Immigration aspects of the Judicial Review and Courts Bill

Immigration analysis: In this analysis, Alasdair Mackenzie, barrister at Doughty Street Chambers, looks at the aspects of the Judicial Review and Courts Bill which will be of interest to immigration practitioners, including the proposed restrictions on 'Cart' judicial reviews.

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Restrictions on 'Cart' judicial reviews

Of most immediate interest to immigration practitioners in the Judicial Review and Courts Bill is clause 2. This seeks, by inserting new section 11A into the Tribunals, Courts and Enforcement Act 2007, to restrict so-called 'Cart' judicial reviews: applications to the High Court for judicial review of decisions of the Upper Tribunal (UT) to refuse permission to appeal to itself from the First-tier Tribunal (FTT). The jurisdiction of the High Court to consider such cases, albeit in limited circumstances, was established by the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663.

Proposed s 11A introduces an ouster clause: it describes a decision by the UT on permission to appeal as 'final, and not liable to be questioned or set aside in any other court' (s 11A(2)), and for good measure adds that the UT 'is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision' (s 11A(3)(a)) and that 'the supervisory jurisdiction [of the High Court] does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision' (s 11A(3)(b)). That appears at first sight (and subject to exceptions) to be a strong ouster clause: harder for the courts to reason their way around than, for instance, that considered in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.

The proposal stems from the recent report of the Independent Review of Administrative Law, chaired by Lord Faulks QC (the Faulks report). Notably, the review's terms of reference did not specifically include the possible abolition of Cart cases, and it was (unidentified) judges themselves who suggested that idea (Faulks report, introduction, §10), apparently on the basis that Cart JRs take up too much court time for too little benefit to the interests of justice.

As currently set out in the Civil Procedure Rules at 54.7A, Cart claims involve a truncated judicial review process, in which (in essence) the decision challenged is automatically quashed after permission is granted, if no-one comes forward to defend it. Very few cases proceed to a full hearing. The test for being granted permission is high: not only must there be 'an arguable case, which has a reasonable prospect of success', that both the UT and the FTT erred in law, but also either the claim must raise 'an important point of principle or practice' or there must be 'some other compelling reason to hear it'.

The 'important point of principle or practice' provision is intended to prevent the Tribunal becoming a legal 'silo' in which the law becomes permanently ossified; the 'compelling reason' provision aims to ensure that serious failings in the Tribunal system can be corrected.

The Faulks review's recommendation for change regrettably appears to have been based on a misunderstanding of the statistics: having adopted a narrow definition of 'success' and assumed that outcomes would always be recorded in legal databases, it found a success rate of only 0.22% in Cart cases. Those figures have been widely debunked, including by the Immigration Law Practitioners' Association and the Public Law Project. In the Explanatory Notes to the Bill at §26 the government assesses the success rate as 3%, which also remains disputed, but even if the figure is accurate, these cases by definition often involve serious implications for the lives and well-being of those affected. A better solution would lie in discouraging

unmeritorious claims (for instance by improving the quality and availability of representation), and in improving decision-making in the Tribunal, rather than in creating further barriers to meritorious claims.

Faulks's recommendation was to abolish Cart cases entirely (Faulks report, §3.46). The government has not followed that proposal, deciding instead, in proposed s 11A(4), to limit the scope of such claims to questions of: the validity of any permission application; whether the UT was properly constituted; and whether it has acted in bad faith; or whether it has acted 'in fundamental breach of the principles of natural justice'.

The first three categories are evidently intended to be very limited, but to provide a 'safety valve' which would limit any temptation for the courts to override the ouster clause; but how narrow is the fourth? The Explanatory Notes hypothesise that it could encompass a UT Judge's refusal 'to hear submissions from the claimant for no good reason', this being cited as an example of 'bad faith' or (more plausibly) 'a fundamental breach of the principles of natural justice'. The counterexample given, where judicial review would not lie, is where the 'claimant thinks the UT's decision was wrong', but this tells us nothing because a judicial review claim would not succeed on those grounds anyway.

It might be felt that a breach of natural justice is always fundamental, and moreover that overlooking relevant evidence or authority—a primary basis on which Cart cases are currently brought, is likely to breach natural justice. So would that fourth category, for instance, encompass the case mentioned (without details) in the Faulks report where the FTT had misunderstood evidence of the applicant's learning difficulties when finding him to be lying? Or the one cited by ILPA, where the FTT had gone behind the agreed position of the parties that the appellant was not a 'foreign criminal' as statutorily defined and then ignored relevant authority in deciding that they were?

If argument is going to continue—as it surely will, over what constitutes a 'fundamental breach of the principles of natural justice', parties will continue to bring Cart JRs which will take up the time of the courts (if only in considering their admissibility), while the evident intention to limit the scope for success will mean that genuine and serious errors by the UT will go uncorrected.

Suspended quashing orders

Clause 1 of the Bill, which introduces the concept of suspended or prospective quashing orders in judicial review, will also impact the immigration sector, particularly where challenges are brought to Home Office policies. Its intention, in introducing proposed new section 29A of the Senior Courts Act 1981, is to potentially allow for a public authority's decisions not to be automatically invalidated by a subsequent quashing of the policy under which they were made, and/or give the authority time to reconsider its policy or any decisions made under it. Alternatively, Parliament could have the opportunity to step in, for instance if the lawfulness of secondary legislation were under challenge. The new proposed powers, also recommended in the Faulks report, are discretionary, with a range of factors having to be considered before they can be exercised. Opinions differ on whether this gives more or less power to the courts rather than Parliament, but what seems clear is that the executive will be the main winner, with the courts being (remarkably) empowered to uphold decisions or policies which have been shown to be unlawful.

Online Procedure Rules

Also of interest to immigration practitioners will be Part 2, Chapter 2 of the Bill, mandating the creation of Online Procedure Rules, for certain types of proceedings—including proceedings in the UT and FTT, by an Online Procedure Rules Committee. These will govern the initiation and conduct of online proceedings, including participation in hearings. There will be exceptions for people who are unrepresented and/or require 'online procedural assistance', ie owing to 'difficulties in accessing or using electronic equipment'. The new Committee's powers would appear to include amending Tribunal Procedural Rules in respect of online proceedings. The detail is yet to be seen, but such rules may well provide clarity in contrast to the sometimes haphazard way in which online processes have developed both before and during the pandemic.

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