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## A Perfect Storm: The Judicial Review Bill and The New Plan for Immigration

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On 31 July 2020, the government, of its own initiative, established an independent panel of experts to determine if there was any need to reform the judicial review process. Beyond just asking if the process needed streamlining, the panel were instructed to consider some of the most fundamental questions of public law;

- whether the exercise of public power should be decided on by judges; and
- what grounds and remedies should be available in claims brought against the government (for example in Immigration cases).

The expert's Report stressed that parliament should not pass any comprehensive or far-reaching legislation amounting to an "ouster clause" on the justiciability of broad public powers [at 2.99]. They tentatively suggested that it could be legitimate for Parliament to legislate to correct certain developments in the law [at 2.95] but only to deal with specific issues in need of clarification [at 2.99].

On the other hand, the Report did suggest that judicial review of a refusal by the Upper Tribunal of permission to appeal a First-tier Tribunal decision should be cut back [at 3.35]. As such a refusal cannot be appealed, in *R (Cart) v Upper Tribunal*, the Supreme Court held it could still be judicially reviewed for an error of law [at 3.36]. Upon assessing the figures for successful applications made under *Cart JR* [at 3.45], the panel concluded that the practice of making and considering such applications should be discontinued [at 3.46].

This notwithstanding, although the panel accepted that the decision to legislate in this area is ultimately a question of political choice, their view, in line with the many submissions they received, is that the temptation to legislate should be resisted (4.166). Perhaps counterintuitively in light of the government having carefully curated the panel in the first place, they have decided to ignore this advice.

In the Queen's Speech, delivered on 11 May 2021, a Judicial Review Bill was announced with the alleged aim of "protecting the judiciary from being drawn into political questions and preserve the integrity of Judicial Review for its intended purpose. This is a controversial representation to make as "the fundamental purpose of the supervisory jurisdiction is... to ensure that all governments, whether at a national or local level and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law." Such a wide-reaching overhaul as to the court's supervisory role may demonstrates the government's reluctance to be held to account for their

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decisions, particularly in light of recent high-profile cases such as Miller II.

At the intersection of the reforms to judicial review and Immigration is the one aspect of the Judicial Review Bill which does stem from the report; the proposed reversal of the *Cart* judgment. This aims to increase the efficiency of the courts and tribunal system and clarify the status of decisions of the Upper Tribunal. The government anticipates that this will have the additional effect of reducing delays in the immigration and asylum system.

This however, comes alongside the bulwark against migration outlined in the Government's New Plan for Immigration (NPI). One measure would extend the Fixed Recoverable Costs regime to apply to immigration-related judicial reviews. Such a system would specify the amount in legal costs that the winning party can recover from the losing party. However, this proposal includes creating a presumption in favour of issuing Wasted Cost Orders (WCO) in immigration and asylum matters, in response to specified events or behaviours, including, alarmingly, promoting a case that is bound to fail. As set in ILPA's fierce response to the NPI, "*the true aim of this measure is not to reduce costs, administrative burdens or to speed up the process, but to load the scales in the Secretary of State's favour...in the hope that this will disincentivise lawyers from accepting appellants' instructions.* The Bar Counsel also points out that it "*runs directly counter to the stated purpose in the NPI of improving access to legal advice.*"

If the primary aim of this policy is to avoid litigation costs in Immigration, then the Home Office would be better off investing more in their caseworkers to ensure that just and lawful decisions are made in the first instance, avoiding the need for entirely litigation.

It is worth noting that appeal rights were already restricted in 2014 by s.15(2) of the Immigration Act, whereby a person may only appeal to the Immigration Tribunal where there has been:

- a decision to refuse a protection claim;
- refuse a human rights claim; or
- revoke protection status.

In addition, it should be highlighted that the majority of claims for judicial review on grounds other than *Cart,* are settled out of court. This supports the view that the situation has been somewhat overstated in the NPI, ignoring the findings of the independent Report.

In addition to the proposed wasted costs regime, the government has committed to "creating a quicker process for judges to take decisions on claims that the Home Office refuse" but to do so it will remove the applicant's right of appeal and judicial reviews. If there is no right of appeal, nor a right to judicial review, such a plan would ultimately amount to an ouster clause. Consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law, especially when there is no right of appeal. Although there is no constitutional or Article 6 requirement for any right of appeal from an appropriate tribunal, the rule of law requires that there be some suitable means of insuring that public power is exercised in accordance with the law.

Despite accepting that over half of the appeals of immigration decisions are successful, the NPI claims that immigration appeals and applications for JR are "often" made without merit. This claim is clearly unfounded as only 17% of JR's dismissed in 2020 were classified as "totally without merit."

These reforms are playing out against the backdrop of the government's official hostile environment policy which strips migrants of their right to access housing, employment and public services. The policy has been as "the compliant environment policy" but it remains the same in all but its name; preventing migrants access to fundamental public and private service. As the NPI and Judicial Review Bill do not take sufficient account for remedies where there is an error of law at the Upper Tribunal, it

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would seem that they are now preventing migrant's access to justice.

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The Citizenship & Immigration Team at Payne Hicks Beach deals with immigration appeals at all levels and works alongside counsel experienced in Judicial Review. Almost all of our clients have won their claims for judicial review through settlement. For further information please contact by email Matt Ingham or Kathryn Bradbury or by telephone on 020 7465 4300, or alternatively your usual contact in the Citizenship & Immigration Department.

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