Title: Judicial Review and Courts Bill: Judicial Review Reform **IA No:** MoJ07/2021 **RPC Reference No:** N/A **Lead department or agency:** Ministry of Justice **Other departments or agencies:**	**Impact Assessment (IA)** **Date:** 21/07/2021 **Stage:** Legislation **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** Christopher.Bowring@justice.gov.uk

Summary: Intervention and Options

RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option			
Total Net Present Social Value	**Business Net Present Value**	**Net cost to business per year**	**Business Impact Target Status**
£2m	N/A	N/A	Not a regulatory provision

What is the problem under consideration? Why is government action or intervention necessary?

Cart Judicial Reviews (JR) are numerous despite the success rate for claimants under such applications being extremely low. Moreover, the Tribunals Courts and Enforcement Act 2007 envisaged that this kind of JR of the Upper Tribunal (UT) would not be possible as the UT would have the same status as the High Court. Against this background, and following an independent review, the Government's policy position is that such JRs do not warrant the significant use of judicial resource that they currently utilise and that removing *Cart* JRs should allow for increased efficiencies in the courts system.

As well as the problem with Cart JRs, there is an additional problem in that the current set of JR remedies are insufficiently flexible, as their bluntness leaves little room for adjustment or correction and can cause potentially adverse administrative and economic impacts, for example through the lack of time to prepare for a decision being quashed. As a result, the Government has concluded that the courts need additional powers with regard to quashing orders: to suspend their effect; and to limit or remove the retrospective effect of any quashing order.

Government intervention is needed as primary legislation is required to make changes to JR or the jurisdiction of courts.

What are the policy objectives of the action or intervention and the intended effects?

The primary rationale for the options detailed in this Impact Assessment (IA) is to increase the efficiency and efficacy of the courts by ensuring that JR avenues are an efficient use of resource and that the remedies available to the courts upon a successful JR are effective.

The associated policy objectives are to:

a. Reduce the inefficient use of judicial resource
b. Prevent administrative problems following JRs and, where appropriate, give defendants the opportunity to rectify any errors in a way which is equitable for claimants.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- **Option 0**: Do nothing: Under this option the current legislation would continue.
- **Option 1:** Remove *Cart* JRs by making certain decisions of the Upper Tribunal final, and not subject to review by any other court, subject to certain exceptions.
- **Option 2:** Introduce new powers to suspend, remove or alter the effect of quashing orders. A non-exhaustive list of factors will accompany the powers for the court to consider when modifying an order, as well as a presumption to use these powers where they offer adequate redress.

Options 1 and 2 are preferred in combination as they best meet the policy objectives.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date: 3-5 years following Royal Assent**

Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?	**Micro** No	**Small** No	**Medium** No	**Large** No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)		**Traded: N/A**	**Non-traded: N/A**	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: Robert Buckland Date: 20.07.21

Summary: Analysis & Evidence

Policy Option 1

Description: Remove *Cart* JRs by making certain decisions of the Upper Tribunal final, and not subject to review by any other court, subject to certain exceptions.

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period 10 Years	Net Benefit (Present Value (PV)) (£m)		
			Low: **£2.1m**	**High: £3.1m**	**Best Estimate:** £2.6m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	£0.7m
High	Optional		Optional	£0.9m
Best Estimate			£92,000	**£0.8m**

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to fully monetise the impacts of this option. For HMCTS, there will be a court fee income loss of around £92,000 per year due to the overturning of the *Cart* decision.

Other key non-monetised costs by 'main affected groups'

Removing the *Cart* JRs will affect those who would have otherwise won a case under this process. Although low, around 3% of applications for a *Cart* Judicial Review result in the permission to appeal decision being remitted to the Upper Tribunal, and the Upper Tribunal finding the original appeal in favour of the claimant at an appeal hearing. In future, claimants will not be able to use this avenue and therefore may lose a case they may have otherwise won, although the chances of doing so are very small. The majority of *Cart* cases relate to Immigration and Asylum, therefore those who lose out are more likely to have particular protected characteristics, for example in respect of race and/or religion or belief.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		£364,000	£2.8m
High	Optional		£402,000	£4.1m
Best Estimate			£364k-£402k	**£3.4m**

Description and scale of key monetised benefits by 'main affected groups'

Based on average case numbers, we estimate that removing *Cart* JRs will save around 173-180 judicial sitting days per year in the High Court and UT. This gives rise to a non-cashable time savings of between £364k-£402k a year in saved judges time that can be used for other cases. This time saving is considerably larger than the estimated loss of net court fee income noted above and so is therefore consistent with the policy objectives.

Other key non-monetised benefits by 'main affected groups'

The High Court and UT Judiciary will be able to use the time savings for other types of priority case where the rate of success is higher, therefore improving efficiency in the system. Government Departments involved in a *Cart* JR and subsequent appeals, such as the Home Office, will save on legal costs. However, this will not be a significant saving as most of the savings made will be spent on other cases.

Key assumptions/sensitivities/risks	Discount rate	3.5%

It is assumed that there would be no significant changes in case volumes and case outcomes were *Cart* JRs preserved
It is assumed that an average sitting day for a Judge in the High Court and Upper Tribunal is 6.5 hours. It is assumed that time spent per Cart JR in the Upper Tribunal is between 3-4 hours.
An optimism bias of 15% has been applied when calculating the NPV, which has been selected based on fluctuations in historic years of data, excluding extreme outlier years.
Legal service providers involved in *Cart* JR cases are assumed to transfer to activities of similar economic value

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m: N/A			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	**Benefits: N/A**	**Net:** N/A	

Summary: Analysis & Evidence

Policy Option 2

Description: Introduce new powers to suspend, remove or alter the effect of quashing orders. A non-exhaustive list of factors will accompany the powers for the court to consider when modifying an order, as well as a presumption to use these powers where they offer adequate redress.

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	**PV Base Year** 2020	**Time Period Years**	**Net Benefit (Present Value (PV)) (£m)**		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

The cost of this option is negligible as no practical changes are necessary, only changes to the rules of the courts, which occur on a regular basis. It is not possible to accurately predict what cases may arise in the future when these powers may be used and what the impact of the use of these new remedies would be.

Other key non-monetised costs by 'main affected groups'

Claimants and those in their class may be impacted by the introduction of powers to modify quashing orders, as this could elongate the time before an order is quashed or limit the retrospective effects. However, negative effects such as this is expressly guarded against in the legislation.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits of this reform.

Other key non-monetised benefits by 'main affected groups'

Parties who would be negatively affected by the bluntness of an immediate quashing order of invalidity, will, under new powers to modify orders, have more time to prepare for implementation. In cases where quashing orders of invalidity are modified to be prospective-only, they may not face negative effects at all as their previous reliance on a decision would be upheld.

Defendants will have the opportunity to correct decisions/amend regulations. This will lessen administrative impacts, as there would be time to prepare for implementation and/or rectify small errors. Third parties may also benefit as they will be able to prepare for a decision/action being quashed, where they have not been able to previously.

Key assumptions/sensitivities/risks	**Discount rate**	
It is assumed that the identified factors will prevent the court from using remedies in a way that would cause unjust outcomes to claimants and others. It is assumed that case length or the time before a quashing order comes into effect may increase due to the introduction of these new powers, but only to a reasonable amount decided by the Judge in that specific case.		

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			**Score for Business Impact Target (qualifying provisions only) £m:**
Costs: N/A	**Benefits:** N/A	**Net:** N/A	

Evidence Base

A. Background

1. Judicial Review (JR) is a process by which the lawfulness of decisions and actions of those carrying out public functions can be challenged in the courts. It is a mechanism which helps to give force and effect to the concept of the rule of law, providing citizens with a way to ensure that those holding public office or exercising authority use their powers according to the law, and within the bounds of the authority granted to them.

2. JR is not concerned with the merits of a decision, but with whether it was lawfully made. In England and Wales, an application for JR can be brought on the grounds of illegality, procedural unfairness, unreasonableness/irrationality, or for breach of the Human Rights Act 1998. The court 'reviews' the decision at issue and decides if it is flawed and, if it is, may grant remedies.

3. In England and Wales, applications for JR are made to the Administrative Court, in the Queen's Bench Division of the High Court. In Northern Ireland, applications are made to the High Court (Northern Ireland); and in Scotland, to the Court of Session (Outer House). The High Court has six remedies available to it in dealing with a JR, three of which are specific to judicial reviews (the "prerogative remedies"):

    a. An order quashing the decision in question. A quashing order quashes, or sets aside, the decision, thereby confirming that the challenged decision has no lawful force and no legal effect. After making a quashing order the Court will generally remit the matter to the public body decision maker and direct it to reconsider the matter and reach a fresh decision in accordance with the judgment of the Court.[1] (quashing order, previously certiorari)

    b. An order restraining the body under review from acting beyond its powers (prohibiting order, previously prohibition).

    c. An order requiring the body under review to carry out its legal duties (mandatory order, previously mandamus).

4. The High Court can also make declarations, issue injunctions, and (rarely) grant damages.

5. Due to the way JR has developed, however, there have been several instances where the courts have not had remedies at their disposal that may have been more flexible and effective. This is the case in instances where a quashing order or declaration of invalidity risks having arguably serious implications for third parties, or national security, or would have serious economic or administrative implications.

6. For example, the case of *HM Treasury v Ahmed* [2010] UKSC 2 found that the court could not suspend relief in such a way as to afford the defendant opportunity to enact primary legislation. The defendant argued that immediate invalidation would have serious implications for national security. On the other hand, the court may decline to give relief on account of such considerations. In the case *Hurley and Moore v SS Business Innovation* [2012] EWHC 201 (Admin) the court declined to quash regulations pertaining to tuition fees despite errors on the decision makers part as immediate and retrospective quashing would

[1] Ibid., section 11.4.

have serious implications for third parties.

7. A *Cart* JR is the means by which an application for JR can be made to the High Court (HC) of a decision of the Upper Tribunal (UT) to refuse permission to appeal the decision of the First Tier Tribunal (FTT) where the decision is affected by an error of law (and therefore the UT's decision was also affected). This is a result of the Supreme Court ruling in R (on the application of Cart) v The Upper Tribunal [2011] UKSC 28 for England and Wales, alongside the Scottish case raising similar points, judgment for which was given separately by the Supreme Court (*Eba v Advocate General for Scotland* [2011] UKSC 29). Since this route was created, there have been around 750 'Cart Judicial Reviews' per year for England and Wales.

8. In its 2019 General Election manifesto, the Government stated its commitment to "ensure that Judicial Review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays". To address this commitment, on 31 July 2020 the Independent Review of Administrative Law (the IRAL) was established to examine trends in JR and to deliberate on any recommendations for reform. The IRAL was conducted by a panel of experts (the Panel) chaired by Lord Faulks QC.

9. The Panel's Report, (including their call for evidence) plus evidence from the Government's subsequent six-week consultation on policy options, provide the basis of the JR proposals in the Judicial Review and Courts Bill which this Impact Assessment (IA) supports although some of the Bill measures go beyond those recommended by the Panel.

10. While the majority of the Bill provisions will applying to England and Wales only, some measures (such as reversing *Cart*) will apply UK wide in respect to reserved powers.

B. Rationale and Policy Objectives

11. The conventional economic approaches to Government intervention are based on efficiency or equity arguments. Governments may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or there are strong enough failures in existing Government interventions (e.g. waste generated by misdirected rules), where the proposed new interventions avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services to more vulnerable groups in society).

12. The primary rationale for the options detailed in this IA is to increase the efficiency and efficacy of the courts by ensuring that the JR avenues available are an efficient use of resource and that the remedies available to the courts upon a successful JR are effective.

13. More specifically, the number of successful *Cart* JRs for the claimant since its introduction is extremely low in comparison to non-*Cart* JRs. Therefore, it is difficult to justify the continuance of such an avenue and use of resource for such a low success rate. The analysis by which we reached this conclusion is set out at Annex A. Likewise, the JR remedies currently available to the courts are insufficiently flexible and increasing this flexibility will allow for better administration, as defendants will be afforded opportunity to rectify errors in a more efficient manner, where such a remedy also affords the claimants adequate redress.

14. Giving the courts flexibility with these new powers is essential for JR to benefit good administration, and to provide claimants with appropriate remedies. The current remedies do not allow for more nuanced or unprecedented scenarios where time is needed to prepare for the effects of a quashing order or declaration. Such powers would not undermine the principles of JR, but would provide more ways for decisions to be altered and prepared for, and to maintain constitutional boundaries between the executive and the judiciary.

15. The associated policy objectives are to:

    a. Reduce the inefficient use of judicial resource
    b. Prevent administrative problems following JRs and, where appropriate, give defendants the opportunity to rectify any errors in a way which is equitable for claimants.

C. Affected Stakeholder groups, organisations and sectors

16. The main groups and stakeholders who will be affected by the proposals described in this IA are shown below:

    - Claimants, including civil legal aid claimants, as well as individuals, businesses, and third sector organisations;
    - Defendants, including public sector organisations/bodies;
    - The Judiciary;
    - Her Majesty's Courts and Tribunals Service (HMCTS);
    - Legal Services providers, including civil legal aid providers;
    - Third parties, including businesses and individuals.

D. Description of options considered

17. To meet the policy objectives, the following options are assessed in this IA:

    - **Option 0:** Do nothing: Under this option current legislation would continue.
    - **Option 1:** Remove *Cart* JRs by making certain decisions of the UT final, and not subject to review by any other court, subject to certain exceptions.
    - **Option 2:** Introduce new powers to suspend, remove or alter the effect of quashing orders. A non-exhaustive list of factors will accompany the powers for the court to consider when modifying an order, as well as a presumption to use these powers where they offer adequate redress.

18. Options 1 and 2 in combination are preferred as they best meet the policy objectives.

Option 0

19. Under this option, the problems identified above would continue. Therefore, this option has been rejected as it would not address the policy objectives.

Option 1:

20. Removing *Cart* JRs through a narrow ouster clause (a clause in legislation which protects a body or person or class of decision from adjudication or review by the supervisory courts) will tackle the inefficient use of resources identified above and will address any concerns

over the rule of law (which may reassure the courts that its jurisdictional oversight in this area is not completely removed). Further detail on *Cart* JR success rates and the associated resource savings from this option is located in Annex A.

Option 2:

21. This option contains new powers that will give the court the ability to:

    a. Suspend the effect of any quashing order they make

    b. Limit or remove the retrospective effect of any quashing order

22. Suspended relief refers to a situation where the court will be able to suspend the effect of a quashing order it makes for a limited period of time. This will give the public body, and any third parties affected, time to prepare for the remedy to come into effect. The public body, in this intervening time, may remake its decision in a lawful manner, enact any transitional arrangements, or even seek to legislate, potentially retrospectively to preserve the state of the law as it was before the quashing order was made.

23. In this way the court's decision when making the suspended quashing order will be final – this is advantageous in terms of legal certainty and removes the bluntness of immediate quashing. What a suspended quashing order, as constituted above, will not do is give the public body any opportunity to rectify or save the original unlawful decision through the legal process.

24. Limiting the retrospective effect of quashing orders means the court will be able to provide for any quashing order to take effect from a certain point in the past or future. This will mean any reliance on a decision before that point would be upheld, but the decision could not be relied upon in the future.

25. A list of factors will guide the court's discretion in deciding whether to use any of these powers. These factors are non-exhaustive and the court will be able use its discretion to consider anything else it deems relevant. Instead, the listed factors will draw the court's attention to certain considerations the Government believes are important and of general applicability to these powers. The factors will be as follows:

    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 or invalidation 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.

26. The legislation also includes a presumption which will serve to point the court towards consideration of using these new powers in circumstances where it appears to the court that these new powers would offer adequate redress. This also ensures that these powers are used where they do not prejudice the claimant's right to an effective remedy.

27. The legislation also provides that the use of these powers is possible regardless of any effects of invalidity or nullity. In using these powers, the decision is question will be treated as valid for the duration of any suspension, or for a period in the past when retrospective relief is limited or removed.

E. Costs and Benefits Analysis

28. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with Her Majesty's Treasury Green Book guidance.

29. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in Great Britain with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are not monetised.

30. The costs and benefits of the options are compared to Option 0, the counterfactual or 'do nothing' option. As the counterfactual is compared to itself, the costs and benefits are necessarily zero, as is its net present value (NPV).

31. The assumptions and risks associated with the analysis below are set out in section F.

Option 1: Remove Cart Judicial Reviews by making certain decisions of the Upper Tribunal final, and not subject to review by any other court, subject to certain exceptions.

Costs of Option 1

HMCTS

32. There will be costs to HMCTS from Option 1 from lost court fee income. Taking annual data from 2016-2019 (and thus avoiding outlier years such as 2020), there were, on average, around 750 *Cart* JR cases a year. Taking this average and considering the associated court fees, which range from £154 for a paper hearing to £770 for a substantive hearing, this amounts to an average yearly fee income of around £120,000. However, as some fees are remitted, the net lost fee income will be around £92,000 a year (more detail is in annex A).

Claimants

33. Removing *Cart* JRs will affect those who would have otherwise won a case under this process. Although low, around 3% of applications for a *Cart* JR result in the permission to appeal decision being remitted to the UT, *and* the UT finding the original appeal in favour of the claimant at an appeal hearing. In future claimants will not be able to use this avenue and therefore may not have recourse to the courts in a case they may have otherwise won, although the chances of doing so are small.

34. The majority of *Cart* cases relate to Immigration and Asylum, therefore those who lose out as a result of this option are more likely to have particular protected characteristics, for example in respect of race and/or religion or belief.

Legal Service Providers

35. Legal service providers who are involved in *Cart* JR cases may lose income as a result of this option. However, as is normally the case in IAs which seek to reform inefficiencies in legal processes, it has been assumed that legal services providers will be able to transfer their activities to those of similar, or next best economic value.

Benefits of Option 1

HMCTS, Judiciary, Government Departments

36. Removing *Cart* JRs will reduce the number of High Court Judge and Upper Tribunal Judge sitting days required, so saving judicial time and allowing Judges to focus on other matters.

37. Based on average case numbers, we estimate that removing *Cart* JRs will save around 173-180 judicial sitting days per year in the High Court and UT. This figure is a rough approximation as the time savings for the High Court are based on a time and motion study which looked at case types across courts but did not focus on a specific level.[2] The assumption was made that an average sitting day for a Judge is 6.5 hours, as per the Judiciary website. This figure may be a slight overestimation, as it assumes all cases will go through to the paper stage, whereas in reality, a small proportion of cases will not make it to the paper stage.

38. It is clear that even if the final figure of 173-180 sitting days is potentially an overestimation, there will still be significant time savings. This will allow the Judiciary to use the time for other types of priority case where the rate of success is higher, improving efficiency in the system.

39. Monetising these sitting day savings, we estimate that the non-cashable time savings will be between £364k-£402k a year in saved judges time that can be used for other cases. This time saving is considerably larger than the estimated loss of net court fee income noted in paragraph 33 and is therefore consistent with the policy objectives.

40. Government Departments involved in a *Cart* JR and subsequent appeals, such as the Home Office will save on legal costs. However this will not be a significant saving and any savings made will be spent on other cases.

Option 2: Introduce new powers to suspend, remove or alter the effect of quashing orders. A non-exhaustive list of factors will accompany the powers for the court to consider when modifying an order, as well as a presumption to use these powers where they offer adequate redress.

Costs of Option 2

Claimants

41. Claimants and those in similar situations may be affected by the introduction of powers to modify quashing orders, as this could elongate the time before an order is quashed or limit the retrospective effects of the quashing order.

Defendants

42. There may be costs to defendants in rectifying errors due to quashing orders, but presumably these defendants will face those costs regardless if they wished to correct or remake the decision in question.

[2] The link to the time and motion study is here: www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf. It is in Annex 4.

Benefits of Option 2

Defendants, Third Parties

43. Third parties who would be negatively affected by the bluntness of an immediate quashing order or declaration, will, under new powers to modify orders, have more time to prepare for implementation. In cases where quashing orders are modified to be prospective-only some third parties may not face negative effects at all as their previous reliance on the decision will be upheld.

F. Risks and Assumptions

44. The key assumptions and risks underlying the analysis above are described below.

Assumptions and risks underlying Option 1

- There would be no significant changes in case volumes and case outcomes if *Cart* JRs continue, therefore the rationale for removing *Cart* would stay the same.
- The number of appeals for which the UT grants permission would have remained the same if the *Cart* JR route had not existed.
- The Upper Tribunal would not have conducted itself in any different way if the *Cart* JR route of review had not existed.
- An average sitting day for a Judge in the High Court is 6.5 hours.
- The fee income figures have been calculated based on historic case trends, excluding 2020 due to the impact of the Covid-19 pandemic on case numbers. The figures include a remissions rate based on historic data and have been rounded to the nearest £10,000.
- Figures for time spent per *Cart* JR heard in the UT are based on discussions with the President and Vice President of the UT. The figures assume around 1 hour is required for each of them to review a case, plus up to 2 hours spent to write up the judgement, reaching a maximum time per case of around 4 hours.
- Based on discussions with the fees team, it is assumed that there is no fee loss from *Cart* JR cases heard in the Upper Tribunal.
- The monetised net judicial time saving is rounded to the nearest £1,000. This is a non-cashable efficiency saving as it will allow judges time to be redistributed to other cases.
- An optimism bias of 15% has been applied when calculating the NPV, which has been selected based on fluctuations in historic years of data, excluding extreme outlier years.
- NPV figures have been calculated using a 10-year appraisal period.

Assumptions and risks for Option 2

- It is assumed that case length or the time before a quashing order comes into effect may increase due to the introduction of these new powers, but only to a reasonable amount decided by the Judge in that specific case.

- It is assumed that the factors identified to accompany the new powers will be sufficient in preventing injustice to claimants and/or third parties.

G. Wider Impacts

Equalities

Impacts for Immigration

45. It is well known that the High Court and Court of Appeal were subject to a high volume of JR applications in immigration and asylum cases until Parliament introduced a form of statutory review of the refusal by the Immigration Appeal Tribunal of permission to appeal to that Tribunal in the Nationality, Immigration and Asylum Act 2002,101(2). However, the availability of judicial review was seen as a particular problem in the context of immigration and asylum appeals.

46. As the majority of *Cart* Judicial Reviews relate to immigration and asylum matters it is reasonable to anticipate that Option 1 may have a differential impact on individuals with the protected characteristics of race and religion/belief. We consider that this could constitute indirect discrimination under the Equality Act, but that any such impact is likely to be extremely limited given that only around 3% of *Cart* Judicial Reviews ultimately succeed. Therefore, we think the policy is justified and that there is a good case for the preferred option. Further, removing *Cart* is not being pursued just in relation to immigration and asylum claims, but will render the whole Upper Tribunal not amenable to Judicial Review.

47. No relevant impact relating to remedial changes have been identified.

48. An Equalities Impact Assessment has been carried out in addition to this IA.

Better Regulation

49. These proposals are exempt from the Small Business Enterprise and Employment Act 2015 and do not count towards the department's Business Impact Target.

Environmental Impact Assessment

50. We expect there to be no environmental impacts as a result of the options within this IA.

International Trade

51. There are no international trade implications from the options considered in this IA.

H. Monitoring and Evaluation

52. The MoJ will evaluate the policy as part of the post-legislative scrutiny process within between 3 and 5 years of the Bill gaining Royal Assent and submit a memorandum to the justice select committee.

53. In the meantime, we will use the quarterly civil justice statistics to monitor the impact of the removal of the *Cart* route of judicial review and, in particular, to identify whether there is any displacement of cases (ie challenges brought in a new or different route).

Annex A – *Cart* statistical analysis

54. The total number of Cart Judicial Review cases brought to the Administrative Court against the Upper Tribunal (Immigration and Asylum Chamber) decisions from 1 Jan 2018 - 31 Dec 2019 was 1,249 excluding cases pending a UT Appeal decision. Of these, 92 resulted in the Upper Tribunal decision being quashed. In the relevant period the Upper Tribunal gave permission to 85 cases post-remittal (excluding cases pending a decision). Of the 85, to date 42 have been successful, 43 unsuccessful. 13 cases are still awaiting a decision by the Upper Tribunal.

55. In summary, on the basis of the data we are able to say that the 'success rate' of *Cart* cases is substantially lower than the average success rate for other types of Judicial Review which is typically in a range of 30% to 50%. For *Cart* Judicial Review, the 'success rate' is around 3.4% - ie the number of cases found in favour of the claimant by the Upper Tribunal in an appeal which followed a remitted grant of permission following a *Cart* Judicial Review, divided by the total number of applications for a *Cart* Judicial Review in the period in question.

'Success Rates' of *Cart* Judicial Reviews

Background

56. 'Success' in a Judicial Review is notoriously difficult to measure. The commonly accepted methodology is to look first at the number of cases recorded as 'found in favour of the claimant' at a substantive hearing, as recorded in the Civil Justice Statistics, and then to estimate and include the number of cases which were settled by the defendant or withdrawn by the claimant prior to a substantive hearing.

57. Several academic studies exist on this, and the commonly accepted figure is that between a third and half of Judicial Review claims settle in favour of the claimant. Going further than this, some studies use interviews with claimants to estimate how many felt they had gained a tangible or intangible benefit as a result of bringing a Judicial Review, regardless of whether a court found in their favour. On this measure Judicial Reviews may be thought to be successful in up to 60% of cases.

58. Measuring success in *Cart* Judicial Reviews is slightly different, as the claimant is using the Judicial Review to try to get the Upper Tribunal to hear an appeal against a decision of the First-tier Tribunal. It is generally accepted that not only the outcome of the *Cart* Judicial Review process itself is important, but also any subsequent decision of the Upper Tribunal regarding the appeal against the first-tier tribunal.

59. This is what the IRAL panel attempted to measure, However, the data set they examined has been challenged as insufficient on several counts. Firstly, that the databases they examined would be unlikely to have complete records of *Cart* Judicial Review cases (both in the Administrative Court and Upper Tribunal) and secondly they did not take into account that cases may be settled as a result of a *Cart* Judicial Review claim. The Government therefore agrees with respondents to the consultation that the IRAL figure of 0.22% is too low.

60. The IRAL Report's process for identifying success numbers was to look through the databases Westlaw and BAILI for all cases involving a *Cart* Judicial Review since its inception. They found 45 reports/transcripts, with 12 positive results. However, Westlaw and BAILI only record cases which set precedent in some way in terms of the judgment or case.

Therefore, these reports and transcripts, and the associated judgements, only relate to small amount of the actual number of successful *Cart* Judicial Review cases during that time.

Methodology

61. Our analysis aimed to trace the outcome of every Immigration *Cart* case remitted back to the Upper Tribunal, through comparison between the Upper Tribunal's (Immigration and Asylum Chamber) internal case management data and the HMCTS ARIA database. This exercise focused on immigration cases because these make up 92% of *Cart* cases and the rate at which non-immigration *Cart* cases are given permission is extremely low (1.67% 2012-2020).

62. For this analysis, success in a *Cart* Judicial Review was defined as

    a. Permission has been given by the High Court for an application for Judicial Review of an Upper Tribunal decision on permission to appeal; and

    b. The appeal has been remitted back to the UT; and

    c. The appeal went to an appeal hearing in the Upper Tribunal and was found in favour of the claimant.

63. We firstly assessed the number of *Cart* Judicial Reviews granted permission by the High Court. CPR 54.7A(9)(b) states that permission being given in a *Cart* Judicial Review automatically leads to the UT permission to appeal decision being quashed, unless one of the parties requests a hearing. From 2012-2020 339 out of 6,293 *Cart* Judicial Reviews were granted permission. This equates to 5.69% (immigration) as the upper limit for potentially 'successful' *Cart* Judicial Reviews over this period – in that they have a chance of leading to the UT quashing the decision of the First-tier Tribunal in an appeal. Looking only at more recent years (2016-2020) the figure is 5.69% (Immigration)

64. In determining settlement rates, the Home Office settlement rate was looked at, as they are party to a number of *Cart* Judicial Reviews (as these often concern Immigration and Asylum). A *Cart* JR is a challenge to the decision of the Upper Tribunal and although the Home Office is an interested party it does not normally substantively engage with *Cart* Judicial Reviews. When a Judicial Review is granted permission, there is a period of time where interested parties can intervene to request a full hearing, beyond which the case is remitted to the Upper Tribunal. The Home Office do not usually intervene at this stage, meaning that the settlement rate here is negligible, and the case is remitted.

65. The Upper Tribunal (Immigration and Asylum Chamber) was able to assess the outcomes of appeal hearings following a *Cart* Judicial Review from 1 Jan 2018 to 31 Dec 2020. This was done by finding the cases remitted back to the Upper Tribunal as a result of a *Cart* Judicial Review in the OPTIC database and from manual trawl of internal case management files. The OPTIC database records the Judicial Review case number as well as the original claim ID.

66. The original claim ID was then fed into the ARIA database, which would give a return on the case ID showing the outcome of any Upper Tribunal appeal decision, or if the case was pending a decision.

67. In this way, the outcome of every case recorded as being remitted back to the Upper Tribunal could be ascertained.

Caveats

68. There is a slight disparity between the total number of *Cart* Judicial Review applications recorded by the Administrative Court (1,249) and the Upper Tribunal (1,192) in the period (1 Jan 2018 – 31 Dec 2019). We believe the reasons for this disparity are as follows:

    a. The Administrative Court records a case as being in the year in which the claim was issued and the Tribunal records a case as being in the year in which the Tribunal was served with it – it is not uncommon for claimants to serve the Tribunal late, or indeed not at all, particularly if they are litigants in person. Hence there may be cases not recorded by the Upper Tribunal (particularly if the cases did not reach a permission decision) at all or would be recorded in subsequent years. An application made in 2019 to the High Court may be recorded as a 2020 case by the UT. Similarly, the UT would record cases at the beginning of the period for which the application was made before 1 Jan 2018. However, this may mean the timing discrepancy is balanced out.

    b. The UT data only shows *Cart* Judicial Review which have outcomes or are pending an appeal decision. Data from the Administrative Court includes Judicial Reviews which are still live, and thus would not appear in the UT statistics.

    c. Otherwise many of the cases not recorded by the Tribunal were likely to be Judicial Reviews which fell out of the system for one of the following reasons:

        i. struck out before the permission stage for non-compliance with the Civil Procedure Rules or Court directions (for example failure to provide a Certificate of Service or file copies of the relevant appeal decisions),

        ii. withdrawn by the Claimants before the permission stage because they obtained a fresh immigration decision or grant of leave from the Home Office,

        iii. abandoned after the Claimants left or were removed from the UK, or

        iv. transferred to the Upper Tribunal Judicial Review jurisdiction after the Court ascertained the decision under challenge was in fact a First-tier Tribunal decision on the timeliness or validity of the appeal.

69. We consider that the Administrative Court data on the total number of applications is a more complete reflection of the number of applications, but acknowledge that this may cause a slight margin of error due to the date that cases are reported.

70. In making calculations for ‘success rates’ we decided to disregard data from 2020 due to the effects of the COVID-19 pandemic, and the fact that a high proportion of cases granted permission in a *Cart* JR are yet to appeal in the Upper Tribunal’s data. This means that 2020 has insufficient data to make accurate calculations.

71. The calculations also disregarded any cases which are pending a UT decision. The number of pending cases was removed from the number of total applications and number of appeals remitted to the Upper Tribunal. This means that our calculations are solely based on ‘completed’ cases – ie that the Upper Tribunal has reached a judgment at an appeal hearing, or the *Cart* JR was withdrawn or dismissed at an earlier state.

72. We recognise there is no like-for-like comparison possible with other kinds of Judicial Review, but the academic consensus supports the approach of comparing a reasonable

metric of ‘success in a *Cart* Judicial Review’ with a reasonable metric of ‘success in a Judicial Review generally’. We believe a reasonable metric of success in a Cart Judicial Review is to have the appeal decision remitted back to the Upper Tribunal *and* for the Upper Tribunal to find the appeal in favour of the claimant when that appeal is heard. In other Judicial Reviews, academic studies tend to focus on the outcome of a substantive hearing and estimate the rate of settlement (for a specific topic or in general). The Independent Review of Administrative law examined evidence on the ‘success rates’ in Judicial Reviews finding there to be a general consensus of around 30-50% of claims being settled in favour of the claimant or found in their favour at a substantive hearing.[3]

Results

73. The tables below show the total number of cases in each year which reach each stage in the High Court and Upper Tribunal, in the course of a *Cart* Judicial Review and subsequent remittal to the Upper Tribunal. A number of cases are pending an appeal decision in the Upper Tribunal, this number for each year has been subtracted from the total number of applications to the High Court for a Judicial Review, the number granted permission, and the number given permission by the Upper Tribunal following remittal. This means that the calculation for success rate only count completed cases.

74. The first table shows the progress of *Cart* Judicial Reviews in the High Court (except those pending an appeal decision in the Upper Tribunal). In the relevant years, out of the total number of applications (1249) 89 were granted permission either at an oral or paper hearing while 2 were heard at a substantive hearing. This meant a total of 92 cases were remitted to the Upper Tribunal for a permission to appeal decision.

75. The second table shows the progress of cases which were remitted to the Upper Tribunal (again except those pending an appeal decision in the Upper Tribunal). This number is 85, 7 less than were remitted. As explained above this could be due to the timing of the applications for Judicial Review and when the Upper Tribunal is served with the case. Cases may also fall away or be withdrawn for other reasons. The Upper Tribunal may also decline to give permission at the remitted permission to appeal stage.

76. Of the 85 cases granted permission following a remittal, the table records how many were found in favour of the claimant at the appeal hearing, and how many were found against. The number of pending cases is also recorded.

77. Forty two cases were found in favour of the claimant at their appeal hearing, taking this number divided by the number of total applications for *Cart* Judicial Reviews (1249), produces the ‘success rate’ for Cart *Judicial Reviews* (3.4%).

[3] Faulks et al, IRAL Report (CP 407), 176-177

78.

Cart - Immigration						
	HIGH COURT (minus cases pending UT Appeal decision)					
Year	Total number of applications	Granted Permission	% Granted Permission	Oral Hearing	Paper Hearing	Substantive
2012	161	2	3.73%	4	157	1
2013	672	34	5.21%	1	671	2
2014	776	55	7.99%	7	768	2
2015	1159	44	4.40%	7	1151	3
2016	683	27	4.83%	6	676	1
2017	789	52	6.97%	3	786	1
2018	614	42	7.17%	2	614	2
2019	635	38	7.09%	7	638	0
2020	307	24	8.79%	3	307	0
TOTAL	**5796**	**331**	**6.18%**	**40**	**5768**	**12**
2018-2019	1249	80	7.13%	9	1252	2

Cart - Immigration						
UPPER TRIBUNAL - IMMIGRATION & ASYLUM (minus cases pending UT Appeal decision						
UT Permission re-decision	% Permission Re-decision	UT appeal found in favour of claimant	% found in favour	UT Appeal found against the claimant	% found against	Cases Pending
-	-	-	-	-	-	-
-	-	-	-	-	-	-
-	-	-	-	-	-	-
-	-	-	-	-	-	-
-	-	-	-	-	-	-
-	-	-	-	-	-	-
45	7.33%	23	3.75%	22	3.58%	3
40	6.30%	19	2.99%	21	3.31%	10
8	2.61%	1	0.33%	3	0.98%	4
-	-	-	-	-	-	-
85	6.81%	42	3.36%	43	3.44%	13

Fee Income

79. Between 2016-2019 there were, on average, around 750 *Cart* JR cases per year in the High Court. To calculate the loss of court fee income to MoJ from removing the *Cart* JR route, we have applied the relevant fees to the different case types (permission to appeal on the papers - £154; oral renewal of permission to appeal - £385; and substantive hearing - £770) to calculate a total for the pre-remission fee income loss per year of around £117,000. The general immigration tribunal remission rate for 19/20 (of 22%) was then applied to calculate the net estimated fee loss to MoJ by removing the Cart JR route of around £92,000 per year.

Time and Efficiency Savings

80. Using that same 750 case load and average figures for judge's time spent on oral, paper and substantive hearings, which have been taken from the Time and Motion study, we have calculated the total hours spent on *Cart* JRs in the High Court each year. This, combined with the assumption that a sitting day for a High Court judge is around 6.5 hours, allowed us to estimate the total sitting days saved as around 150 days. Then using High Court Judge salary figures and sitting days per year, we estimated the total judicial cost per sitting day. This was then multiplied by the total sitting days saved to monetise these time savings. However, this judicial cost saving is non-cashable, as judicial time will be redistributed.

81. Between 2018-2019 there have been on average around 50 *Cart* JR cases per year heard in the UT. Based on discussions with the President and Vice President of the UT, time spent on *Cart* JRs in the UT are estimated as being between 3-4 hours. This is based on around 1 hour spent for each of them to review, plus up to 2 hours spent on the write-up. Using this range of figures for judge's time spent we have calculated the total hours spent on *Cart* JRs in the UT each year. This, combined with the assumption that a sitting day for an UT judge is around 6.5 hours, allowed us to estimate the total sitting days saved figure of between 23 and 30 days. Multiplying this by the total cost per sitting day for the UT Immigration and Asylum Chamber, we have monetised this time saving. However, and as with the High Court, this saving is also non-cashable, as judicial time will be redistributed to other cases.