



Law Society  
of Scotland

# Law Society of Scotland

## Second Reading Briefing on the Judicial Review and Courts Bill

August 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the Second Reading Briefing of the Judicial Review and Courts Bill consultation. The sub-committee has the following comments to put forward for consideration.

## General Comments

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### The Judicial Review and Courts Bill

The [Judicial Review and Courts Bill](#) introduces reforms to the delivery of justice primarily in England and Wales.

In particular the Bill relates to Judicial Review, Courts, Tribunals and Coroners, English Criminal Procedure, Online Procedure in English Civil Courts and Reserved Tribunals, Employment Tribunals and the Employment Appeal Tribunal, Coroners and courts in the City of London.

### Specific Comments

Part 1 Judicial Review

#### Clause 1 Quashing Orders

Clause 1 inserts a new section 29 A into the Senior Courts Act 1981.

#### Section 29A (1)

Section 29A (1) gives a court the power to include in a quashing order provision

- (a) for the quashing not to take effect under a date specified in the order (“a suspensive quashing order”) or
- (b) removing or limiting any retrospective effect of the order (“a prospective quashing order”).

This provision will give a court the power to make a suspensive quashing order or a prospective quashing order in every case where a court decides to make an order to quash or reduce some provision in

subordinate legislation or some administrative act or decision by Ministers or some other body because it is invalid and ultra vires.

In their Report, the Independent Review of Administrative Law (IRAL) thought that a suspended quashing order would be useful in providing flexibility in two general areas –

- (a) where the case raises significant constitutional questions or where the quashing decision would pose significant risks to national security or the public interest and the order would allow Parliament to clarify or amend the position; and
- (b) where the order would allow the defect to be corrected by new legislation or further administrative action.

The 1981 Act does not apply to Scotland and the Scottish courts do not make orders called quashing orders. Nevertheless, it may be interest to note that, in responding to the Lord Chancellor's Consultation, the Society took the view that it would be useful to give the English courts the power to make provision analogous to section 102 of the Scotland Act 1998.

The Government appears to have accepted the Society's view because the wording of section 29A (1) is very similar to that in section 102. In particular, it goes further than IRAL recommended because it provides not only for suspended quashing orders but also for orders which modify the retrospective effect of the quashing orders, prospective quashing orders

Section 102 applies only in certain circumstances - where a court or tribunal decides

- (a) that an Act of the Scottish Parliament or some provision in it is not within the legislative competence of the Scottish Parliament or
- (b) that a member of the Scottish Government does not have the power to make a provision of subordinate legislation or purports to exercise a function outside devolved competence.

In these circumstances, section 102 (2) provides that the court or tribunal may make an order

- “(a) removing or limiting any retrospective effect of the decision, or
- (b) suspending the effect of the decision “

It might be helpful were we to set out our approach to this issue:

#### **a. Precedent for section 102 of the Scotland Act 1998**

Section 102 of the Scotland Act 1998 is derived from s.172 (1)(b) of the Constitution of South Africa which empowers a court, when declaring invalid any law or conduct" which is inconsistent with the Constitution, to make. "(i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect." An example of where the Constitutional Court made such orders was

the *First National Bank of South Africa v Land and Agricultural Bank of South Africa* <http://www.saflii.org.za/za/cases/ZACC/2000/9.pdf>

#### **b. Policy necessity for section 102 of the Scotland Act**

The Scotland Act 1998 provides for what it is competent for the Scottish Parliament and Scottish Government to do. Section 29(1) provides that, if a provision of an Act of the Scottish Parliament (ASP) is outside its legislative competence, it is “not law”. There are similar provisions in relation to any subordinate legislation made, or other act, by a member of the Scottish Government (see, for example, sections 54 and 57(2)).

Given that background and the consequences which could follow if a court were to decide that some provision of an ASP or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, strictly null and void, it was clearly appropriate, and even necessary, that the court should be given similar powers as in the South African Constitution to limit the retrospective effect of its decision and, in particular, to suspend the effect of its decision so as to enable the defect to be remedied.

#### **c. Legal necessity for section 102 of the Scotland Act**

At the time of the Scotland Act, there were doubts as to whether, when a court decided that some act was ultra vires or null and void, it had, or would consider it appropriate to exercise, any inherent powers to make any such order. Given the background of the vires provisions in that Act, it was particularly doubtful whether a court would do so in the context of that Act,

The effect of section 102 is therefore to make it clear that, even although a court decided that some provision of an ASP or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, strictly null and void, the court could nevertheless make an order limiting the retrospective effect, or suspending the effect, of its decision.

This express statutory power would override any qualms which a court might otherwise have had about the appropriateness of making any such order, such as were subsequently expressed by the Supreme Court in *Ahmed (No 2) v HM Treasury 2010 UKSC 5*. In that case, it was held, by a majority, that it would not be appropriate to suspend a quashing order because it would be inconsistent with its nullity effect. In this context, it is noticeable that the Supreme Court did not have any similar qualms in *Cadder v. HMA [2010] UKSC 43* at 58 when it held that it had, and could appropriately exercise, its inherent discretionary power to limit the retrospective effect of its decision that some act of the Lord Advocate was ultra vires.

#### **d. Examples of cases where orders under section 102 have been used.**

Section 102 has been used in a number of cases for example:

- a. *Salvesen v Riddell [2013] UKSC 22*. This case was a “devolution issue” appeal, under paragraph 13 of Schedule 6 of the Scotland Act 1998, from the Court of Session. The case concerned a challenge to the legality of section 72 of the Agricultural Holdings (Scotland) Act 2003 on the basis that it was

incompatible with the applicant's right to property, as protected by Article 1 of the First Protocol of the European Convention of Human Rights (A1 P1). The legislation under scrutiny sought to reform the regulation of the relationship between agricultural tenants and landlords. Section 72 of the Agricultural Holdings (Scotland) Act 2003 sought to change the way that limited partnerships between tenants and landlords could be terminated. The Supreme Court held that section 72 (10) of the 2003 Act was outside the legislative competence of the Scottish Parliament but made an order, under section 102 (2) (b) of the Scotland Act 1998, to suspend the effect of its decision for 12 months (or such shorter period as was necessary for the Scottish Parliament to legislate). This was to enable the Scottish Government and Parliament to correct the "defect" in the legislation. In 2014 the Scottish Government produced The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 in response to the judgment, which was approved by the Scottish Parliament.

- b. *P v Scottish Ministers [2017] CSOH 33* concerned standard and enhanced disclosures issued under the Police Act 1997 ("the 1997 Act") and disclosures of PVG scheme records issued under the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") – these types of disclosures are referred to collectively as 'higher level' disclosures. In 2015, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 ("the 2015 Remedial Order") amended the 1997 and 2007 Acts in relation to the spent conviction information which could be disclosed in a higher-level disclosure. That 2015 Remedial Order introduced lists of offences into schedules 8A and 8B of the 1997 Act. Schedule 8A lists certain spent convictions for which will continue always to be disclosed due to the serious nature of the offence. In *P v Scottish Ministers*, P raised a petition for judicial review in relation to the disclosure of a previous conviction for lewd and libidinous practices on his PVG scheme record. Although the conviction was spent, the offence was included in P's record because it was on the Always Disclose List. The court declared that, insofar as the regulations require automatic disclosure of P's conviction before the Children's Hearing, the 2015 Remedial Order unlawfully and unjustifiably interfered with the petitioner's right under Article 8 of the ECHR, and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998.

However, the effect of the court order was suspended under section 102 for nine months to allow Ministers to remedy the legislation. The 2018 Remedial Order set out amendments to the 1997 and 2007 Acts. The effect of the amendments was that recipients of higher-level disclosures under those Acts whose disclosure contains information about a conviction for an offence listed in the Always Disclose List will in certain specified circumstances have the right to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

#### e. **Section 102 in a non-devolution context**

Section 102 only applies in a devolution context under the Scotland Act where a court holds that a provision of an Act of the Scottish Parliament or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, null and void.

There is no statutory equivalent to section 102 in a non-devolution context where a Scottish court holds that some subordinate legislation or some administrative or executive act by a Government Minister or other body is ultra vires for some reason which is not relevant to legislative or devolved competence under the Scotland Act.

It is not clear whether, in a non-devolution context, a Scottish court would have the power at common law to suspend the effect of its decision or to limit its retrospective effect. The question whether some statutory provision is required to give a Scottish court such a power is something which will no doubt be considered by the Scottish Government.

### **Section 29A (2)**

This subsection provides that in using the powers in 29A (1), the court may make that order subject to conditions so that, for example, the quashing order will not take effect if certain conditions are met. The clause does not limit or prescribe the conditions, leaving this to the court's discretion.

### **Section 29A (3) (4) and (5)**

These subsections provide in effect that, when a court makes a suspensive or prospective quashing order, the invalid act is to be treated as valid until the order takes effect. These provisions mean that, when a court makes such an order, it has the effect of rendering valid something which was invalid, or even null and void, until the suspensive or prospective order takes effect. These effects may be implicit from the making such an order but providing for them expressly demonstrates the wide powers which a court is being given. A court could, for example, decide that some subordinate legislation or administrative act or decision is invalid or ultra vires because it is outwith the powers given by Parliament but nevertheless it will suspend the invalidity or remove its retrospective invalidity and thus give validity to something which Parliament did not intend. There are no similar provisions in section 102.

### **Section 29A (8)**

This subsection sets out a list of non-exhaustive factors to which a court must have regard when deciding whether to exercise the power to make a suspensive or prospective quashing order. The factors include:

- (a) the nature and circumstances of the relevant defect;*
- (b) any detriment to good administration that would result from exercising or failing to exercise the power;*
- (c) the interests or expectations of persons who would benefit from the quashing of the impugned act;*
- (d) the interests or expectations of persons who have relied on the impugned act;*
- (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;*
- (f) any other matter that appears to the court to be relevant.*

The IRAL Report recommended that it should. “be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity” (para 3.69) However, given the considerable powers which a court is being given, it seems to the Society that it is right that a court should be required to have regard to certain factors, provided it is possible, as subsection (8)(f) provides, for a court to have regard to other factors.

It is noticeable that section 102(3) requires a court, in deciding whether to make an order under section 102 to “(among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected”. This factor is not expressly mentioned in the list in section 29A (8) and it is considered that it should be.

### **Section 29A (9)**

This subsection provides that a court must make a suspensive or prospective quashing order if it considers that such an order “would, as a matter of substance, offer adequate redress in relation to the relevant defect... unless it sees a good reason not to do so”

The Explanatory Notes (paragraph 21) refer to this provision as a “general presumption”, but it is more than a presumption. A court is required to make such an order if it is of that opinion unless it sees a good reason not to.

It is not clear what this means. Does it mean that a court is required to make such an order where they consider that it would, as a matter of substance, offer only the person bringing the judicial review adequate redress? If so, what about the interests of persons who are not parties to the proceedings which may be adversely affected by making such an order? This seems to run counter to the factor which the courts are required to consider by section 102(3). This would seem to be very unjust and would doubtless be a “good reason” why a court should not make the order. But this calls in question the need for this provision at all.

It is suggested that this subsection should be deleted.

### **Clause 2 Exclusion of review of Upper Tribunal’s permission-to-appeal decisions**

Clause 2 removes *Cart* Judicial Reviews (*R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2011] UKSC 28) and *Eba (Respondent) v Advocate General for Scotland (Appellant)* [2011] UKSC 29 by way of an ouster clause. This will remove an individual’s ability to judicially review a decision of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal. Clause 2 will apply UK-wide in relation to matters of reserved law (see subsection (5)). Clause 2 will remove the jurisdiction of the Court of Session over decisions of the Upper Tribunal (under the Tribunals Courts and Enforcement Act 2007 (‘TCEA’)) on applications for permission to appeal from the First-tier Tribunal. The bill does not apply to cases which relate to devolved policy and the legislative consent convention does not apply. Because the TCEA is reserved (insofar as tribunals are dealing with reserved matters), any changes required to Scottish legislation will be consequential.

## Our Comment

The justification for the ouster provision in relation to the law in England and Wales and reserved matters seems to be the high volume of applications and low number of successful outcomes. It is worth noting that the evidence in England has been disputed:

[Joe Tomlinson and Alison Pickup: Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews – UK Constitutional Law Association](#)

[Mikołaj Barczentewicz: Should Cart Judicial Reviews be Abolished? Empirically Based Response – UK Constitutional Law Association](#)

We have no evidence that there is the same problem in Scotland. On the contrary there is a good example of a recent successful Cart/Eba Judicial Review: *CM (Petitioner) 2021 CSIH 15*, in which the First Tier Tribunal (FtT), Upper Tribunal (UT), and the Lord Ordinary misunderstood the petitioner's evidence and the Inner House intervened to reduce the UT's decision refusing permission to appeal:

[https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csih015.pdf?sfvrsn=81f7eddd\\_0](https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csih015.pdf?sfvrsn=81f7eddd_0)

We are not persuaded that the proposition that the UT has already considered and dismissed the case is well founded. This suggests a detailed adversarial hearing took place with a reasoned judgement being issued by the UT, but this is not what happens. Only the FtT issues a reasoned judgement. Applications for permission to appeal to the FtT, and subsequently to the UT, are both considered by a single judge and decided on the papers. The reasoning is usually very brief. A hearing before a Lord Ordinary in a Cart/Eba judicial review is the first opportunity to put forward detailed oral submission addressing why the FtT erred in law.

Furthermore, we question the Government's conclusion that the Legislative Consent Convention does not apply to the abolition of *Cart* judicial reviews in respect of reserved tribunals in Scotland. Judicial review is a devolved matter under the Scotland Act 1998, being included in the definition of *Scots private law* in section 126(4). While the Scottish Parliament does not have the power to modify the law relating to reserved matters (Sch 4, para 2(1)) that provision only applies to the rules of judicial review insofar as the rule in question is "special to a reserved matter" (Sch 4, para 2(3)). According to the Supreme Court majority in *Martin v Most* [2010] UKSC 10, a general rule which applies to both reserved and devolved matters is *not* "special to a reserved matter".

The rule established for Scotland in *Eba v Advocate General for Scotland* that unappealable decisions of the Upper Tribunal are subject to judicial review in limited circumstances is not a rule which is special to reserved matters because (as the Bill implicitly acknowledges) it currently applies to devolved and reserved tribunals alike. In other words, it forms part of the unified law of judicial review in Scotland applicable to both reserved and devolved matters, and it would be within the competence of the Scottish Parliament to modify that general rule for both reserved and devolved matters.

The abolition of *Cart/Eba* judicial reviews in Scotland by clause 2 of the Bill has the effect not of *modifying* a rule which is special to a reserved matter, but rather of *creating* such a rule, as it means that, in future, there will be a difference in the amenability of reserved and devolved tribunals to judicial review in Scotland. In our view, this engages both limbs of the Legislative Consent Convention: 1. it relates to a matter which is currently within the competence of the Scottish Parliament; and 2. it has the effect of narrowing the future competence of the Scottish Parliament by creating a rule special to a reserved matter which the Parliament will not in future be able to modify.

In our view the decision in *Cart* provides an important safeguard which is necessary to prevent injustice. The Government should reconsider the necessity for the ouster provision in clause 2.

## Part 2 Courts, Tribunals and Coroner

We have no comment to make on Chapter 1 Criminal courts or Chapter 2 Online Procedure

### Chapter 3 Employment Tribunals and Employment Appeal Tribunal

Clauses 32-36 transfer the responsibility for the making of Employment Tribunals (ETs) procedure regulations and Employment Appeal Tribunal (EAT) rules from the Secretary of State for Business, Energy and Industrial Strategy (SoS BEIS) and the Lord Chancellor respectively to the Tribunal Procedure Committee (TPC), as a power to make unified Employment Tribunal Procedure Rules equivalent to the TPC's rule making power under the Tribunals, Courts and Enforcement Act 2007; Clause 35 allows for the delegation of judicial functions in the ETs and the EAT to authorised case officers on a similar basis to the First-tier Tribunal and Upper Tribunal. The Employment Tribunals measures extend to England, Wales and Scotland. Responsibility for Employment Tribunals in Scotland is due to transfer to the Scottish Government following the Government's acceptance of the recommendations of the Smith Commission. Until that point, the rule making Committee would have rule-making powers for the Employment Tribunal and Employment Appeal Tribunal in England and Wales and the equivalent Tribunals in Scotland.

### **Our Comment**

Chapter 3 provisions seem to be sensible and will improve the working of the ETs and EAT.

We have no comment to make on Chapter 4 Coroner's Courts or Chapter 5 Other Provisions about Courts.



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