Supplementary Submission further to Oral Evidence to Public Bill Committee

Judicial Review and Courts Bill

November 2021

Introduction

1. This submission is provided in fulfilment of the commitment made to the Committee at the close of the oral evidence session in which Steve Valdez-Symonds, Refugee and Migrant Rights Programme Director provided evidence. We thank the Committee for that opportunity.

2. The purpose is to answer the question, for which there was insufficient time, as to why we consider the changes to judicial review are not justified, specifically in relation to Clause 2 and what are known as *Cart* reviews. We will take this opportunity to address certain other questions put to other witnesses concerning this matter, to which we would have wished to respond.

3. In summary, Amnesty is opposed to Clause 2. We regard it as a very serious undermining of the twin constitutional principals of parliamentary sovereignty and the rule of law; and consider that such justifications as have been advanced for it overlook significant considerations and are seriously inadequate. Those considerations include changes since the judgments of the Supreme Court in *Cart*[1] and *Eba*.[2]

Undermining of constitutional principle

4. We remind the Committee of the evidence of Professor Feldman. Ultimately, he appears to support Clause 2. We disagree, for reasons elaborated here and in our other evidence, but note his express "*great disquiet*" at Clause 2.[3] It is useful to reflect on the explanation he gave of the constitutional significance of what is to be done by Clause 2, which if properly understood ought, in our view, to stir at least great disquiet in all who consider what it proposes. He said:[4]

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[1] *R (Cart) v the Upper Tribunal* [2011] UKSC 28
[2] *Eba v Advocate General for Scotland* [2011] UKSC 29
[3] *Hansard* HC, Judicial Review and Courts Bill Public Bill Committee, 2 November 2021 : Col 26
[4] *Hansard* HC, Judicial Review and Courts Bill Public Bill Committee, 2 November 2021 : Col 24

> "*I think it is important to note that parliamentary sovereignty and the rule of law generally require that people should have access to courts to determine the lawfulness of action. There is a functional inconsistency between Parliament's saying that there are limits to the powers of a body or person and, on the other hand, saying that that person or body can decide for themselves, effectively, what those limits are. That is quite apart from the importance of access to courts for the rule of law.*"

5. We agree with that statement. It neatly summarises the concern at the heart of Clause 2 because by ousting the constitutional supervisory role of the High Court in England and Wales – and the Court of Session in Scotland and High Court in Northern Ireland – it will leave the statutory tribunal appeals system to determine for itself the limits of the jurisdiction and powers given to it by Parliament.

6. It also provides the answer to the profound misunderstanding by all those who suggest that current provision for *Cart* review provides something additional, in terms of access to justice, that is not provided in other jurisdictions. Without the *Cart* review, the tribunal system is left to determine for itself the limits of its jurisdiction and powers. Other jurisdictions are not so left. Indeed, other jurisdictions are subject to a supervisory jurisdiction of the High Court that is far less restrictive than the one, which following *Cart*, has been adopted.[5] The *Cart* review, which Clause 2 is to oust, is significantly more restrictive both in terms of process[6] and in terms of the very high test that an applicant for judicial review must meet to succeed.[7]

Considerations that are overlooked or misunderstood

7. We shall focus on two considerations of especial significance. First, the changes since the judgments in *Cart* and *Eba*, which have significantly reduced the immigration appeals in the tribunal system and narrowed these to those concerning asylum and human rights. Secondly, the continued and growing inhibition of the tribunal system's judicial functions in relation to immigration appeals by Home Office sponsored legislation.

   <u>Immigration Appeals</u>

8. *Cart* and *Eba* were each decided in 2011. At the time, the tribunal system had only relatively recently acquired jurisdiction to hear immigration appeals. These were transferred into that system in February 2010; and had originally been omitted from the tribunal system constituted by the First-tier and Upper Tribunals created by the Tribunals, Courts and Enforcement Act 2007. We pause to note that it has been suggested, including in Committee, that Clause 2 is only seeking to do that which Parliament had intended in 2007. That, with respect, is not consisistent with the Government's understanding of the matter in 2008, a time when it was contemplating

[5] Civil Procedure Rules, Part 54, rule 54.7A
[6] Rule 54.7A(8)
[7] Rule 54.7A(7)

bringing immigration appeals into the new tribunal system. Its consultation in August 2008[8] made express that it was still considering whether to:

> "*…bring forward legislation in consultation with the devolved authorities where appropriate, to make the status of the Upper Tribunal absolutely clear and seek to ensure that decisions of the Upper Tribunal are <u>not routinely</u> challenged by judicial review.*" (our underlining)

9. In any event, the appeals brought into that system in 2010 were far more extensive in range and number than is now the case. There has been a dramatic reduction in appeal rights from April 2015 by the Immigration Act 2014. Moreover, with one exception, immigration appeals *only* concern decisions to refuse asylum, decisions to refuse a human rights claim and decisions to revoke asylum provided to a refugee.[9] The exception – which is currently large in number but can be expected to disappear or largely disappear in the near future – concerns appeals of people who were exercising EU free movement rights prior to the UK's withdrawl and have been refused status under the EU settlement scheme that is intended to resolve their status in the UK after that withdrawal.

10. The importance of this is twofold. First, the number of immigration appeals is much reduced and can be expected shortly to be even further significantly reduced. Second, the remaining appeals (particularly as and when appeals against EU settlement scheme refusals disappear) concern such questions as whether the Home Office decision in question would result in a person being exiled from home and family in the UK or returned to torture, disappearance or execution, to be once more trafficked or domestically enslaved or abused or to some other form of persecution, cruel or degrading treatment. (As regards such appeals, it must be remembered that the Home Office exercises powers by which it may bar any appeal, or prevent an appeal being brought or continued while the person remains in the UK, by declaring the person's claim to be of insufficient merit.[10])

11. We have seen it suggested that these appeals are routinely ruled upon by the Court of Appeal. That is not so. There is indeed no route to the Court of Appeal unless all of the following has occurred. Permission has first been granted to appeal to the Upper Tribunal. The Upper Tribunak has then (it can only then) consider the appeal substantively on the legal merits. Permission has been granted to appeal to the Court of Appeal against that substantive decision of the Upper Tribunal. *Cart* reviews all concern refusal of permission to appeal to the Upper Tribunal leaving the First-tier

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[8] https://webarchive.nationalarchives.gov.uk/ukgwa/20081230104537/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigrationappealsconsultation?view=Binary

[9] Section 82, Nationality, Immigration and Asylum Act 2002 as amended by section 15 of the Immigration Act 2014

[10] Section 94 and 9B, Nationality, Immigration and Asylum Act 2002 as amended are among the current provisions

Tribunal decision as the only substantive consideration on the law and facts on appeal against the relevant Home Office decision.

Inhibition of the tribunal's judicial functions

12. There are two types of inhibition that we wish to emphasise. First, the power for the Home Office to determine the appeals process to be followed and require its acceleration. Second, direction to the tribunal judiciary of both tiers as to such matters as how they must conduct their assessment of evidence and facts before them. (We merely note that the Nationality and Borders Bill contains other controversial directions concerning the meaning of the UK's international law obligations concerning who is a refugee and the circumstances in which asylum is to be provided.)

13. Each of the two inhibitions we emphasise is to be significantly enlarged by provisions of the Nationality and Borders Bill.

14. Home Office determination of the process by which the independent judicial body is to conduct an appeal against that department's decisions has long been a significant curtailment of the tribunal's judicial functions. This should concern Parliament – more so having regard to Clause 2. The tribunal system, where appeals are permitted, is there to safeguard appellants against wrongful decisions of the Home Office, which as indicated above may have profound human rights consequences including loss of life, liberty, other serious mistreatment or exile.

15. Directions pre-determining or restricting how the tribunal system should consider, or what conclusion it may make on, the evidence presented to it is a profound encroachment on that body's judicial function. That these inhibitions on the basic judicial function of evaluating the evidence and facts are presented in legislation sponsored by the government department whose decisions are the subject of the appeal before that tribunal system serves to exacerbates concern about the impact of this on the functioning of that system.

16. In our oral evidence, we made brief mention to an early iteration of such inhibition by section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.[11] There have been several judgments of the higher courts, including the Court of Appeal, in the years since seeking to ensure that tribunal judges do not misunderstand or misapply directions in that provision in ways that pre-determine an appellant to have no or less credibility before the judge evaluates all the evidence and facts. That this remains a source of error is indicated by the finding of the Court of Appeal, even as late as June 2019, once again that the tribunal system had wrongly "*automatically downgraded*" an appellant's credibility and not corrected that failure to understand and properly apply the statutory provision.[12]

[11] *Hansard* HC, Judicial Review and Courts Bill Public Bill Committee, 2 November 2021 : Col 65
[12] *KA (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 914.

17. Inhibitions such as each of those discussed above make it especially important that the tribunal system is effectively supported by the High Court by exercise of its constitutional supervisory role. That includes to ensure against that system adopting a wrong and too widely exacting understanding of any such inhibitions. This is because misunderstanding and misapplying its powers and jurisdiction in this regard can only lead to the tribunal failing to perform the function that Parliament has given it to act as the primary means by which the limited range of Home Office immigration decisions are to be subject to judicial scrutiny.

Conclusions

18. There are three conclusions we draw from the above:

    a. Clause 2 is a matter of grave constitutional concern. At a minimum, Parliament should be extremely sceptical about its introduction.

    b. If Parliament is determined to consider further whether to undermine the twin constitutional principles of parliamentary sovereignty and the rule of law by enacting Clause 2, it needs to consider what is being proposed with great care. Thus far, neither the Government nor other supporters of Clause 2 have adequately or at all confronted the full context of what is proposed including what has changed since the judgments in *Cart* and *Eba*.

    c. Moreover, Parliament should be even more sceptical about the introduction of Clause 2 because it ought to recognise that it is seriously hampered in its capacity to oversee just what is being proposed and what the impact will be. It does not help that Ministers have chosen to legislate separately to oust the High Court's jurisdiction to supervise the tribunal system by this Bill and, on the other hand, to undermine the capacity of that tribunal system to deliver justice by another.[13] This raises the further concern about what may be done in future to further undermine that capacity if and when the High Court's jurisdiction is ousted. Both Professor Feldman and Dr Morgan, who appear to support Clause 2, emphasised that their support for the ouster was contingent on the peculiar circumstances they thought arose in relation to it. What their evidence did not confront is that those circumstances are both radically changed and still changing by the reduction in both number and type of immigration appeals before the tribunal system and inhibitions on the judicial function of that system.

19. The Committee has received evidence about the relevant financial costs, judicial time, volume of reviews and success rates. It is clear that on any calculation the costs – whether in time, money or other resources – are considerably less than they once were. We note the confusion over the calculation of success rates. What is clear is that the Government began by hugely underestimating this. Evidence provided to the Committee now suggests that the success rate may be – there is insufficient recording

[13] Nationality and Borders Bill

or transparency of data to be sure – between around 3.7% and 10%.[14] Success, the evidence indicates, means that a person goes on to win their appeal. Given what is at stake, this is a significant success rate. However, it underestimates the importance of *Cart* review. The cases that are not recorded as successes but which nonetheless result in permission to appeal to the Upper Tribunal may make significant contribution to the delivery of justice in the tribunal system where these expose errors within that system as to its powers and jurisdiction – errors that would, if not corrected, cause other people not to receive justice in that system. This is so whether or not the correction of the error in the case of the individual who brought the *Cart* review leads to their winning their appeal.

20. All things considered – both as a matter of pure principle and evaluating the totality of what is stake – there is no good case for Clause 2, which would do considerable harm both to individuals and to the UK's constitutional arrangements.

[14] *Hansard* HC, Judicial Review and Courts Bill Public Bill Committee, 2 November 2021 : Col 52