First, there would logically have to be an analogous change in relation to declarations of nullity. Quashing orders and declarations of nullity are used interchangeably in many instances, and they both traditionally lead to the decision being void. If the proposed change were made only in relation to quashing orders, claimants would then seek recourse to declarations of nullity if they were not subject to the same conditions.

46. Secondly, if the MoJ Response proposal is that all quashing orders (and declarations of nullity) should be subject to the presumption that they should be suspended, or the stronger mandatory formulation, it should not be supported and would be retrograde for the following reason. The very great majority of judicial review actions that lead to quashing orders and declarations of nullity have nothing to do with statutory instruments, or broad policy choices. They involve review of decisions directed at a particular individual, which are then contested by that individual. They are, to use United States parlance, concerned with individual adjudication, not rule-making. There is no evidence that the classic form of quashing order is problematic in this context. The courts routinely strike down such decisions where the requisite error exists, and issue a traditional quashing order, or declare the contested decision to be a nullity. The default assumption in such instances is that the decision is then retrospectively invalid, which normally gives rise to no practical problem precisely because the decision concerns a particular person. To put this another way, in the bulk of judicial reviews where a decision is quashed there is simply no case for, or benefit to, suspending the effect of the order.

47. Thirdly, the impact of moving towards a suspended quashing order would, moreover, commonly be negative for the individual, or at the very best neutral. Consider the classic case where an individual decision is quashed for breach of natural justice, with the result that the denial of welfare benefits is unlawful, or the removal from an employment post

[36] Ibid, [69a-b].

is invalid. This has, for 400 years, led to the decision being null and void, with the consequence that the individual gains the relevant benefits, or retains his or her employment position, unless and until some lawful act that removes such benefits or terminates the employment. If the MoJ Response proposal were to be taken forward this would then mean that there would be a presumption that the quashing order should be suspended, or the stronger mandatory variant, with the consequence that the claimant would have no access to the welfare benefits, or would not retain the employment position. The court would impose an obligation that the public body hear the affected person in accord with the requirements of natural justice within a specified time, but prior to a positive determination in favour of the individual as a result of the hearing, the claimant would have no access to any benefits and would no longer be in his or her prior employment post.

48. Fourthly, the argument in favour of suspended quashing orders is premised on the assumption that the measure in question is a statutory instrument, rule or policy, the quashing of which has broader implications. Insofar as there might be instances where a suspended quashing order might be felt warranted in relation to an individual decision, this can be achieved pursuant to the discretionary criteria discussed when answering Question 1 above. There is no need for the stronger formulation contained in the MoJ Response.[37]

49. There are then three ways to proceed on this issue. However, two of them raise significant problems.

    49.1. The first and best option is to vest the courts with a general discretion as to whether to issue a suspended quashing order, subject to some possible guiding criteria, in accord with the discussion of Question 1.

    49.2. The second option is to introduce the stronger formulation in the MoJ Response[38] for all quashing orders, which is unwarranted for the reasons set out above.

    49.3. The third option is to embrace the stronger formulation in the MoJ Response[39] for some cases, while leaving the option of using a suspended quashing at the general discretion of the court in other cases. This would require statutory definition of the types of case where the stronger formulation was warranted. This would be difficult

[37] Ibid, [69].

[38] Ibid, [69a-b].

[39] Ibid, [69a-b].

and would generate sterile and unhelpful secondary litigation about the types of case where the stronger formulation was to be applied.

Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

50. We consider it inappropriate for Parliament to legislate for any of the listed proposals on the issue of nullity. This is so for several reasons.

51. The first is that the debate about the metaphysic of nullity is principally an *academic debate* that has little impact on the practice of judicial decision-making. For example, although it is true that a number of prominent academics embrace a theory in accordance with which unlawful decisions are automatically null and void, they qualify this principle such that invalidity in practice only takes effect consequent on a decision by a judge to issue a remedy.[40] Because on such a theory 'automatic' invalidity depends upon the issuing of a remedy, any decision to suspend the effect of a quashing order or to declare that such an order should only apply prospectively would itself condition the effect of the finding of invalidity. There are reasons to question the intellectual coherence of such a position,[41] but the important point for present purposes is that embrace of such an understanding does not itself stand in the way of ensuring greater remedial discretion. The debate is in the end more about how to *describe* the legal situation – including accepted facts about remedial discretion – as opposed to how to circumscribe or direct legal decision-making.

52. That being said, there are exceptional cases in which the courts' embrace of the notion of automatic invalidity absent some further contextualising or qualifying principle has impacted upon their understanding of the remedial options available to them.[42] The first thing to stress about this is that such cases are genuinely exceptional and that in almost all situations the courts have availed themselves of, or accepted the possibility of,

[40] See, e.g., HWR Wade and CR Forsyth, *Administrative Law* (11th edn, OUP 2014) 247-251; PP Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 739-747; Mark Elliott and Jason Varuhas, *Administrative Law: Text and Materials* (5th edn, OUP 2017) 90-105.

[41] Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 CLJ 289, 294-298.

[42] See *Secretary of State for the* Home *Department v JJ and others* [2007] UKHL 45, [2008] 1 AC 385, [25]-[28] (although cf [48]-[55]); *Ahmed & Ors v HM Treasury (no 2)* [2010] UKSC 5, [2010] 2 WLR 378, [4]-[8]

remedial discretion when appropriate.[43] Secondly, we believe that any remaining hesitancy on the part of the courts would likely be overcome through the making of provision for further remedial discretion (either by way of the ability to suspend the effect of quashing orders, or through the creation of prospective quashing orders or both). Because the effect of such techniques is clearly inconsistent with an absolute understanding of nullity, their widespread availability should be enough to prevent the courts from limiting their own discretion through endorsement of a mistaken understanding of that concept.

53. Finally, we believe that the suggested statutory techniques for taming nullity would likely have the effect of increasing complexity and confusion in this area as opposed to clarifying matters. It will lead to considerable litigation in which courts will be forced to grapple with the distinctions that the MoJ Response proposes to enshrine in legislation.[44]

54. There are a number of difficulties with the MoJ Response's suggestions (a) and (c).

    54.1. They would require the courts to distinguish between issues going to jurisdiction or the scope of power and other kinds of public law wrong: a difficult conceptual divide that has long haunted the case law, with the possibility that any such distinction would end up being pragmatically manipulated by the courts to achieve favoured results.

    54.2. The suggested distinction is, as stated, intellectually unsustainable. It is predicated on a distinction between the government acting without any power and a wrongful exercise of power.[45] The assumption is that the first category is narrow, as exemplified by a tax tribunal deliberating on murder, wherein all other public law defects fall within the latter category, and can be regarded as wrongful exercises of

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[43] See, e.g., *In re Spectrum Plus Ltd* [2005] UKHL 41, [39]-[42] (prospective overruling accepted in principle); *Martin v Her Majesty's Advocate* , [43] (prospective order and suspension of effect of court's judgment both accepted in principle); *Salvasen v Riddell* [2013] UKSC 22, [52]-[57] (decision that Scottish Parliament had acted outside of its competence suspended in its effect); *R. (National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin), [2019] QB 481 (disapplication order relating to primary legislation held to be inconsistent with EU law suspended for a stated period); *Fratila v Secretary of State for Work & Pensions* [2020] EWCA Civ 1741 (discriminatory provision in Regulations quashed, but the order has been stayed to afford the government opportunity to appeal to the UKSC: https://cpag.org.uk/sites/default/files/files/Fratila-CoA-Final-Order_0.pdf). Note also that in *HM Treasury v Ahmed (No 2)* [2010] UKSC 5 the majority accepted that the court had the power to suspend the quashing order, though they thought it improper to exercise the power on the facts: 'Mr Swift submitted that this court has power to suspend the effect of any order than it makes. Counsel for the appellants conceded that this was correct and that concession was rightly made' ([4]).

[44] MoJ Response, (n 2), [81].

[45] MoJ Response, (n 2), [81c].

a power. This is conceptually wrong. If a tribunal exercises a power to tax for a purpose that is inconsistent with the legislation, or fails to take account of a mandatory relevant consideration when deciding on taxation, then it never had the power to tax in the circumstances in issue. It is, moreover, axiomatic that courts adjudicate on the cases that come before them, and on the facts as elaborated in those cases, often with multiple grounds of review at issue. To task them with making a distinction between different grounds at the remedial stage would overly complicate matters. If a decision-maker acts unlawfully its decision is invalid, and this should be the result, subject to any practical problems that flow therefrom, which might indicate that remedial discretion is required.

54.3. The distinction (outlined in para 49.1 above) also implies that suspending the effect of quashing orders or limiting their application to the future would not be possible in cases of jurisdictional error. It is worth noting in this regard that the Scotland Act 1988, s 102, provides for just such a possibility (removal of retrospective effect, or suspending application of the court's decision in the case of excess of competence).

55. The MoJ Response's suggestion (b), the presumption against nullity, would be in one sense superfluous: if a court issued a quashing order with suspended effect it is clear that the relevant unlawful action would continue to have legal effect for the time of the suspension. However, in another sense, suggestion (b) would be potentially damaging to the prospects of remedial flexibility, for it would require the courts to distinguish between situations in which the relevant presumption did and did not apply, with remedial discretion again being squeezed out of the picture in 'automatic' nullity cases.

56. The procedural exclusivity rule constitutes a timely warning of the risks attendant on 'reforms' of this nature. As judicially articulated,[46] this rule was designed to prevent 'abuse of process' by requiring that public law challenges be brought *only* via the judicial review procedure set out in Senior Courts Act 1981, s 31, rather than the writ procedure applicable to 'ordinary' (eg, contract and tort) claims, the latter involving a longer time-limit. Failure to fully define a 'public law' or 'ordinary' challenge – or the exact rules governing 'collateral' situations involving a mixture – meant that cases frequently thereafter went to the House of Lords concerning possible 'abuse'. However, a

[46] See *O'Reilly v Mackman* [1983] 2 A.C. 237; *Cocks v Thanet DC* [1983] 2 AC 286.

meaningful attempt to provide workable definitions would have required either the courts or the legislature to confront some extremely complex analytical and policy questions. It is unsurprising that the Law Commission later proposed a pragmatic solution allowing transfers from one route to another on a case-specific basis,[47] while the House of Lords ultimately accepted in *Mercury Communications v Director General of Telecommunications* that 'abuse' should in future be determined by courts by reference to the behaviour of the litigant rather than to assumed categories of case.[48] The lesson offered is that if procedure- or remedy-related rules presuppose substantive distinctions, unwanted litigation is likely to be avoided *only* by the provision of workable legislative or judicial definitions of the categories concerned. The alternative is to entrust courts to exercise a remedial discretion in individual cases, keeping in mind the rule of law-associated necessity for the articulation of full reasons for their decisions.

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

57. The MoJ Response seeks advice as to whether the methods that it posits, or other methods, could be devised so as to give effect to an ouster clause relating to a particular subject-matter area. Three such methods can be discerned in the discussion in the MoJ Response.

    57.1. *Qualification to the Ouster Clause:* the legislation would contain a 'safety valve' provision as to how the ouster clause is to be interpreted, such that the courts would not have to give effect to the clause in certain exceptional circumstances.[49]

    57.2. *Unlimited discretionary power to determine its own jurisdiction:* the MoJ Response[50] draws on the dissenting judgment of Lords Sumption and Reed in *Privacy International*,[51] to the effect that it would normally be Parliament's intention, when creating a body of limited competence, that this body was subject to judicial review on the ground of lack of competence (in the narrow sense), unless

[47] Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Report No 226, 1994).

[48] [1996] 1 WLR 48.

[49] MoJ Response, (n 2), [91].

[50] Ibid, [92].

[51] *Privacy International, R (on the application of) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22.

Parliament made it clear that it intended for that body to have 'unlimited discretionary power to determine its own jurisdiction'.[52] The MoJ Response proposes to enact this as a principle of interpretation for future ouster clauses. We take this to mean that any such ouster clause would be framed to state that Parliament intended the primary decision-maker to have unlimited power to determine its own jurisdiction.

57.3. *Local Law:* the MoJ Response[53] raises the possibility, albeit somewhat equivocally, that the primary decision-maker vested with the ouster clause could be justified as establishing its local law, which would be distinct from the general law of the land.

58. The following points should be borne in mind in this respect. They are related but distinct.

59. First, the likelihood of any such techniques being accepted by the courts depends crucially on the nature of the primary decision-maker. The dissent in *Privacy International* was predicated on the assumption that the IPT was an independent tribunal, exercising powers no different from those of the ordinary courts. There is nothing in this dissent, or in other cases, to substantiate the conclusion that Lord Reed or Lord Sumption would have reasoned in the same manner if the primary decision-maker had been a minister or government agency. We do not, therefore, think that the courts would be minded to accept an ouster clause framed to include provisions of the kind posited by the MoJ Response if the primary decision-maker were a minister, government agency or a body analogous thereto.

60. Secondly, the MoJ Response's justification for imposing such an ouster clause is cast in terms of preferring political to legal accountability.[54] There are two related difficulties with this reasoning.

60.1. If the primary decision-maker is indeed a tribunal, or something akin thereto, rather than a minister or government agency, then this by definition means acceptance of legal accountability, as opposed to political accountability. The exclusion of the ordinary courts in such instances clearly has nothing to do with a preference for political as opposed to legal accountability. The salient issue is whether the legal accountability will stop with the tribunal, or whether it will include the ordinary

[52] Ibid, [210].

[53] MoJ Response, (n 2), [93]-[94].

[54] Ibid, [86]-[87].

courts. There must then be some particular reason why the normal mechanisms of judicial review are sought to be wholly excluded in such instances. This is more especially so given that it is clear that the ordinary courts take account of the expertise of a tribunal when exercising their powers of appeal and review.[55]

60.2. If the primary decision-maker is a minister then there may be certain instances where the justification for ouster cast in terms of political as opposed to legal accountability might have some purchase, such as in relation to a decision to dissolve Parliament in a post-Fixed Term Parliaments Act 2011 world. These cases will, however, be rare. In most instances where a decision is taken by a minister or government agency the justification for an ouster clause cast in terms of political accountability to the exclusion of legal accountability is highly problematic. General talk of political accountability simply conceals political reality. If a minister protected by an ouster clause uses discretionary power for an improper purpose, or misconstrues the clear and established meaning of legal terms in the enabling legislation, the idea that this can or will be rectified through political accountability bears scant, if any, relation to political reality. The mechanism through which the grievance could be raised is far from obvious, and the efficacy of any such controls even less so. The idea that the matter would even be raised through parliamentary question, or select committee investigation, is very uncertain, and the suggestion that it would then be redressed in a manner that would benefit the injured party is dependent on a host of contingencies that render such a conclusion empirically very unlikely.

61. Thirdly, insofar as the MoJ Response frames the case for ouster clauses based on subject-matter suitability for judicial review, this is already considered by the courts when exercising their powers of review. Thus, the courts already show considerable respect for ministerial determinations in areas such as foreign policy and defence, as expressed through the developed law on justiciability.

[55] See, e.g., *R v Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd* [1993] 1 WLR 23; *R. (Jones) v First-tier Tribunal* [2013] UKSC 19; *R. (Wiles) v Social Security Commissioners* [2010] EWCA Civ 258.

62. A public authority local law system may *prima facie* still be subject to European Convention rights, and some sort of express exclusion would probably be necessary in order to prevent them from applying if this would otherwise be the case.[56]

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about Cart Judicial Review Claimants, and their protected characteristics.

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

63. Subsequent paragraphs respond to Questions 18 and 19 jointly.

64. The Equality Act 2010, s 149, sets out the duty to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between persons who share one of the listed protected characteristics in the Equality Act 2010, s 4,[57] and persons who do not share it. The duty is generally known as the Public Sector Equality Duty (PSED).[58] According to the Equality Act 2010 (Specific Duties) Regulations 2011, s 2, the government 'must publish information to demonstrate its compliance with the' PSED.

65. The MoJ Response anticipates that the proposals to remove '*Cart* judicial reviews' may have a differential impact on grounds of religion or race, and that this could constitute indirect discrimination. However, it regards any indirect discrimination as being

[56] See, as an example, the University Visitor system: Michael Beloff and Nicholas Bamforth, 'The University Visitor, Academic Judgment, and the European Convention on Human Rights' [2002] Judicial Review 221.

[57] Equality Act 2010, s 4, stipulates that: 'The following characteristics are protected characteristics—age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.'

[58] Equality Act 2010, s 149, holds that: A public authority must, in the exercise of its functions, have due regard to the need to—(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

extremely limited, quoting the IRAL finding that only 0.22% of '*Cart* judicial reviews' result in a finding of error of law.[59]

66. This, it claims, means that the policy which prima facie appears to be indirectly discriminatory is in fact justified.

67. The requirements for fulfilling the PSED are well-established and frequently rehearsed in courts. Most recently, the Court of Appeal in *Bridges*,[60] which in turn followed *Bracking*,[61] set out the following principles:

> (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.[62]

68. The duty is, therefore, one of process, not outcome. However, the Court of Appeal in *Bridges* stressed:

> That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good

[59] MOJ Response, (n 2), [51].

[60] *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin) (CA).

[61] *Bracking v Secretary of State for Work and Pensions* (2013) EWCA 1345

[62] *R (Bridges) v Chief Constable of South Wales Police* (n 60), 75]

> processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect.[63]

69. Most importantly, the Court emphasized:

> The reason why the PSED is so important is that it requires a public authority to give thought to the potential impact of a new policy which may appear to it to be neutral but which may turn out to have a disproportionate impact…. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.[64]

70. In the light of the above principles, it is clear that more needs to be done by the MoJ to discharge its obligations under the PSED. It is not sufficient to, for example, speculate on the potential discriminatory impact of removing '*Cart* judicial reviews'. Nor is it sufficient to request that consultation respondents provide the MoJ with information on '*Cart* judicial review' claimants, and their protected characteristics, particularly given that, as stated above, the PSED is non-delegable.

71. There are, therefore, at least two issues which need further consideration:

    71.1. evaluating the proposed restrictions to '*Cart* judicial review' in light of all nine protected characteristics listed in the Equality Act 2010, s 4; and,

    71.2. conducting a transparent and properly-reasoned justification analysis.

72. Pursuant to this, while we have not been able to find information on '*Cart* judicial review' claimants that is disaggregated by their protected characteristics, the majority of '*Cart*

[63] Ibid [176]

[64] Ibid [179], [181]

judicial reviews' appear to be brought in relation to asylum and immigration cases.[65] Consequently, in the paragraphs that follow, we focus on the impact of the proposals on this group. The Ministry of Justice is, however, required to fulfil its PSED obligations, in relation to *all* those effected by its proposals.[66]

(i) Protected Characteristics:

73. Of the nine protected characteristics covered by the PSED, the MoJ Response only refers to race or religion in relation to differential impact. To discharge the duty, the government needs to have due regard to the impact on all the protected characteristics. If, as the government acknowledges, it does not have sufficient information, the *Bridges* principles state that there is a duty to acquire it. In particular, the fact that certain groups with protected characteristics are already disadvantaged in the asylum and appeal process should put the government on notice that a full equalities impact assessment of withdrawing '*Cart* judicial review' on these groups is required to discharge the PSED. Below we point to evidence of disadvantage in the asylum and appeal process in relation to sex and gender, sexual orientation and age, which demonstrates that a detailed impact assessment is required in relation to the proposal to withdraw '*Cart* judicial review'.

74. *Sex and gender:* A cursory review of relevant Home Office statistics reveals disparities in the number and proportion of male and female asylum-seekers of different nationalities who are compelled to appeal their initial asylum decisions and in these appeals' outcomes.[67] Such quantitative evidence is complemented by research that demonstrates that women experience particular disadvantage in the asylum process. In qualitative research based on interviews with judges, lawyers and asylum-seekers, judges and legal representatives stated that there were two specifically challenging aspects of asylum appeals often encountered in women's cases:[68]

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[65] National Statistics, *Civil Justice Statistics Quarterly: October to December 2020 Tables.* See further J. Bell, 'Digging for Information about Cart JRs', UK Const L Blo (1st April 2021) (available at https://ukconstitutionallaw.org/).

[66] It will be recalled that *Cart* (n 13**Error! Bookmark not defined.**) involved two claims, one concerning the then Social Security and Child Support Tribunal the other concerning the First-tier Tribunal (Immigration and Asylum Chamber).

[67] Home Office, *Immigration Statistics: Asylum and Resettlement - Asylum appeals lodged and determined* (published 25 February 2021).

[68] Gina Clayton and others, *Through her Eyes: Enabling women's best evidence in UK asylum appeals* (NatCen 2017) 41. See also D Singer 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe" in E Arbel, C Dauvergne and J Millbank (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).

74.1. Firstly, gender-based violence is commonly an issue and this raises particular challenges in obtaining and assessing evidence. In particular, psychological harm is difficult to comprehend and evidence. Whether the claim succeeds on appeal is influenced by how effectively these challenges are addressed.

74.2. Secondly, it is common for women to have been subject to or in fear of harm from family or other private individuals, rather than the state. This raises further issues as to whether the woman could be effectively protected in her home state.[69]

Removal of the possibility of '*Cart* judicial reviews' might, therefore, have an indirectly discriminatory effect on grounds of sex or gender. All of the potential gender impacts, not only the two outlined above need to be examined within a detailed equality impact assessment for the PSED to be properly fulfilled.

75. Even a quick search of decisions in the Immigration and Asylum Chamber,[70] revealed cases in which '*Cart* judicial review' succeeded in cases of gender-based violence. One concerned a woman who had been trafficked and experienced gender-based violence as a migrant domestic worker from the Philippines, but whose claim was rejected on the grounds that she could refuse jobs because of the risk of trafficking. Permission to appeal was refused by both the First-tier and the Upper Tribunal, but on a '*Cart* judicial review' of the Upper Tribunal's refusal, the decision to refuse permission was quashed. The case then came before the Upper Tribunal (Immigration and Asylum Chamber) which set aside the decision of the First-tier Tribunal on the basis that it had made an error on a point of law, and the appeal was allowed on asylum and human rights grounds.[71]

76. *Sexual Orientation and Gender Reassignment*: Similarly, there is evidence that many individuals seeking protection in the UK because of a well-founded fear of persecution in their home countries due to their sexual orientation or gender identity face significant obstacles in the asylum process.[72] The great majority of claims on the basis of sexual orientation and gender identity (SOGI) have been denied, most frequently because decision-makers do not believe the claimant to be gay, lesbian, bisexual, transgender or to identify as gender diverse. Research suggests that tribunals look for stereotypes based

[69] Clayton and others, (n 68), 41, 43

[70] tribunalsdecisions.service.gov.uk searching by keyword 'Cart'

[71] https://tribunalsdecisions.service.gov.uk/utiac/pa-13132-2018

[72] A. Briddock, 'The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of Law and Procedure' (2016) 4 Birkbeck Law Review 123

on Western assumptions, in particular, a stereotypical white, male, middle-class gay identity.[73] Research published in 2018,[74] which included 32 decisions of the First-tier Tribunal made from March 2015 onwards, draws on several illustrative examples of First-tier decisions where the Tribunal disbelieved the claimant because their account did not show any 'particular turmoil' or conflict about their sexuality; or expected the claimants to be 'discreet' on their return and therefore escape detection. All of these were overturned by the Upper Tribunal. Andrade's 2020 study found that, based on Home Office statistics, there were 5,916 claims for refugee status based on sexual orientation between 2015 and 2017, most of them by nationals from Pakistan, Bangladesh, Nigeria, Uganda and Iran.[75] Given that these claimants come from very different cultures, there is a risk that their claims might not be believed because of stereotypical understandings of SOGI, as the illustrative cases show. Once again, a quick search of decisions in the Immigration and Asylum Chamber,[76] revealed one in which a '*Cart* judicial review' had been brought and which concerned these very issues – the initial refusal of a gay male asylum-seeker's claim for protection on the basis of his sexual orientation on credibility grounds.[77] Consequently, to discharge the PSED in relation to the withdrawal of '*Cart* judicial review', the government will need to investigate its potentially discriminatory impact on grounds of sexual orientation and gender reassignment in relation to LGBTQI and non-gender conforming asylum seekers.

77. *Age*: Age is a further possible area of discrimination. It is well-established that determining an individual's age is not a scientific process, but rather is difficult and subjective.[78] In 2019, the Court of Appeal required the Home Office guidance on assessing age to be revised, so that the words 'significantly over 18' in the relevant guidance should be revised to 'significantly over 25' because of the extent of the risk that

[73]Nina Held What does a "genuine lesbian" look like? Intersections of sexuality and 'race' in Manchester's Gay Village and in the UK asylum system. In: Francesca Stella and others (eds) *Sexuality, Citizenship and Belonging: Trans-national and Intersectional Perspectives* (Routledge 2015) 131-148.

[74] UK Lesbian and Gay Immigration Group, 'Still falling short: The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity' (2018) <https://uklgig.org.uk/wp-content/uploads/2018/07/Still-Falling-Short.pdf> accessed 16 April 2021.

[75] V Andrade 'The British and South African approaches based on sexual orientation and gender identity' (2020) 28(590 REMHU, Rev. Interdiscip. Mobil. Hum. Brasília May/Aug. 79.

[76] tribunalsdecisions.service.gov.uk searching by keyword 'Cart and sexual orientation'

[77] *MSR v Secretary of State for the Home Department UT* (IAC) Appeal Number: PA/14149/2016

[78] *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 [52].

the criteria for determining whether an individual is a child could be erroneous.[79] There remain many areas in which a decision made by a First-tier Tribunal is based on criteria which could be directly or indirectly discriminatory on the basis of age.[80] Here too, the government should conduct a full impact assessment both to determine the actual statistics and the impact of closing off the possibility of '*Cart* judicial review'.

78. *Race and religion*: The MoJ Response acknowledges that there could be indirect discrimination on grounds of race and religion. It also states that 'we do not collect comprehensive information about court users generally, and specifically those involved in Cart proceedings, in relation to protected characteristics'.[81] As per *Bridges* and *Bracking*, if the information required to discharge the PSED is not available, there is a duty to acquire it. Furthermore, information is available on the *nationality* of all asylum applicants (and of immigration applicants, by various categories). This can be checked against initial, and then final, decision rates. The Home Office does publish information, some of which is disaggregated by sex, about the number/percentage of cases that are brought by people of various nationalities, are decided and then appealed.[82] Although this cannot be matched to '*Cart* judicial reviews', or any particular protected characteristic, the data clearly demonstrates the importance of robust appeal processes.

79. To take just one example from the dataset, Zimbabweans had an initial asylum grant rate of 19% in 2018, but the estimated final grant rate for Zimbabweans in the same year was 47%. The average (of all nationalities) asylum initial grant rate for 2018 was 46%. Applicants from Zimbabwe are/were, therefore, more likely than other applicants to have their initial claim for asylum incorrectly rejected and consequently, are more likely to be adversely affected by reforms that reduce their opportunities for correcting this.[83] This is clearly an example of potential indirect discrimination on grounds of race, and its relationship to '*Cart* judicial review' needs further investigation.

80. In respect of general the duty to obtain and investigate evidence, it is worth recalling one of the Court of Appeal's conclusions in *Bridges*: 'We also acknowledge that, as the

[79] *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872

[80] Refugee Council Policy Briefing, *Age Disputed Young People in the Asylum System* (June 2019).

[81] MOJ Response (n 2) [113- 114].

[82] Home Office, *Immigration Statistics Asylum and Resettlement – Outcome analysis of asylum applications* (published 27 August 2020, updated 25 February 2021) see footnote All the relevant datasets are available here Asylum and resettlement datasets - GOV.UK (www.gov.uk).

[83] Home Office, *Immigration Statistics Asylum and Resettlement – Outcome analysis of asylum applications* (published 27 August 2020, updated 25 February 2021).

Divisional Court found, there was no evidence before it that there is any reason to think that the particular AFR [automated facial recognition] technology used in this case did have any bias on racial or gender grounds. That, however, it seems to us, was to put the cart before the horse. The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account'.[84]

(ii) Justification

81. The government acknowledges that there might be indirect discrimination on grounds of race and religion, but states that it is justified on the basis that the impact is extremely limited, quoting the IRAL finding that only 0.22% of '*Cart* judicial reviews' result in a finding of error of law. Under the Equality Act 2010, s 19, indirect discrimination is only justified if the respondent 'can show it to be a proportionate means of achieving a legitimate aim'. It is thus necessary to show both that the aim is legitimate and the means (abolishing '*Cart* judicial review') is a proportionate means of achieving that aim.

82. *Legitimate Aim*: The government's aim in abolishing '*Cart* judicial review' appears to be to save in costs and court time. It is well-established that although budgetary considerations may influence the choice of social policy, they cannot themselves constitute the sole aim of that policy. According to the Supreme Court in *O'Brien v Ministry of Justice*, 'sound management of the public finances may be a legitimate aim, but that is very different from deliberately discriminating against part-time workers in order to save money'.[85] Moreover, 'a discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost'.[86] Most recently, in *Heskett*,[87] in 2020, it was stated:

> It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide

[84] *R (Bridges) v Chief Constable of South Wales Police*, (n 60), [82].

[85] *Ministry of Justice v O'Brien* [2013] UKSC 6 [63].

[86] Ibid [69].

[87] *Heskett v Secretary of State* [2020] EWCA Civ 1487.

> whether that aim is legitimate. … It is only if the fair characterisation is indeed that the aim was *solely* to avoid increased costs that it has to be treated as illegitimate.

83. The MoJ Response relies primarily on the figure of 0.22% success rate as support for its position that '*Cart* judicial reviews' 'come at a considerable cost'.[88] We have already established above that the figure of 0.22% is not accurate.[89] The MoJ Response states that the full cost-benefit impact assessment is still to follow. For the purposes of justifying proposing an indirectly discriminatory policy, it would need to show, not merely what those costs are, but also that the aim was not solely to avoid increased costs.

84. The second potential justification of the policy set out by the MoJ Response is that rendering Upper Tribunal decisions justiciable by judicial review is contrary to the intention of Parliament. As noted above, Parliament did not communicate a clear intention on this issue. [90] From the MoJ Response alone, therefore, the government has not yet established that it has a legitimate aim.

85. *Proportionality*: If the government can establish an aim which is not solely that of costs, it still needs to demonstrate that the abolition of '*Cart* judicial review' is a proportional means of achieving the end of cost savings and court efficiency. The standard is high in relation to protected characteristics listed in the Equality Act 2010. The prospects of success or loss must be weighed against the extremely high cost to the claimant if a flawed decision has been made – namely being exposed to persecution and/or other serious harm in their country of origin. Even on a quick look at the tribunal decisions, we have found four in which the '*Cart* judicial review' process has played a central role in reversing legally flawed decisions[91] – at least one of which involved gender,[92] and one involving age.[93] In *UNISON*, Baroness Hale held that in determining the proportionality of the measure (in this case to charge higher tribunal fees) in achieving the cost-cutting

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[88] MoJ Response, (n 2), [51]

[89] See [14]-[16] above, this document.

[90] See [18] this document.

[91] https://tribunalsdecisions.service.gov.uk/utiac/pa-11680-2016-pa-11659-2016; https://tribunalsdecisions.service.gov.uk/utiac/pa-13132-2018; https://tribunalsdecisions.service.gov.uk/utiac/pa-06610-2017; https://tribunalsdecisions.service.gov.uk/utiac/pa-00029-2016

[92] https://tribunalsdecisions.service.gov.uk/utiac/pa-13132-2018

[93] https://tribunalsdecisions.service.gov.uk/utiac/pa-00029-2016

aims of the measure, the fact that both meritorious and unmeritorious claims were deterred should be taken into account.[94] This principle applies by analogy to '*Cart* judicial review'.

86. Furthermore, in determining proportionality, other less discriminatory alternatives should be considered. Alternative options include improving the quality and availability of legal advice and representation in immigration and asylum cases; improving tribunal processes to safeguard against legal error[95] and/or limiting applications to only certain categories of case (e.g. asylum cases and those engaging rights protected by the European Convention on Human Rights). To fulfil the PSED, the government must demonstrate that removing '*Cart* judicial review' is the least intrusive measure.

87. On the legal advice and representation point, *if* a disproportionate number of '*Cart* judicial reviews' are unsuccessful, this may be because many appellants in asylum and immigration cases are compelled to represent themselves.[96] Increased numbers of litigants in person have resulted in significantly increased costs for both the MoJ[97] and applicants. As the then Master of the Rolls, Lord Dyson, told the House of Commons Justice Committee:

> It is impossible to prove but it would be extraordinary, frankly, if there were not some cases that are decided adversely to a litigant in person which would have been decided the other way had that litigant in person been represented by a competent lawyer. It is inevitable.[98]

88. In reviewing these other, potentially less discriminatory alternatives, we would like, therefore, to highlight the significant negative impact that successive 'reforms' of legal aid have had on both asylum and immigration applicants and the civil justice system as

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[94] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [129].

[95] [24] this document.

[96] A number of resources have been developed to assist applicants in this position, see for example, Right to Remain's Toolkit pages on judicial review at https://righttoremain.org.uk/toolkit/jr/. These pages also explain some of the current legal aid system's deficiencies.

[97] The National Audit Office (NAO) found that the increase in litigants in person had led to an estimated £3.4 million of additional costs for the Ministry of Justice in the family courts alone, NAO, *Implementing reforms to civil legal aid*, (HC 784, Session 14-15, November 2014) [1.17]-[1.34].

[98] House of Commons Justice Committee *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (Eighth Report of Session 2014-15, HC 311, 2015)) [137]. This comment concerns litigants in person in the family courts, but can be applied by analogy to the immigration and asylum applicants.

a whole[99] and to call on the MoJ to ensure that all those who require publicly funded legal advice and representation receive it.

89. Consequently, to comply with the law, the government must publish and make publicly available the information it has considered in having due regard to the equality impacts of removing '*Cart* judicial review'.

[99] See, for example, ibid, NACOMM, Refugee Action *Tipping the Scales: Access to Justice in the Asylum System* (NACOMM, Refugee Action 2018); Law Society, *Access Denied? LASPO four years on: a Law Society review* (Law Society 2017); Helen Connolly *Cut Off From Justice: The Impact of excluding separated migrant children from legal aid* (The Children's Society, 2015).