ILPA's response to the Independent Review of Administrative Law

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

The Call for Evidence from the IRAL Secretariat was directed solely to Government Departments. We have therefore addressed some points from the terms of reference where we considered that our input would be of use to the panel.

The starting point for the review must be a reminder that judicial review is about enforcing the law as enacted by Parliament, and can only be successful where the Government has acted unlawfully. To allow the Government to act in an unlawful manner, unchecked by the law, would undermine the sovereignty of Parliament. The availability of judicial review helps to ensure good governance and better quality decision making. Guidance to government lawyers conducting judicial review work highlights that 'A public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration'[1].

[1] Treasury solicitor's guidance on discharging the duty of candour, at p 1, citing Donaldson MR in R v Lancashire County Council ex p Huddleston [1986] 2 All ER 941 in which he describe the relationship between the courts and public law decision makers as *'one of partnership based on a common aim, namely the maintenance of the highest standards of public administration'*.

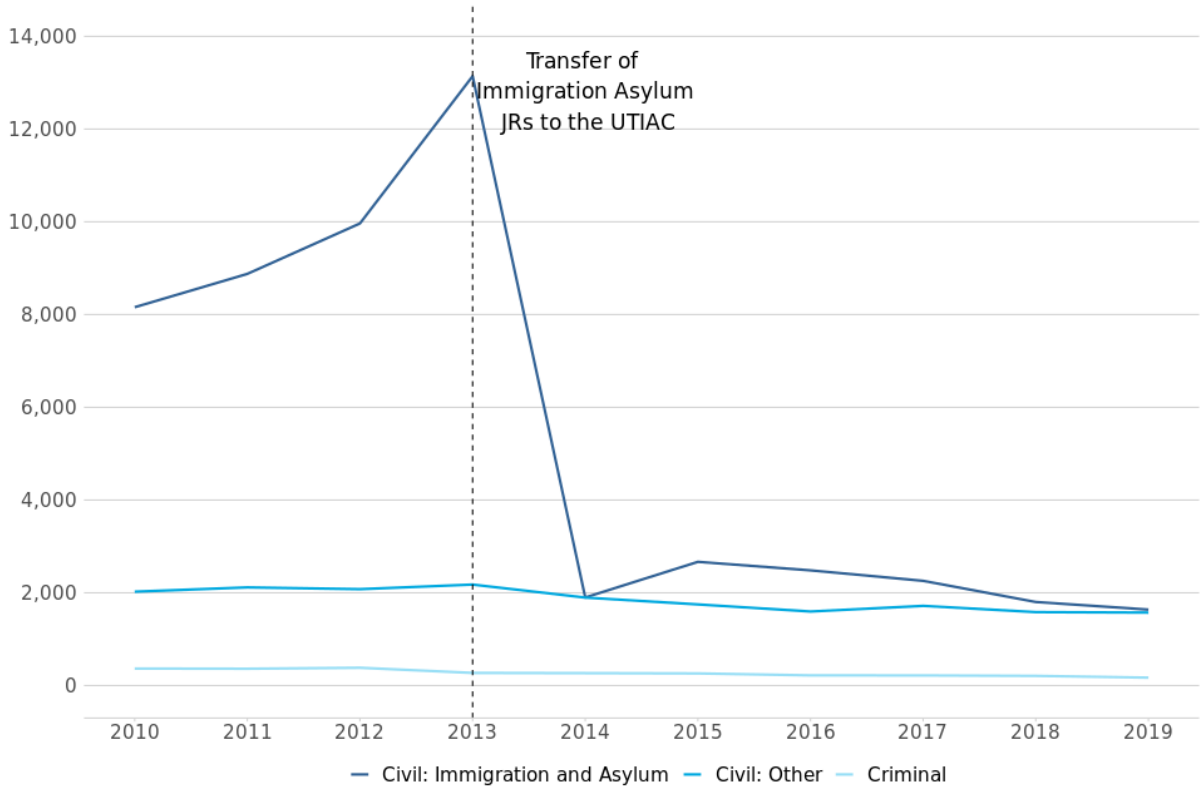
As stated by the Joint Committee on Human Rights in their report on 'The implications for access to justice of the Government's proposals to reform judicial review Thirteenth Report of Session 2013–14', "it is in the public interest for public bodies to make lawful decisions".[2] Since 2014 it is also no longer possible for an immigration judge to allow an appeal on the ground that the decision is not in accordance with the law. Many unlawful immigration decisions can only be challenged by way of judicial review.

Page 48 of last year's Conservative Manifesto stated 'We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays'. It is right that the importance of the ability of individuals to protect their rights, which is the topic of the vast majority of immigration judicial reviews, is explicitly accepted. This is particularly the case in the context of a Home Office which itself acknowledges that it needs to improve its processes and quality of decisions after several high profile failures including the handling of the Windrush cases.[3]

Immigration judicial reviews

Following previous reforms and changes, immigration judicial review numbers have fallen considerably and remain on a downward trend. In November 2013, the majority of Immigration and Asylum judicial reviews were transferred from the Administrative Court to the Upper Tribunal (Immigration and Asylum Chamber). This table is from the Civil Justice Statistics Quarterly: April to June 2020[4] and shows the number of judicial reviews in the Administrative Court since 2010.

[2] https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/174.pdf Para 43
[3] https://www.gov.uk/government/publications/windrush-lessons-learned-review-response-comprehensive-improvement-plan
[4] https://www.gov.uk/government/publications/civil-justice-statistics-quarterly-april-to-june-2020/civil-justice-statistics-quarterly-april-to-june-2020#judicial-reviews3



Immediately following that change, in line with the above chart showing the decrease in those cases in the Administrative Court, there was a corresponding increase in the number of judicial reviews in the UTIAC. However as can be seen in the following table[5], the number of judicial reviews has dropped steadily since 2015/16, and is now lower than prior to the transfer of cases from the Administrative Court in 2013.

Year	UTIAC judicial reviews
2019/20	5,679
2018/19	7,850
2017/18	10,011
2016/17	13,372
2015/16	15,727
2014/15	15,179

[5] https://data.justice.gov.uk/courts/tribunals

Year	UTIAC judicial reviews
2013/14	7,841

It is unclear to what extent the restoration of statutory appeals beyond asylum and human rights cases would further reduce these numbers, however if that is the aim then research should be undertaken into what proportion of current immigration judicial reviews are challenging decisions that could previously be appealed. Statutory appeals are a better form of challenge for applicants, as leave will be preserved under section 3C of the Immigration Act 1971 for those who had it prior to the refusal. Appeals are a more effective way to bring a challenge, as evidence can be heard and the Tribunal can undertake a fact finding exercise. Appeals are also usually faster and cheaper for all parties.

The Home Office has recently published its response to Wendy Williams' Lessons Learned Review. It accepted the recommendation to develop ethical standards and a decision-making model, and says that the "focus should be on getting the decision right first time".[6] A crucial part of being able to make the correct decision, is that there is a robust process available to challenge unlawful decisions. Judicial review played and continues to play an important role in assisting those people who were subject to unlawful Government actions in the mishandling of the Windrush cases. For many of the people affected by this, the application they needed to make was for a 'No Time Limit' document the refusal of which did not and still does not attract a right of appeal.

As stated by ILPA's Chair Adrian Berry to the Home Affairs Committee in oral evidence for their inquiry into Windrush Children on 25 April 2018: "There are no rights of appeal as such against the refusal of a no time limits decision on a Windrush generation case. There is no tribunal remedy on that because they were removed in the 2014 Act."[7] This remains the case, and so judicial review is the only legal remedy available to this group. The introduction of the Windrush scheme[8] to help people in this position also does not provide people with the ability to appeal negative decisions, and so again the

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922973/CCS001_CCS0820050750-001_Resp_to_Windrush_Lessons_CP_293_Accessible.pdf page 25

7 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/windrush-children/oral/82003.pdf%23page=15 Q54

8 https://www.gov.uk/windrush-prove-your-right-to-be-in-the-uk

only remedy is that of judicial review.[9] We would strongly recommend that this group is carefully kept in mind when considering any changes to judicial review, particularly in light of the commitments made by the Government towards them in the Comprehensive Improvement Plan.

Trafficking cases

One area where judicial review has been of critical importance in the last few years is in relation to trafficking and modern slavery. Recent cases which have had a wide positive impact for victims are as follows:

- *R (on the application of) K & Anorv Secretary of State for the Home Department* [2018] EWHC 2951 (Admin): successful challenge to the decision to cut financial support to potential victims of trafficking from £65 to £37.75 per week
- *R (on the application of) DS v Secretary of State for the Home Department* [2019] EWHC 3046 (Admin): successful challenge to the policy of refusing to accept reconsideration requests in respect of a negative trafficking decision from anyone other than a First Responder or support provider.
- *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9: the procedural route to the Supreme Court in this case was a mix of appeals and judicial review. The principal issue in this case was whether or not a tribunal could make its own decision on whether or not a person was a victim of trafficking, or whether it was bound by the decision of the SSHD unless the Tribunal found that the decision was perverse, in breach of the guidance or unlawful on some other public law ground. This issue was conceded by the SSHD in the Supreme Court.
- *R (on the application of) NN v Secretary of State for the Home Department* [2019] EWHC 1003 (Admin): the High Court granted general interim injunctions in a judicial review and found there was a real risk of irreparable harm to a significant number of vulnerable victims of slavery and trafficking if their support were to end after 45 days.
- The successful challenge, brought by LL and conceded by the Lord Chancellor at an early stage, to the exclusion from legal aid of potential victims of trafficking seeking immigration advice on their entitlement to discretionary leave to remain on the basis of their trafficking status.[10]

[9] https://www.duncanlewis.co.uk/news/Duncan_Lewis_Solicitors_challenge_discriminatory_refusal_of_citizenship_under_the_Windrush_Scheme_(27_August_2020).html

[10] https://atleu.org.uk/news/legalaidimmigrationadvice

- *R (on the application of) PK (Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98: successful challenge to the policy guidance on granting discretionary leave to remain on the basis of a person's status as a victim of trafficking.
- The successful challenge, brought by KTT and conceded by the SSHD at an early stage, to the SSHD's policy on the detention of victims of trafficking.[11]

The importance of each of these cases cannot be overstated, we recommend that any proposed changes are considered in the context of what effect they would have had on the above, each of which have improved the situation for victims of trafficking in some way.

Case Study 1

Mirza, Re Judicial Review [2016] ScotCS CSOH 73, it is a Scottish case but still demonstrates the importance of judicial review for Windrush type cases. Mr Mirza is a Pakistani man who arrived lawfully in the UK as a Commonwealth citizen child in the 1960s. He subsequently acquired indefinite leave to remain. In 2014 he lost his old passport which contained his indefinite leave to remain stamp. When he attempted to obtain a new immigration status document, he got caught up in the same hostile environment that bred the Windrush scandal. Without so much as an interview the Home Office advised him he was committing a criminal offence by remaining in the UK and advised him that he must depart voluntarily or face removal from the country that had been his home for almost 50 years. His only remedy against the unlawful refusal to issue him with an immigration status document was judicial review. Without judicial review, he would have either been removed from the UK or forced to argue a human rights case in the immigration tribunal from the erroneous starting point that he was a person without leave. A positive outcome in a tribunal appeal would have, at best, placed him on a costly ten-year route to indefinite leave to remain.

Case Study 2

Another judicial review that helped the Government correct another unintended injustice, with wider benefits for others affected, is that of *The Advocate General for Scotland v Romein* (Scotland) (Rev 1) [2018] UKSC 6. Ms Romein was born in the USA in the 1970s to a British by descent mother. Due to historic gender discrimination in British nationality law, Ms Romein's mother was prevented from

11 https://www.duncanlewis.co.uk/news/Home_Office_to_review_policy_on_detention_of_trafficking_and_slavery_survivors_as_a_result_of_legal_challenge_brought_by_a_survivor_of_trafficking__(18_May_2020).html

registering Ms Romein's birth at a British consulate. That registration would have made her a British citizen. Had it been Ms Romein's *father* who was the British citizen by descent, her birth could have been registered. The discrimination is clear. Parliament tried to remedy this discrimination by inserting section 4C in to the British Nationality Act 1981. Section 4C was poorly drafted. The consequence of that drafting was the perpetuation of the historical gender discrimination for those like Ms Romein who had been born in a foreign country to a British by descent mother. Ms Romein's application for citizenship was refused and her only remedy was judicial review.

Without judicial review, Ms Romein would have had to accept the persistence of historic gender discrimination today, and would have had no means of redress save for lobbying her MP to seek amendment to the British Nationality Act 1981. She would not be British and would still be subject to immigration control on the ten-year route to settlement, with the thousands of pounds of fees and lengthy period of unsettled status that involves.

Case Study 3

In an unreported decision, a person who had been living in the UK since they were 13 applied for British citizenship instead of indefinite leave to remain following ten years of lawful residence in the UK. This is a common misconception whereby people confuse the separate concepts of citizenship and settlement. Had he applied for indefinite leave to remain, he would have succeeded in his application. However, because he applied for citizenship, his existing leave to remain was not extended by section 3C of the Immigration Act 1971. His citizenship application was refused because he did not have indefinite leave to remain (a necessary ingredient for citizenship). Instead of telling him he had made the wrong application and offering to process the correct one, the Home Office detained him in an immigration detention centre and tried to remove him to his country of origin. Without judicial review, he would have been removed from the UK and sent to a country he had not lived in since he was six months old simply because he filled in the wrong one of two very similar forms.

Case Study 4

'TO' was an 18 year old pregnant female Sudanese national. She had suffered domestic abuse from her 35-year old British national husband, a man she had been forced to marry. He was displeased with the level of dowry received and so he sent her on 'holiday' to Sudan to visit her mother. While she was out of the country, he reported a breakdown of the relationship to the Home Office in order to

prevent her return. On her return to the UK, TO was detained by border officers who immediately cancelled TO's visa and issued her with removal directions to be returned to Sudan without further enquiry. The Secretary of State has clear published guidelines for how immigration officers should act in such situations, particularly in cases where there is an element of domestic violence or forced marriage. The immigration officers at the airport failed to follow these guidelines. Their actions deprived TO of time to apply for an alternative visa in the UK or to seek a right of appeal from within the UK. TO's only legal remedy was judicial review. A judicial review was lodged to challenge the lawfulness of the decision to cancel TO's leave, and this resulted in the cancellation of her removal directions. Crucially, this litigation also had the benefit of allowing the vital time needed to prepare a separate application for indefinite leave to remain under the domestic violence concession. A couple of months later TO was granted indefinite leave to remain in the UK.

Case Study 5

In *A v Secretary of State for the Home Department* [2016] CSIH 38 a foreign national victim of domestic violence successfully challenged the exclusion of dependant partners of refugees from the domestic violence section of the Immigration Rules. Section DVILR of Appendix FM to the Immigration Rules sets out criteria for the granting of indefinite leave to remain to victims of domestic violence. The petitioner (claimant) 'A' was a dependant partner of a refugee and had suffered domestic violence. She was unable to benefit from the rule granting indefinite leave to remain to other foreign spouses. She challenged this rule by judicial review on grounds that her treatment was discriminatory. Without judicial review, the victim of domestic violence in this instance would have had to suffer the discriminatory rule without recourse. The immigration rules have now been amended to include dependant partners of refugees as a direct consequence of this litigation.

Delays

The Conservative manifesto refers to "needless delays", and as a membership organisation for immigration lawyers we are well aware of this Government's concerns about "last minute judicial reviews". However, this is something which appears to have been deliberately built into the current system, due to a combination of lack of access to legal advice at an early stage and then very short notice (seven days) of removal directions. The combination of these two factors means that for many people, the first time they see a lawyer will be under the Detained Duty Advice Scheme when they are in detention with a removal flight booked. This is a situation that is in no one's interests, and the result is that a large number of these challenges are successful. The most effective way to reduce the number

of these judicial reviews will be to ensure that legal advice is accessible at an early stage, and to give more notice of when removal will occur.

Disclosure and the duty of candour

The terms of reference mention the duty of candour "particularly as it affects Government". This duty applies equally to both parties, and the principle of equality of arms in legal proceedings is an important one. It is difficult to see how a duty could legitimately be imposed on one party only. The Administrative Court's Judicial Review Guide 2020[12] goes into detail about the reasons why the duty of candour is so important.

The lack of a formalised duty of disclosure in judicial review proceedings[13] can cause difficulty, disclosure is often requested from the SSHD at the pre action stage, but not provided. This can lead to judicial review proceedings being issued, and/or an application for disclosure made, where this could have been avoided through the provision of disclosure at an earlier stage. Failure to disclose relevant documents in a timely manner can also result in proceedings being drawn out unnecessarily.

There are many examples of poor practice on the part of the SSHD in relation to these duties, for example *Babbage, R (on the application of) v Secretary of State for the Home Department* [2016] EWHC 148 (Admin):

> 13. I confess to having been extremely concerned about the attitude of the Secretary of State, or alternatively her advisers, towards the supply of documents necessary for the resolution of this case. The Secretary of State, through her officials or advisers, was under a duty to disclose this material of their own volition. They did not do so. They were prompted to supply it by the solicitors for the Claimant. They did not provide them. They were ordered to provide it by Collins J. They failed properly to comply with that order. They were then ordered to provide specific, identified material, or an explanation of why they could not do so, by Picken J. They failed to comply with that order too.
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> 14. The deficiency in the response to this claim was compounded by the fact that the Secretary of State served no evidence whatsoever in support of her resistance of the claim. The failure

[12] https://www.gov.uk/government/publications/administrative-court-judicial-review-guide pages 30 and 70; see also treasury solicitor's guidance at fn 1 above.
[13] CPR Practice Direction 54A – Judicial Review, para 12.1

of the Secretary of State to provide evidence has been a subject of comment by the Courts on a number of previous occasions, notably R (I) v SSHD [2007] EWCA Civ 727 and R (Das) v SSHD [2014] EWCA Civ 45. In the latter case, the Court of Appeal noted "*the absence of any evidence on behalf of the Secretary of State before the Court below or before this Court to explain her decision-making in this case*" (paragraph 79) and rejected D's plea that it was hard to serve evidence.

Another example is *R (On the Application Of) Citizens UK v Secretary of State for the Home Department* [2018] EWCA Civ 1812:

> 168. In my view, there was a serious breach of the duty of candour and co-operation in the present proceedings. An incomplete picture was left in the mind of the reasonable reader, including Soole J, as a result of the evidence that was filed below. I dare say this was not deliberate. I note in this context that Ms Farman did file further evidence relating to the filter process in the Upper Tribunal in the case of *FH*, which suggests that there was no deliberate attempt to suppress these matters. There is no reason to think that there was bad faith. Nevertheless, the effect, even if it was unintentional, was that significant evidence was not brought to the attention of the High Court.
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> …
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> 170. The most serious omission, in my view, was the failure by those presenting evidence on behalf of the Secretary of State to inform the High Court that the reason why the reasons for an adverse decision in the expedited process were "sparse" (to use Soole J's phrase) was not because of the urgency nor because the French authorities demanded that (as he thought and said in his judgment) but because the British authorities did not wish to give more reasons and that this was because of a perceived risk of legal challenge to the decisions.
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> 171. As I have said earlier in reviewing the main authorities on the duty to act fairly, one of the rationales for that duty is precisely to permit a person to know whether they have any basis for mounting a legal challenge to a decision; and to enable a court or tribunal to assess whether a decision is wrong. These are elementary but fundamental features of the rule of law. They explain why reasons for a decision *should* be given; they are not reasons for why they should *not* be given.

172. For those reasons I conclude that:

(1) there was a serious breach of the duty of candour and co-operation by the Secretary of State in this case; and

(2) the evidence now before this Court supports the fundamental submission made by Citizens UK that the process adopted in this case was unfair and unlawful as a matter of common law.

The case of *Teh v Secretary of State for the Home Department* [2018] EWHC 1586 (Admin) is another example. This was a case heard in the Administrative Court because it was a statelessness case about whether a British Overseas Citizen was stateless and whether he was admissible to Malaysia. For months before the full JR hearing the Claimant's lawyers had sought from the Home Office their evidence on his admissibility. There was a lot of evidence referred to in the 2013 case of Ku on the same point which the lawyers therefore knew existed but which had never been disclosed.

The Home Office made an application to adduce the evidence the day after the full judicial review hearing. This is the further evidence which is referred to in the judgment of Teh at [39] and which was objected to and not admitted. In rejecting the application, Steven Kovats QC sitting as a deputy High Court judge held at [41] that:

> The new material (by which I mean the material that does beyond clarifying the dates and current status of documents already before the court) consists of evidence which the defendant served in the case of *R (Ku) v Home Secretary* [2013] EWHC 3881 (Admin), extracts from Hansard, correspondence between the UK and Malaysian authorities in 2011 and a Malaysian newspaper article dated 4 April 2014. This last item is, as Mr Singh points out, ironic, for it is the same newspaper article which the claimant submitted in support of his own application and which the defendant's refusal letter said had not been taken into account because it did not emanate from an official source (paragraphs 23 above and 56(b) below refer). All this material has long been available to the defendant. There is no good reason why the defendant did not serve this new evidence earlier. To admit it now, would lead to cost and delay, for the claimant would need an opportunity to respond to it. The new material is far from decisive, not least because it is several years old. My refusal to admit this evidence in the present case does not prevent the defendant from adducing the material in another case, if she thinks that it is significant. In these circumstances, to admit it would in my judgment be contrary to each of paragraphs (b)-(f) of CPR 1.1(2).

As will be the case with many immigration judicial reviews, here the Home Office was the only holder of relevant evidence and the failure to disclose meant that the Claimant was put at a severe disadvantage in presenting the case as they were essentially only in possession of the extracts of evidence referred to in earlier case law. Failure to provide relevant disclosure or to comply with the duty of candour inevitably makes litigation far messier than is necessary. If any changes are necessary, we would suggest that these should be to facilitate more disclosure and candour to be exercised at an earlier stage in the proceedings, ideally pre action.

Time limits

The existing time limits are short in comparison to other areas of civil law and carefully supervised by the courts under the CPR[14], with careful reference to the particular circumstances of the case. Judicial review claims must be brought 'promptly' and in any event within three months. Shorter time limits already exist where planning decisions are under challenge by way of judicial review. Shortening the time limit to bring a judicial review challenge would mean that there is less time available for matters to be resolved at a pre action stage. This move would therefore be likely to increase the number of judicial reviews that are lodged. It would also be likely to result in perverse outcomes.

Further, many immigration judicial reviews are funded under legal aid, and a reduction in the time limit would mean more pressure on the Legal Aid Agency to decide applications much more quickly than they do at the moment. This can be contrasted with statutory appeals where legal aid providers are able to grant funding themselves, and so the shorter time limits there are less of an issue.
Instead, it would be useful if flexibility could be built into the process, so that, for example where the SSHD is engaging with the pre action process, it is possible to agree an extension to the deadline by mutual consent, with a view to avoiding the need for proceedings to be issued at all.

Interveners

The use of interveners improves the efficiency of proceedings, it is difficult to see where the advantage is to either party, or to the Court which in any event must approve the intervention, to have their role limited in any way. If the concern is that interveners are 'conducting politics by another means', then

[14] CPR 54.5

we submit that there is no evidence to support this position. We echo the observation of the Joint Committee on Human Rights in their 2014 report 'The implications for access to justice of the Government's proposals to reform judicial review'[15]:

> 91. Finally, it is not clear to us at what mischief this clause is aimed. The Government has not produced evidence of abusive interventions or cases in which an intervention has significantly and unjustifiably increased the costs of the case for other parties.

To our knowledge, there have not been any reported costs orders made against an intervener since the introduction of section 87 of the Criminal Justice and Courts Act 2015, which provides for a costs order to be made against an intervener where the evidence and representations have not been of **significant** assistance to the court. The evidence therefore supports the position that the role of interveners is valued by the courts[16] and we submit that there is no reason to limit this role.

26 October 2020

[15] HL Paper 174 HC 868 https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/17407.htm

[16] See e.g. *Secretary of State for the Home Department v R (on the application of) Joint Council for The Welfare of Immigrants* [2020] EWCA Civ 542 at [6], *R (on the application of) Help Refugees Ltd v Secretary of State for Home Department & Anor* [2018] EWCA Civ 2098 at [6], *R (on the application of) Garrec & Anor v Secretary of State for the Home Department & Anor* [2020] EWCA Civ 621 at [32].