ILPA's response to the Ministry of Justice consultation: Judicial Review – Proposals for Further Reform

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, 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 an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on the Immigration and Asylum Chambers of the Tribunals Presidents' Stakeholder Group, on the Legal Services Commission/Law Society Civil Contracts Consultative Group, on the Ministry of Justice Administrative Justice Advisory Group and on many other consultative and advisory groups.

This response focuses on immigration and asylum cases because this is ILPA's main area of expertise. We also count among our membership those with substantial experience of age assessment judicial reviews, unlawful detention judicial reviews and community care judicial reviews. This response should be read with our responses to the Ministry of Justice consultations *Judicial Review: Proposals for Reform* (the "2012 consultation")[1] and *Transforming Legal Aid: delivering a more efficient and credible system* (the "2013 consultation")[2].

INTRODUCTION

We disagree that these proposals are necessary as a disincentive to bringing judicial reviews without merit[3]. Existing procedures in judicial review, particularly the permission filter, already are able to identify weak cases at an early stage[4]. Further, the application process for legal aid requires that claimants pass a rigorous merits test[5].

Ministers and others have cried out against the Human Rights Act 1998 and what they see as human rights looming too large in the legal landscape. Yet it is proposed to do violence to the counterweight that is judicial review. We recall, not for the last time in this response, that judicial review is not at base about rights, but about public wrongs[6]. Ensuring that the law is adhered to and that Government is called to account are matters of the Executive being judged against the laws enacted by Parliament.

The courts have been active in discouraging claimant lawyers from bringing unmeritorious claims. If an urgent application is made to stay removal or deportation, lawyers must set out the reason for the urgency and justify any late application. The Administrative Court has required lawyers who fail to comply with these requirements to attend court personally to

[1] ILPA's 24 January 2013 response is available at www.ilpa.org.uk/data/resources/17007/13.01.24-ILPA-response-to-Ministry-of-Justice-consultation-on-Judicial-Review-proposals-for-reform.pdf
[2] ILPA's 3 June 2013 response is available at www.ilpa.org.uk/data/resources/18039/13.06.03-ILPA-response-to-Transforming-legal-aid.pdf
[3] Consultation, paragraph 20.
[4] See also the ILPA response to 2012 consultation, paragraph 9.
[5] ILPA response to 2012 consultation, paragraphs 10-11.
[6] *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121.

explain their failures (*R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070(Admin)).

The President of the Queen's Bench Division has presided over several cases in the Divisional Court in which he has underlined to practitioners their duties: a duty to disclose all relevant matters (*Awuku* [2012] EWHC 3298); a duty to satisfy themselves that a claim is one that can properly be made (*Awuku* (No 2) [2012] EWHC 3690); and a duty to act competently and with their obligations to the court uppermost in their minds (*B & J* [2012] EWHC 3770[7]).

Breach of these duties may lead the court to refer the practitioner to their regulator, as seen in the case of Consilium Chambers LLP (a non-legal aid firm). The principal solicitor and his firm were referred to the Solicitors Regulation Authority in August 2013 by the President of the Queen's Bench Division for urgent investigation of their conduct in last minute applications for judicial review.[8] On 4 September 2013 the firm was closed with immediate effect.[9]

Active judicial management of cases and sanctions for inappropriate conduct are appropriate tools. They do not prevent meritorious claims being brought, as the current proposals will do.

- ***Length of consultation period***

The consultation period is only eight weeks. It contains proposals that are contentious. It coincides with the consultation period for *Transforming Legal Aid: Next Steps*, which sets out proposals for legal aid with which many potential respondents are trying to engage. The Cabinet Office Consultation Principles[10] require the time for a consultation response to be proportionate and realistic and in the circumstances we do not consider that this period is either.

- ***Incomplete statistics/evidence***

The consultation paper *repeatedly* makes assertions unsupported by evidence. For example, it is stated that these proposals are part of measures proposed to "prevent abuse of judicial review"[11] and that judicial review is "sometimes used as a delaying tactic in cases which have little prospect of success"[12]. No evidence is given to support these assertions.

It is stated that delays and costs associated with judicial review hinder actions the executive wish to take and that "weak judicial reviews are being funded, undermining public confidence in the legal aid system".[13] No evidence is given to support this statement.

In our response to the 2012 consultation we stated that the statistics provided in that document were incomplete and had the potential to mislead:

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[7] See also *R(H) v SSHD* [2013] WL 4411374.
[8] *Investigate law firm after 'untruthful' asylum case, says top judge*, The Telegraph, 8 August 2013, available at www.telegraph.co.uk/news/uknews/law-and-order/10231629/Investigate-law-firm-after-untruthful-asylum-case-says-top-judge.html (accessed 26 October 2013).
[9] Solicitors' Regulation Authority Decision 566515, 4 September 2013, available at www.sra.org.uk/consumers/solicitor-check/566515.article
[10] Cabinet Office Consultation Principles, www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf, accessed 20 October 2013.
[11] Consultation paper, paragraph 5.
[12] Consultation paper, paragraph 6.
[13] Consultation, paragraph 7 (iii).

> *For example, there is little or no consideration of the fact that significant numbers of judicial review claims settle pre-and post-permission, suggesting that far from being unmeritorious, or deliberate "delaying" tactics, the claims were properly and responsibly brought and conducted, and that the parties managed to achieve a resolution of the claim without using further court time and resources. Comprehensive statistics, identifying this class of case discretely, should be collated and provided.*[14]

In its response to the 2012 consultation, the Public Law Project requested the data underpinning the Government's proposals. In May 2013, when a further consultation was released containing proposals that would restrict access to judicial review, *Transforming Legal Aid: delivering a more credible and efficient system*[15], the Public Law Project made a further request for statistics[16] and was informed by the Ministry of Justice that these could not be provided for reasons of cost[17]. It would be expected the statistics would be readily available to the Government if the proposals were based on objective data.

We continue to request comprehensive data.

The Government acknowledges where claims for judicial review are withdrawn before any decision on permission there is evidence that many cases may be settled on terms favourable to the claimant, as described by Bondy and Sunkin in 2009[18]. However the Consultation Paper also states that the Government:

> *…wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that prolonged legal battle can involve.*[19]

Avoiding further delay and cost is a standard element of any settlement negotiation. That does not mean that a case does not have merit. We ask what, if any, evidence the Government has gathered about allegedly unmeritorious cases in which the State concedes and how it has tested that evidence.

Three days after the consultation was released the Government also released data on judicial review "end points" which showed the cases recorded as concluding at particular stages of proceedings[20]. There was no outcome data included in that report. This data is available to the Government, as all providers have to supply it when a legal aid certificate is discharged.

In the statistical report released on 25 June 2013, data was provided showing that in cases of civil representation for immigration and nationality, 70% of cases where proceedings were

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[14] Paragraph 5, ILPA response to 2012 consultation.
[15] Ministry of Justice, April 2013.
[16] Public Law Project, Data relating to judicial review, 22 May 2013 ,see (accessed 26 October 2013): www.publiclawproject.org.uk/documents/FOIA_82534_%20legal_aid_consultation_april%202013_judicial_review_permission_IA_and_EIA_30052013.pdf
[17] See the 30 May 2013 letter from the Ministry of Justice available at http://www.publiclawproject.org.uk/data/resources/127/FOIA_82534_-legal_aid_consultation_april-2013_judicial_review_permission_IA_and_EIA_30052013.pdf (accessed 26 October 2013).
[18] Bondy, V and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, June 2009. http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf
[19] Consultation, paragraph 12.
[20] Statistics Release Legal Aid Statistics, 9 September 2013, Table 6: Legal Aid Agency Judicial Review end-point code data, 2011-2012 and 2012-2013 (page 10) available at (accessed 26 October 2013): www.gov.uk/government/uploads/system/uploads/attachment_data/file/238115/legal-aid-statistics-090913.pdf

issued had a benefit to the client.[21] This figure will include claims issued in the Court of Appeal and Supreme Court as well as the High Court. The data does not indicate a level of unsuccessful claims that is in any way unacceptable.

In addition, the Government must have outcome data on judicial reviews. This has not been provided.

The consultation paper states that the Government incurs costs in defending claims[22]. If the Government has acted unlawfully or failed to act in a lawful manner then claimants are entitled to bring proceedings to challenge such actions or failures. Statistical data released by the Ministry of Justice on 25 June 2013 shows that in immigration cases where the opponent (i.e. the Government department) paid costs for claims initially funded by legal aid, the increase in costs was 12% in 2012-2013 from the previous period. This increase was 15% for public law claims.[23]. This money reimburses the legal aid fund but the cost is felt by another part of the State. Good, lawful administrative decision making would avoid such flows of money by obviating the need for applications for judicial review of such decisions.

- **Timing of the proposals**

The Consultation paper recognises that many judicial review cases will soon be transferred from the High Court to the Upper Tribunal. This change takes effect from 1 November 2013[24]. The effect of the transfer should be studied before further change is made[25]. In his recent lecture, Lord Neuberger commented that because of the transfer the cause of the delays complained of in the consultation is largely historic[26].

The Joint Committee on Human Rights recognised the lack of data on the transfer of judicial review cases over to the Tribunal and recommended safeguards be introduced to protect certain cases by keeping them in the High Court:

> *We are aware that there has still been no systematic review by the Government of the exercise by the Upper Tribunal of its judicial review jurisdiction generally, and there is therefore no evidence before Parliament of how the Upper Tribunal is performing that significant judicial role. We urge the Government to consider amending the Bill to insert additional safeguards ensuring that immigration and nationality cases in which human rights such as life, liberty or freedom from torture are at stake continue to be decided by high court judges.*[27]

We are unaware of any review that has taken place since that proposal last year. Judicial reviews within the Tribunal are subject to extensive delays with, in contrast to the

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[21] Legal Aid Statistics in England and Wales, Legal Services Commission 2012-2013, Ministry of Justice Statistics Bulletin, 25 June 2013, Table 14: Civil Representation Outcomes (page 41) available at: www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf

[22] Consultation paper, paragraph 16.

[23] Legal Aid Statistics in England and Wales, Legal Services Commission 2012-2013, Ministry of Justice Statistics Bulletin, 25 June 2013, Table 14: Civil Representation Costs met by opponent (page 40) Available at www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf

[24] See The Crime and Courts Act 2013 (Commencement No. 4) Order 2013 (SI 2013/2200 (C. 90)), The Tribunal Procedure (Amendment No. 4) Rules 2013 (SI 2013/2067); The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment No. 2) Order 2013 (SI 2013/2068) and The Upper Tribunal (Immigration and Asylum) (Judicial Review) (England and Wales) Fees (Amendment) Order 2013 (SI 2013/2069).

[25] See further ILPA response to 2012 consultation, paragraphs 14-15.

[26] Tom Sargant Memorial Lecture 2013, *op cit.*

[27] Joint Committee on Human Rights, Legislative scrutiny: Crime and Courts Bill, 26 November 2012, page 8 www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/67/67.pdf (accessed 27 October 2013).

Administrative Court, little active management pre-permission. The impact of the changes is not yet known and should be obtained before consideration is given to further changes.

The Government has now introduced an Immigration Bill that will further restrict rights of appeal or of appeal within the UK[28]. The Appeals Impact Assessment published with the Bill[29] predicts a resultant increase in judicial review applications. It is said in the Appeals Impact Assessment that displacement onto judicial review cannot be quantified and therefore cannot be costed. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. Given that in 2011 there were 8,711 immigration and asylum judicial reviews[30] and only 4,630 reached the stage of a decision on permission, this appears to be a very substantial increase.

QUESTIONS

Questions 1-8

No response. These relate to areas of law outside ILPA's expertise.

STANDING

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

No, in our view there is not a problem.

To coincide with the publishing of this Consultation, the Secretary of State for Justice stated the Government's case thus:

> *…[judicial review] is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change. We will protect the parts of judicial review that are essential to justice, but stop the abuse.*[31]

This is a mischaracterisation of what are, frequently, successful legal challenges to unlawful executive action. The Secretary of State for Justice's article casts claimants as 'countless Left-wing campaigners', judicial review as their 'promotional tool', and lawyers as cynical entrepreneurs benefiting financially from this 'lucrative industry'. Irrespective of the irresponsible way in which the point is made, this is neither a fair nor accurate description of judicial review, the individuals who seek to use it and the lawyers who assist them.

In the Consultation paper itself, the purported 'abuse' of judicial review is summarised as: "…[t]he Government wants to ensure that judicial review … cannot be used simply to campaign against, frustrate or delay decisions[32] .

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[28]See Immigration Bill (HC 110) Part II , available at www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/14110.pdf (accessed 26 October 2013).

[29] Impact Assessment of Reforming Immigration Appeal Rights, IA NO. HO0096, 15 July 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249120/appeals_impact_assessment.pdf (accessed 26 October 2013).

[30] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf (accessed 26 October 2013).

[31] *The judicial review system is not a promotional tool for countless Left-wing campaigners*, Daily Mail on 5 September 2013: www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html (accessed 26 October 2013).

ILPA agrees that initiating proceedings with the aim of causing delay, seeking publicity or political campaigning are improper purposes for judicial review but does not accept that the Government has accurately stated the prevalence of such misuse of judicial review and hence the need for change.

The recent article by Bondy and Sunkin *How Many JRs are too many?*[33] demonstrates this as a matter of statistics. Having excluded environmental challenges (which are not within scope of this consultation) and the Equality and Human Rights Commission, which has statutory power to bring proceedings, Bondy and Sunkin found in their database of 502 final hearing decisions in judicial reviews heard in a 20-month period between July 2010 and February 2012, only four cases where it could have been said that the claimant had no apparent direct and tangible interest[34].

Campaigning and litigating are not incompatible. They are distinct activities that may legitimately complement each other. Campaigning may in some cases be an attempt to avoid litigation. An organisation that campaigns on an issue may conscientiously take legal action to stop unlawful activity by a public authority. Litigating to prevent unlawful action holds government to account. That the same organisation that successfully brought judicial review proceedings also lobbies to achieve the same goal politically does not make the unlawful government action any less unlawful.

We consider that any suggestion that non-governmental organisations start proceedings, irrespective and careless of merits, for the purpose of mere publicity is inaccurate. Litigation by a non-governmental or other organisation irrespective of the merits of the case would jeopardise and undermine the credibility of the organisation and its aims. A defeat in the courts could set a campaign back many years. Duties of directors and trustees are as much engaged when committing resources to litigation as for any other purpose.

An organisation may be left with little option but to pursue its concerns before the courts. An example of this is the *HSMP Forum* litigation, discussed below. The cases concerned changes to the Highly Skilled Migrant Programme, which were implemented without transitional provisions and resulted in persons, who had been required to make long-term commitments to the UK as part of their application, being prejudiced. Despite meetings with the then Minister for Immigration and the recommendations of an inquiry conducted by the Joint Committee on Human Rights[35], those affected were only able to obtain a remedy via judicial review[36].

The purpose served by judicial review, namely, to ensure that public law wrongs do not go unchecked, will be undermined if the current rules on standing are narrowed. Claimants for judicial review have long been required to have a sufficient interest in the matter[37]. The

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[32] Consultation, paragraph 8.

[33] V. Bondy and M. Sunkin, 'How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform" UK Const. L. Blog (26th October 2013) available at http://ukconstitutionallaw.org (accessed 27 October 2013).

[34] *Children's Rights Alliance for England v SSJ* ([2012] EWHC 8 (Admin), *British Pregnancy Advisory Service v SSH* ([2011] EWHC 235 (Admin;) *Child Poverty Action Group v SSDWP* ([2011] EWHC 2616 (Admin)) which was a challenge to reforms to housing benefit scheme, *Medical Justice v SSHD* ([2010] EWHC 1925 (Admin).

[35] *Highly Skilled Migrants: changes to the Immigration Rules,* Joint Committee on Human Rights, Twentieth Report of Session 2006-7, 26 July 2007, HL Paper 193, HC 993, available at (accessed 26 October 2013): http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/173/173.pdf

[36] *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC 711 (Admin).

[37] Senior Courts Act 1981 s 31(3). See the work of the Law Commission that preceded this: *Remedies in Administrative Law* Cmnd. 6407 (49 of 1976), and Law Commission Working Paper no 40 of 1971. See subsequently Law Commission Working Paper no 226 of 1994.

primary reasons to justify the current rules of standing (with particular reference to the immigration and asylum context) are:

i) To ensure the rule of law and that unlawful public action does not go unchecked

It is vital that there should be redress from (in particular) serious breaches of public law principles. Eloquent summaries of the need for the current rules of standing to ensure the rule of law have been provided by the courts. To cite but a few:

Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644E-G said as follows:

> *…it would, in my view, be a grave lacuna in our system of public law if a pressure group, like a federation, or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from brining the matter to the attention of the court to vindicate the rule of law and to get the unlawful conduct stopped.*

And in *Ex p Bulger* [2001] EWHC Admin 119 at [20]:

> *…the threshold for judicial review has generally been set by the courts at a low level. This… is because of the importance of the importance in public law that someone should be able to call decision makers to account, lest the rule of law break down and private rights be denied by public bodies.*

Thus, the current approach to standing recognises that public law is, as described above, about public wrongs.

Further, the Government has failed to consider *holistically* the impact of changes already made to judicial review. In particular, the changes made to legal aid will mean that that many individuals who are directly affected by Government action will be precluded from seeking judicial review. In these circumstances, public interest challenges are likely to be the *only* recourse against unlawful executive action in many cases. Migrants, as a politically (and often socially and economically) disenfranchised group, are likely to be amongst the hardest hit.

Whilst Article 6 of the European Convention on Human Rights does not apply to determinations of the entry, residence and expulsion of aliens, there is no such restriction on Article 47 of the Charter of Fundamental Rights of the European Union. Where a case falls within the scope of EU law, therefore, the cumulative effects of the lack of legal aid combined with restrictive standing rules may violate the standards of effective judicial protection required by Article 47.

There are situations in which no individual is appropriately placed to bring a claim. This may be where it is the cumulative effect of Government action that is the proper subject of challenge or that reveals its illegality and the effect on any one individual will not be sufficient to demonstrate this, or where any one affected party is not prejudiced to the extent that he or she would go to the expense and bother of proceedings. In cases where there are general concerns about a policy or practice, a non-governmental organisation may be better placed to identify and evidence a claim to bring about a better and quicker resolution to the unlawful public action. For example, we frequently see the Home Office settle cases where a complaint is made against a particular practice, but fail to change the practice or the causes of the problem.

ii) ***To encourage and facilitate good administration***

That individuals or groups beyond a person directly and individually affected may challenge unlawful action by the Government encourages and facilitates better administrative practice

thereby reducing the scope for legal challenges in the longer term. There are many instances of cases in the immigration and asylum context brought on behalf of those affected in the public interest. For example:

R (RLC) v SSHD[38] - a challenge to the accelerated asylum procedures at Harmondsworth detention centre. In this case, a protective costs order was given, by consent. Whilst finding that the process was not inherently unfair, the Court of Appeal expressed considerable concern that there was no written flexibility policy setting out the circumstances in which it would be appropriate for the Home Office to take a case out of the fast track or enlarge the time frames.

R (HSMP Forum) v SSHD[39] - the UK Government introduced the Highly Skilled Migrant Programme (HSMP) to attract migrants with exceptional qualifications to the UK. As part of the application process migrants on the programme were required to make long-term commitments to the UK. As a result, these individuals made many sacrifices such as leaving well-paid jobs, selling properties and uprooting their families. However, the rules were suddenly changed without transitional provisions making it more difficult, and in some cases impossible, for those on the HSMP to remain in the UK despite the commitment that had been required of them in the application. HSMP Forum, a not-for-profit organisation which supports and assists skilled migrants in the UK, successfully brought judicial review proceedings to challenge the application of the changes to the Immigration Rules to these individuals. When the HSMP individuals were further prejudiced by the Government's decision to change the rules on settlement, HSMP Forum again successfully took proceedings on their behalf.[40]

R (BAPIO Action Ltd) v SSHD[41] - the Secretary of State decided to restrict the access of non-EEA migrant medical professionals to jobs within the NHS without taking into account the interests of those who had made the UK their main home and had a legitimate expectation of seeking and obtaining employment. BAPIO (the British Association of Physicians of Indian Origin), a voluntary organisation, successfully took judicial review proceedings on behalf of those affected. The case was appealed to the House of Lords, which confirmed that the Secretary of State's policy was unlawful.

R(Medical Justice) v SSHD[42] - Medical Justice, a charity that works to defend and promote the health rights, and associated legal rights of persons detained under UK immigration act powers challenged the Home Office policy of giving no, or almost no, notice of removal to certain categories of person. The Court of Appeal upheld the decision of the High Court that this abrogated the constitutional right of access to justice and was *ultra vires*.

R (Detention Action) v SSHD[43] - Detention Action, a charity supporting migrants held in immigration detention, has brought proceedings to challenge the legality of the detained fast track. This follows the challenge brought by the Refugee Legal Centre mentioned above.

In all these cases, proceedings were brought by an organisation in the public interest and on behalf of a group of individuals affected. They were all challenges to a policy or practice that affected a large number of individuals, many of whom would be unable (whether because of their individual circumstances, such as being in detention, or due to difficulties in raising the necessary funds) to take proceedings themselves.

[38] [2004] EWCA Civ 1296.
[39] [2008] EWHC 664 (Admin).
[40] [2009] EWHC 711 (Admin).
[41] [2008] UKHL 27.
[42] [2011] EWCA 1710.
[43] Proceedings commenced in 2013.

Lady Hale provided examples from other fields of law in her speech to the Public Law Project conference on 20 October 2013[44]. We also highlight the article by Varda Bondy and Maurice Sunkin *How Many JRs are too many?*[45].

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

No. The alternatives are grouped thematically below. They are not considered appropriate or reasonable for the reasons given. All would be liable to give rise to satellite litigation.

Individual concern

The test for standing before the European Courts is that of 'direct and individual concern'. The requirement that the individual concerned be 'individually' concerned such that he/she is affected in a way peculiar to him/her has been widely criticised as inimical to effective judicial protection.[46] It does not however appear that this is viewed as a workable alternative in the Consultation.

Direct interest - the 'victim' test under the European Convention on Human Rights and section 7(1) of the Human Rights Act 1998; "person aggrieved"; 'the potential to produce a benefit for the individual, a member of the individual's family or the environment'

It would be inappropriate to equate standing in public law to the requirement of direct concern as required under European and domestic human rights law, statutory planning challenges and/or the civil legal aid regime. This is because public law is not only (or even primarily) concerned with the vindication of rights, but about a broader public interest in lawful government and the correction of public wrongs. Sedley J (as he then was) put the point succinctly in *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121:

> *Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issues or outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive.*

Repeated reference is made in the Consultation paper to the proper purpose for judicial review being a vital check on the lawful exercise of public power.[47] A restriction of the rules

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[44] *Who Guards the Guardians?* Available at http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians (accessed 26 October 2013).

[45] *Op. cit.*

[46] See, e.g., Opinion of Advocate General Jacobs in Case C-50/00 *Union de Peqnenos Agricultores v Council* [2002] ECR I-6677.

[47] See e.g. Consultation, Foreword: '[judicial review] is a crucial check to ensure lawful public administration'; Foreword: 'it is right to test the potential for further, substantive, reform which seeks to restore and secure judicial review to its proper place as a check on unlawful executive action'; Foreword: 'Judicial review is a crucial means of holding Government to account'; paragraph 1: 'Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. The Government will ensure that judicial review continues to retain its crucial role'; paragraph 8: 'The Government wants to ensure that judicial review is readily available where it is necessary in the interests of justice and holding the executive to account'; paragraph 21: '[*judicial review*] can be characterised as the rule of law in action… a key mechanism for individuals to hold the executive to account.'

on standing to direct concern (a version of the 'victim' test) or direct and individual concern would not satisfy that purpose.

The common law rules on standing have been developed incrementally over decades and represent a delicate balance between protecting Government action and holding it to account. In the recent case of *Walton v The Scottish Ministers* [2012] UKSC 44 the Supreme Court returned to the distinction between a "a mere busybody" and a person with a reasonable concern in the matter, while Lord Hope introduced, in the beguiling form of the osprey, those cases where what is affected is a bird or place, unable to bring proceedings.

Question 11: Are there any other issues, such as the rules on interveners, we should consider in seeking to address the problem of judicial review being used as a campaigning tool?

No.

See our response to question 9 above. ILPA takes issue with the premise of this question. Where Government action is unlawful in public law terms it may properly be challenged by way of judicial review. It is in the public interest that unlawful action is challenged.

The existing rules on standing give the court more than adequate power to prevent abuse of judicial review, whether for campaigning or other purposes. For example, where a claimant is acting out of ill will or improper purpose, granting him or her standing would amount to an abuse of process: *per* Dyson LJ (as he then was) in *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546 [2004] 1 WLR 1761 at [23]. There is a direct link between the importance of the issue and the grant of standing under the current rules: see, e.g. *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386. Further, the courts apply those rules with that aim in mind. On the current approach:

(a) it is very unlikely that the court would permit a non-governmental organisation to pursue a claim where there is a more appropriate claimant with a more direct interest in the subject matter of the claim, who is able and willing to bring the claim (see *R v SSFCO, ex p WMD* [1995] 1 WLR 386), and

(b) there are more than adequate powers to prevent unmeritorious cases from being allowed to proceed. Where there is no suitable alternative claimant to pursue a meritorious claim, there is no good reason to prevent the claim being pursued. It is not possible to properly characterise such claims as either 'abusive', or mere campaigning.

To limit standing in such a case is to potentially immunise unlawful government action from scrutiny by the courts (see Lord Diplock in *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses* [1982] AC 617).

As to the specific question of interveners, as we understand paragraph 90 of the consultation paper the Government's concern is that were the rules on standing tightened, there would be an increase in applications to intervene. We not consider that there is such a neat correlation. The purpose of an intervention is to assist the court. Interventions are only permitted if they will assist the court, as explained at length in the Justice publication of that name[48]. The rules of the Supreme Court make express reference to "submissions in the public interest"[49]. Lady Hale commented in her speech to the Public Law Project conference

[48] *To Assist the Court: Third Party interventions in the UK*, Justice, October 2009.
[49] The Supreme Court Rules 2009 (SI2009/1603) (L. 17), Rule 15(1)(a). See also Supreme Court Practice Direction 3.

on 14 October 2013[50] "...the invitation is a very open one, but not I think abused." She described the wide range of options open to the courts:

> *...I can think of at least two cases in which interveners who had made written submissions in fact turned up at the hearing. In one case they filed helpful additional written submissions as a result of listening to the debate: this was the Coram Children's Legal Centre in H(H) v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25, [2013] 1 AC 338 (the case about the interests of children whose parents face extradition). In another they made brief additional oral submissions: this was only last week in Preddy v Bull (the case about Christian hotel keepers who refused to let double-bedded rooms to unmarried couples).*

Lady Hale highlighted that in the case of an intervention by a public body such as the Equality and Human Rights Commission, or a non-Governmental organisation such as Liberty, their intervening rather than acting for the claimant may make it easier to disentangle the private interests of the client from the broader public interests. ILPA intervenes very rarely indeed. ILPA will normally give consent for its information to be used by members in litigation and similarly will provide witness statements on matters of fact or settled policy to them. Decisions as to whether to intervene are taken on the basis that we consider that we are in a position to assist the court with material that cannot or will not be put before it by the parties, that is relevant to the decision. We consider our own objects and purposes in deciding whether or not to do so.

The United Nations High Commissioner for Refugees has intervened in a number of cases before the UK courts. These interventions are often acknowledged by the courts as having been of tremendous benefit to them. The interventions and the way in which the courts deal with them are often closely studied around the world[51].

We do not understand the Government to be opposed to the principle of intervention, nor to disagree with the notion that interveners assist the court. Government ministers can and do intervene, see e.g. R*(G) v London Borough of Southwark* [2009] UKHL 26 *(Secretary of State for Children, Schools and Families intervening), Birmingham City Council v Ali and others* [2009] UKHL 36 (*Secretary of State for Communities and Local Government intervening).*

Option 1 - Bring forward the Consideration

Question 12: Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

Judicial review is a procedural remedy. The Administrative Court hearing a judicial review is not exercising an appellate jurisdiction but looking at the lawfulness, including the procedural propriety, of the decision-making. Much of what is said in this part of the paper leads us to say to the Ministry "Be careful what you wish for". The more judges are asked to turn their attention from the procedural to the substantive, the more there are likely to be complaints from the Executive and others such as local government that they are trespassing on the roles of legislature and Executive.

We consider that the presentation of the status quo in the Consultation paper is misleading. Insofar as it is suggested that it is never possible to resolve "no difference" at the permission stage and that in practice "no difference" goes only to remedy, we consider that the

[50] Op.*cit.*
[51] See e.g. *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 3, *Al- Sirri v SSHD* [2012] UKSC 54, *HJ (Iran) & HT (Cameroon) v SSHD* [2010] UKSC 31 (07 July 2010). For further examples see http://www.refworld.org/type,AMICUS,UNHCR,GBR,,,0.html#SRTop21 (accessed 27 October 2013).

consultation paper is inaccurate. Insofar as it is proposed that there should be substantive argument about "no difference" at the permission stage in cases that are not clear-cut, we do not agree with the proposal.

Paragraph 99 of the Consultation appears to criticise the use of judicial review to challenge 'a procedural defect rather than a substantive illegality'. Procedural defects are the proper subjects of judicial review. Substantive merits may be examined only insofar as a decision is irrational.

The presentation of the 'no difference' principle in paragraphs 91-100 of the Consultation is insufficiently nuanced. The principle has been expressly disapproved in certain areas, the scope of which are unresolved – see *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269). In *AF (No 3),* following the judgment of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625, the House of Lords confirmed that the 'no difference' principle does not apply to the non-disclosure of security-sensitive material containing the case against an individual (at least in the context of control orders).

As set out in the Consultation paper at paragraph 97, it is possible to argue "no difference" as early as in the Acknowledgment of Service letter. We have seen permission refused on the basis of "no difference" where it is clear that a procedural flaw has had no impact on outcome and there is no other reason, i.e. no general point of principle, to hear the claim.

We consider that in general the balance is struck correctly in the courts' present treatment of the 'no difference' principle. In the leading case in the immigration and asylum context – *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 the inevitability threshold was satisfied. Whilst rare, it is by no means an anomaly and reflects the efficacy of the current position. Maintaining the status quo avoids the undesirable position in which the permission hearing becomes a dress rehearsal for the substantive claim but still permits recourse to 'no difference' arguments in clear-cut cases.

The case of *R (Ghadami) v. Harlow District Council* [2004] EWHC 1883, misleadingly presented in paragraph 96 of the consultation paper, would, we suggest have been such a "dress rehearsal" case had any attempt been made to deal with "no difference" arguments at the permission stage. While the claimant lost on various procedural defects, including that alluded to in the consultation paper; he won on apparent bias or predetermination. The chairman of a planning committee had been in close touch with a developer and had spoken with them about promoting their proposal. He had also threatened compulsory purchase of the land of an objector to the development. This was a case of considerable complexity involving a litigant in person. Considerable court time would have been taken up trying to deal with "no difference" at the permission stage and it would have been wholly appropriate in any event to have dealt with an allegation of bias in this way.

The costs of disputes over procedural defects could often be avoided if procedural disputes were resolved at a stage prior to litigation with improved procedures, at the outset or following the problem's being highlighted by a pre-action protocol letter if a government department is willing to respond at this stage.

The status quo, which provides the possibility of a 'no difference' challenge at the permission stage, strikes the correct balance. It permits obvious cases to be decided at the permission stage. However, for cases where the question of whether the decision would have inevitably been the same absent the procedural irregularity is anything less than clear cut, or where other issues are raised by the challenge, the question should be heard at a substantive hearing. For a judge to undertake a full assessment at the permission stage, in particular an

assessment that respects the requirements of anxious scrutiny[52] necessary in the immigration and asylum field, full disclosure and evidential preparation would be necessary. Effectively, this would amount to a mini-hearing, which would add to cost and delay of procedural challenges rather than mitigate the problems identified in the Consultation.

The scope of what is proposed to be included within 'procedural defects' is not set out and needs to be. Does this include, for example, actual and/or apparent bias; and/or failure to apply a relevant and binding policy?

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

As set out above, arguing 'no difference' points at the permission stage is not appropriate for anything other than the most clear-cut cases. In other than such cases, to engage in a full and proper consideration of the 'no difference' issue, it would be impossible to avoid a 'full dress rehearsal' or mini-substantive hearing at the permission stage. This would add significantly to the costs of litigation and to delays where the 'no difference' challenge in the Acknowledgment of Service ultimately fails.

Option 2 – Apply a lower test

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

No.

Probability is not sufficient and would not serve the administration of justice, as set out below.

i) Lowering the threshold is constitutionally improper

If the threshold were lowered from certainty or inevitability to probability (high or otherwise) the court would be required to overstep its constitutional limits and engage in an assessment of the substantial merits of the decision.

The point is made by Lord Bingham in *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344 thus:

> *[i]n considering whether the complainant's representatives would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.*

It is re-iterated in *R (Smith)* [2006] EWCA Civ 1291, [2006] 1 WLR 3315, in which the Court of Appeal said the following (at 3320-3321):

> *Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.*

[52] *R v SSHD, ex p Bugdaycay* [1987] AC 514.

And by Maurice Kay LJ in *R (Shoesmith) v Ofsted and others* [2011] EWCA Civ 642 (at para 72):

> *…this is not such a clear case that I feel able to say 'no difference' without risking inappropriate encroachment into "the forbidden territory of evaluating the substantial merits of the decision".*

ILPA suggests that the proposal has the potential to produce the opposite outcome from that which is intended. It invites a court to get involved in the merits of administrative decision-making. It is precisely the court's unwillingness to take this step that means that judicial review is concerned only with the legality of decision making. The corollary of this proposal is that the court would feel more, rather than less, willing to overturn government decisions in some contexts.

There is also a practical problem. For the court to make a decision about what outcome was likely, or would have occurred, will require a detailed assessment of underlying evidence (which may be very extensive), which is at present not required. This will fundamentally alter the nature of the judicial review process, increasing the length and cost of proceedings considerably.

ii) The nature of the assessment required in evaluating 'no difference' necessitates the threshold of inevitability

The application of the 'no difference' principle requires a court to second-guess the outcome of the case had the procedural irregularity not taken place. This is a process that is notoriously prone to error. The well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402 makes the point:

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

As at present, the principle in *John v Rees* should be reflected in the threshold for assessing whether a procedural defect has made a difference.

iii) Lowering the threshold would damage public confidence in justice system

Appearances matter in judicial review. Justice should be seen to be done. The words of Lord Widgery in *R v Thames Magistrates' Court, ex p Polemis* [1974] 1 WLR 1371 are instructive:

> *It is…absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly no seen to be done, as on the afternoon in question here, it seems to me to be no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same.' This is mixing up the doing of justice with seeing that justice is done.*

Any threshold lower than inevitability would result in unfairness for litigants the outcome of whose cases may have been affected by a procedural defect but who were denied a remedy. This would erode wider public confidence in the justice system.

iv) Unfairness is constitutive of injustice

If a court cannot be sure that an individual is not prejudiced, it should not withhold a

remedy. In the words of Lord Donaldson MR in *R v Leicester City Justices, ex p barrow* [1991] 2 QB 260 (at 290):

> *Any unfairness, whether apparent or actual and however inadvertent, strikes at the roots of justice. I cannot be sure that the applicants were not prejudiced and accordingly I have no doubt that the justices' order should be quashed.*

Rights to procedural protection are not to be lightly denied. The propriety of lowering the threshold from inevitability to probability has not been tested against the requirements of Article 6 of the European Convention on Human Rights and, for matters within the scope of EU law, Article 47 of the Charter of Fundamental Rights of the European Union. As set out above, although Article 6 does not apply to decisions on the entry, residence and expulsion of migrants,[53] there is no such restriction on Article 47 of the EU Charter. Moreover Article 5(4) of the European Convention on Human Rights provides protection to persons in immigration detention and there are implied procedural rights in Articles 3 and 8 of the Convention. The changes to the 'no difference' principle proposed in the Consultation are unlikely to be immune from challenge on EU and/or Strasbourg human rights grounds. The proposed change would likely add momentum to the arguments for the extension of the protection of Article 6 to cases involving entry, residence and expulsion, arguments canvassed in the dissenting opinions in *Maaouia v France*[54]

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

ILPA does not consider that the solution to any perceived difficulty lies in changes to the nature of the procedure governing judicial review.

The problem is not one of judicial process. It should be managed at a political level. If the Government is making decisions which are procedurally flawed to the extent a consultation on the effects of such decision making is deemed necessary, it is considered that the Government should either redouble efforts to achieve better and lawful decision making or review the procedural requirements expected of it.

The concerns about impact expressed in the consultation paper are about delay and about the resources used to address these cases. Both are likely to be reduced by a prompt and detailed acknowledgement of service and by the early provision of all relevant information. Where it is clear that there has been non-compliance with a procedural requirement, the Government should set out at the earliest possible stage how it intends to address the error and within what timescale and give such undertakings as it is in a position to give as to its future conduct. This is far more likely to result in the matter being resolved pre-permission or, if it reaches the permission stage, to matters being clear-cut by then.

In immigration one of the current problems is with delays in the acknowledgment of service letters as set out in our response to question 19 below.

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

ILPA considers that examination of cases in which decisions have been overturned on essentially procedural grounds shows that a *different* outcome is often achieved following a

[53] See *Maaouia v France* (2001) EHRR 42.
[54] *Ibid.*

proper procedure. ILPA therefore considers that, far from this showing that the main effect of procedural challenges is to increase costs and delay with little substantial benefit, in fact such challenges produce real benefits, both to claimants, and by improved government decision-making following delay. As set out above, judicial review is a procedural remedy.

For example, the *Rodriguez*[55] case on the proper application of evidential flexibility demonstrates the importance of maintaining avenues for redress of procedural defects. In that case the Secretary of State's failure to apply binding policy was found to be unlawful in public law terms. The Upper Tribunal concluded at paragraph 28 that had the policy been applied, the application would have been successful. Similarly, *Thakur (PBS – common law fairness)*[56] is an example of a case in which a procedural defect (failure to provide an opportunity to make representations) led to a different substantive outcome.[57] See also *Walumba Lumba (Congo) v SSHD; Kadian Mighty (Jamaica) v SSHD* [2011] UKSC 12.

THE PUBLIC SECTOR EQUALITY DUTY AND JUDICIAL REVIEW

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

Restricting the right to bring a claim against the State for unlawful behaviour interferes with the balance of the constitution, and should not be done for administrative expedience.

The proposals in relation to the Public Sector Equality Duty arise from a report by the Independent Steering Group that conducted a review of the Public Sector Equality Duty. This review came out of the Government's "red tape challenge". The Consultation fails to mention that the review group found that a lack of clear guidance on how to implement the Public Sector Equality Duty had led to the adoption of overly onerous practices by some public bodies,[58] and respondents reported that case law was helpful in the absence of any formal guidance on the meaning of "due regard", a term that was ambiguous and not adequately qualified in the Equality Act.[59] It is therefore misleading to suggest that court challenges are the root of uncertainty.

The review team also found that:

> *Although the number of Judicial Reviews (JRs) brought under the PSED is low, it is still a significant proportion of the overall number of JRs and there have been several high profile cases. In all the cases we have seen, the PSED is just one of a number of grounds, which suggests that these JRs would have arisen even in the absence of a PSED...*[60]

If further work is only undertaken in response to litigation, then that litigation still has a value. The review team reported that:

> *The regulatory bodies and inspectors also felt that some sectors cut corners as they were unlikely to be challenged. While fear of Judicial Review was thought to encourage compliance (or displays of*

[55] [2013] UKUT 00042 (IAC).
[56] [2011] UKUT 00151 (IAC).
[57] See also *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC) and *R (Kizhakudan) v SSHD* [2012] EWCA Civ 56.
[58] Government Equalities Office, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013, page16, available at (accessed 26 October 2013) www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf
[59] *Ibid*, p.28
[60] *Ibid*, p.11

> *compliance) in some areas, this was not thought to be the case in most sectors, as Judicial Reviews are rarely brought. It was thought this was possibly down to a lack of knowledge among citizens of the legal options available to them.*[61]

Further:

> *Lawyers had found that threat of litigation alone could have a powerful effect in ensuring equality issues were effectively addressed by decision makers, negating the need for legal action.*[62]

These comments underline the importance of judicial review in improving the conduct of public bodies. At a meeting convened by the Ministry of Justice on 28 October 2013 in the Royal Courts of Justice to discuss these proposals, it was explained to the meeting by an expert in equalities law that of the six cases on the Public Sector Equality Duty that had succeeded since 2011, only one had resulted in the decision being taken again in the same terms. Concerns were also raised at that meeting that since cases involving a breach of the duty often involve other breaches as well, to attempt to deal with breaches of the duty through an alternative route could lead to a matter being challenged, or even litigated, twice.

As we stated in our response to the 2012 consultation:

> *Deterring decision- makers from reaching unlawful, irrational or unfair decisions is desirable, and if the availability of judicial review causes public authority decision makers to stop and think before reaching rash decisions, something that is in everybody's interest*[63].

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

The Government's review team were unable to provide comprehensive evidence on the number of judicial review challenges that have involved the Public Sector Equality Duty to varying degrees as such information is not collected centrally.[64] It is therefore unclear how asking for this data from respondents could provide a comprehensive picture. The review team has already referred to the independent study being conducted by the Public Law Project and the University of Essex. It would seem prudent to await the outcome of their analysis as to what extent the equality duty was relevant to the cases examined before making any changes to this area.

REBALANCING FINANCIAL INCENTIVES

Paying for permission work in judicial review cases

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

No. ILPA does not agree that 'payment should be made by the Legal Aid Agency only if permission is granted or if the Agency exercises discretion to do so.'

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[61] *Ibid*, p.26
[62] *Ibid*, p.27
[63] ILPA response to 2012 consultation, paragraph 13.
[64] Government Equalities Office, op. cit. page 27.

See our response to the 2013 consultation on this point, in particular, our answers to questions 5, 34 and 35 in relation to judicial review.

We do not consider that the proposal for discretionary awards of costs addresses the principal mischief of the proposals. The proposal addresses the problem of lawyers not being paid at the end of the day. There is already a solution to that problem, which is not to take the case. The mischief that we and others responding to the *Transforming Legal Aid Proposals* urged the Ministry of Justice to address was that, for fear that they will not get paid at the end of the day, the lawyer will not take the case in the first place. It was the effect on clients, rather than the effect on lawyers' that we sought to highlight.

At the meeting convened by the Ministry of Justice at the Royal Courts of Justice on 28 October 2013 to discuss these proposals, one legal representative commented that if he took 10 judicial reviews and did not get costs in just one, that could be enough to push his firm from breaking even to making a loss. There is a risk that providers will not cope with more financial risk in their business and that quality providers will leave the field.

At present a claim can be submitted for a payment on account after three months from a certificate's date of issue, and up to two interim payments on account may be requested in a 12 month period.[65] Under the proposals here, providers will have to bear all the costs of a case, including disbursements such as expert and court fees, until a claim for payment is finally determined by the Legal Aid Agency under the discretionary scheme. Immigration practitioners will be doubly disadvantaged by their frequent need to use interpreters when advising clients and taking instructions and the fact that many claims are now within the Tribunal system where they are currently taking far longer to process than cases still within the Administrative court. This arrangement is not a feasible basis for a viable business.

We disagree with the statement that no application where permission is refused can result in a claim to the Legal Aid Agency.[66] This ignores the conduct of the defendant, for example, introducing new decision letters after proceedings have been issued, in conjunction with the Acknowledgment of Service and grounds of defence. If the Claimant is unable to settle a claim with such a Defendant, and the application proceeds to permission stage and is refused, they lose out for no good reason.

There is little reason to think lawyers will be sanguine about the Legal Aid Agency's exercise of discretion in their favour, especially in the light of the Exceptional Funding Scheme, than they are about getting costs as part of a settlement or from the court. Our experience of the scheme has been wholly negative. It is difficult to negotiate, onerous and has a negligible rate of success, particularly for non-inquest cases. We refer to the recent evidence of the Public Law Project to the Joint Committee on Human Rights on the operation of the Exceptional Funding Scheme:

> *18. On 1 July 2013 the LAA published statistics detailing how many applications there had been in the first four months of the scheme, the breakdown of those applications according to the area of law and the number of grants of exceptional funding that had been made. In total, the LAA had received 213 applications for non-inquest cases. Of those, 146 were in family law and 63 in immigration. There had been only two grants of funding:* ***one in an immigration case concerning EU law and one in a family case. In the immigration case, funding was only granted after a pre-action protocol letter was sent.***
>
> *19. On 1 July 2013 there had been only 16 applications from applicants in person, of which none had been given a positive preliminary view of their eligibility for exceptional funding.*

[65] Legal Aid Agency, 2013 Standard Civil Contract Specification, paragraph 6.22 www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf

[66] Consultation, paragraph 130.

> *20. These figures are striking for two reasons: first, they demonstrate that the scheme is not being accessed by as many applicants as the Ministry of Justice thought it would be. Second, they demonstrate that the threshold for exceptional funding is being set very high, and* ***the success rate in non-inquest cases is less than one per cent****.*
>
> *21. It is PLP's experience that* ***the scheme is inaccessible for applicants in person and for solicitors. The latter are routinely refusing to make exceptional funding applications because they are done at risk, they are onerous and the chances of success are so poor.*** *For applicants in person the process is almost impossible to navigate, largely because the kinds of applicants who may be eligible for exceptional funding under human rights or EU law will be the kinds of people who find it impossible to fill out lengthy forms, grapple with legal concepts, put forward arguments or understand legal procedures.* ***These concerns are particularly acute for vulnerable applicants, including children and young people and people who lack capacity to litigate****.*[67] [Our emphasis]

Members' experience of assessment by the Legal Aid Agency in other types of case, for example, escape fee claims, has been, broadly speaking, bruising. As one said:

> *It is incredibly time consuming (and also demoralizing) having to argue against flawed assessments. Sometimes it is not worth the time one would have to spend, but there is a limit to the number of times you can just conclude that it's not worth the candle. The fear looms large that leaving it up to the LAA to exercise discretion in the circumstances is likely to replicate such experiences and thus providers won't take the chance.*

As the Civil Justice Council has stated:

> *"[T]he proposal would deny payment in a case with real merit but that just failed to get permission. … The proposal carries the danger that it will act as a barrier to access to justice as lawyers and other advice providers will err on the side of caution where the appeal is ambitious but not one with little or no merit – perhaps only bringing cases with a predicted 70/30 or more prospect of success, when the proposal intends to remove funding only where the case fails at 51/49 or less."*[68]

Those who have no option but to give up their challenge or to represent themselves will be placed in an unequal position against the State, who will continue to be legally represented. As such the proposal is contrary to Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

The proposals provide several perverse incentives. They provide an incentive to issue as soon as possible, because only if you have issued will you have a chance of being paid. They provide an incentive, having issued, to proceed to a permission hearing as soon as possible. To this must be added the defendants' lawyers trying to anticipate how the claimants' lawyers will behave. The defendants' lawyers do not settle because they are waiting to see whether the claimants' lawyers will move beyond pre-action work to start to prepare to issue. What is created is akin to the children's game of "chicken".

Novel cases discouraged

The proposals will prevent lawyers taking cases that present too much risk. This means that cases that lead to significant developments in the law in the wider public interest will not

[67] Written Evidence to the Joint Committee on Human Rights in response to enquiry into the implications for access to justice of the Government's proposed legal aid reforms submitted by the Public Law Project, 26 September 2013.

[68] Civil Justice Council response to Ministry of Justice consultation paper: *Transforming Legal Aid*, June 2013, page, available at (accessed 26 October 2013): www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2Fconsultation+responses%2FCJC+response+to+MOJ+consultation+paper+Transforming+Legal+Aid.pdf

happen. Such cases are by their nature often harder if challenging an established principle or practice. However they perform a social good by clarifying issues for a wide group of people. Such cases should not be deterred, particularly in a common law jurisdiction where the ability to develop the law by bringing novel challenges is central to maintaining the rule of law and democracy.

In cases against the Home Office it is very often the case that no reply at all is received to a pre-action protocol letter until proceedings are issued. See the correspondence about delays in Acknowledgement of Service between Duncan Lewis solicitors and the Home Office, copied to ILPA and to the Administrative Court, and appended hereto. The matter was addressed by the High Court in *Jasbir Singh v SSHD* [2013] EWHC 2873 (Admin). Mr Justice Hickinbottom summarized the Home Office evidence thus:

> 14. In a statement dated yesterday (16 September 2013), Mr Daniel Hobbs, the Director of UK Visas & Immigration with overall management responsibility for the litigation *caseworking and appeals operations for the Secretary of State, has sought to explain, if not excuse, the delays. …. Mr Hobbs frankly accepts that his teams have simply been unable to keep up.*
>
> *15. To an extent, I can sympathise. The rise in challenges to decisions of the Secretary of State has been prodigious, particularly steepening over the last few months…without any correlative increase – or, indeed, any significant increase at all - in resources to deal with them. However...the Secretary of State could – and, indeed, should - have anticipated the increases in the number of claims, many of which result from Government policies for which she is responsible.*

He agreed to provide the Secretary of State with additional time in the short term in which to acknowledge service:

> *23… as she accepts, the Secretary of State must aim, within a reasonable period of time, generally to comply with the requirement of the rules that a summary response to the claim is filed within 21 days.*
>
> *24. Nevertheless, certainly in the period whilst the benefits of the positive measures that are being taken are achieved and assessed, in my view, unless a claimant identifies some good reason why such an extension would be particularly prejudicial, the first application in any claim for an extension of time of up to three weeks need not be supported by any detailed evidence or grounds, and such an application should be treated generously by the court.*
>
> *25. However, subsequent applications must be supported by a full explanation for the delay in compliance and a firm promise to the court as to when the acknowledgement of service and summary grounds will be filed. Repeat applications with barely aspirational dates, such as have been made in the past, are to be deprecated….*
>
> *27. The court must remain in control of the management of each case, and should not hesitate to impose sanctions on the Secretary of State, including costs sanctions, if good reason for delay is not made out on second or subsequent applications. Where the time and effort of parties and the court are wasted because of a failure on the Secretary of State's part to comply with a reasonable procedural timetable, then severe sanctions can be expected. In this, of course the court must be even-handed.*

Case of X

X issued a claim for judicial review against the Secretary of State for the Home Department over a five-year delay in processing his application for an extension of leave to remain. After the claim was issued the Defendant granted X indefinite leave to remain. X's solicitors wrote to the Defendant's solicitors on 4 July to tell them of this and sent a copy of the status document and a proposed consent order to settle the claim as it was now academic. Despite this being an uncontentious proposal, the Defendant's solicitors were simply unable to get instructions from their client until 16 September 2013 despite several requests for the

> Defendant to reply. In the meantime the Defendant's solicitors filed a request for an extension of time to file the acknowledgement of service and grounds of defence as they had been unable to contact their client. This was refused by a judge who said that judicial review was meant to be a prompt remedy and not being able to contact their client was not a good reason for further delay. The Defendant ultimately agreed to settle the claim in X's favour but unnecessary time was wasted by the Defendant's conduct towards their own solicitor.

These problems overlie longer standing problems at the initial decision-making stage and with the Home Office's conduct as a litigant before the tribunal, including the "closed, secretive and defensive" culture described by the Home Secretary[69] and evidenced by, for example, lack of disclosure[70]. Very often it is only at the judicial review stage, when Treasury Solicitors and counsel are instructed, that full disclosure is given and the Secretary of State's case made clear. Addressing these matters would reduce the amount of new material appearing for the first time at the permission stage and increase the likelihood of matters being clear-cut at that stage.

All too often it is only after issue that the case is given any substantive consideration. In some cases this results in an offer of settlement. That it should not have been necessary to issue proceedings, we agree. That all too often it is necessary, we aver.

The claimants' lawyers have a duty to recover costs from a defendant in a case that is successful and so reimburse the legal aid fund (or not make a claim on it).[71] In our experience, Government departments continue to resist agreeing costs orders in cases where the claimant has achieved all or most of what they sought in a settlement. If a defendant will not agree to its liability for costs and wishes to have a decision made by the court, or if cost determination proceedings are necessary after a consent order then at present efforts to recover costs can be covered by legal aid and the representatives know this in advance of undertaking the work. That work can be time consuming, drafting submissions on costs to the court and negotiating with the defendant. Having legal aid already in place is a vital safeguard in a case where there is no guarantee that the defendant will act as they should. Even if there is ultimately no need for a claim, the existence of a certificate gives the provider confidence they can pursue costs matters robustly as they would still be paid for their work, and so get better outcomes that will mean there is no claim on the legal aid fund. The Government now proposes that legal aid for this costs stage will be available but still subject to a discretionary assessment. If a case concluded before permission with a settlement in the client's favour, it could still necessitate cost proceedings with no guarantee of reimbursement under the discretionary scheme.

In our view, implementation of the proposal will encourage claimants to push for orders from the Court in more cases to achieve greater certainty in their claim to the Legal Aid Agency. This will mean more work for judges in the court. And to avoid the uncertainty of costs not being paid on settlement, claimant lawyers may decide to push for a determination on permission in every hearing to have a more straightforward claim to the Legal Aid Agency. This again will increase court costs and time all round.

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[69] HC Report 26 March 2013, col 1500ff.

[70] *R(Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin) (19 December 2008) , subsequently *Walumba Lumba*
(Congo) v SSHD; Kadian Mighty (Jamaica) v SSHD [2011] UKSC 12.

[71] Legal Aid Agency, 2013 Standard Civil Contract Specification, paragraph 6.58, available at: www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf

Case of Y

Y issued a claim for judicial review over the Secretary of State's refusal of her fresh claim with no right of appeal. After the claim was issued the Secretary of State agreed to reconsider the case and the claim was settled on this basis. Y's solicitor has a duty to recover costs from the Defendant in such a situation in order to reimburse the legal aid fund and duly negotiated a consent order to this effect. This case was concluded before permission stage. Y's solicitor submitted a request for costs to the Defendant's solicitors and asked them several times if they would agree a payment without the need to issue a notice of commencement, which would incur unnecessary time and expense for all parties, including the court. Two weeks before the deadline to file a notice of commencement the Defendant's solicitor informed the Claimant's solicitor that she had many similar costs requests on her desk and could only "hope" she could respond to Y's in time. This was not done, so a notice of commencement was issued, and now the Defendant has agreed to pay the Claimant's costs. However the delay and disregard of time limits by the Defendant incurred unnecessary costs all round. Y's solicitor had confidence to pursue a proper and timely costs determination as there was a legal aid certificate in place to allow this.

The Government states that the permission test should be used as the threshold for legal aid as the provider is well placed to assess the strength of their client's case and the likelihood of permission being granted.[72] This does not reflect the reality of judicial review work, for example the duty of candour allowing the claimant access to documents the defendant has in their possession that are not disclosed pre-issue. Treasury Counsel told the Attorney General in their letter of 4 June 2013:

> *First, there is a misconception in the Consultation Paper as to the level of certainty which is achievable when advising on the outcome of claims.*
>
> *When advising government departments in public law cases, as when advising claimants, it is often difficult or impossible to say more than that there is a reasonable defence to a claim but that the outcome is hard to predict. This is so despite the fact that,* ***especially in the early stages, the defendant is likely to have more information to enable it to assess the merits of a claim. Indeed, most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%. Sometimes we will have been proven wrong. No one has ever suggested that, in such cases, government bodies should be barred from defending a claim for judicial review. To take such an approach would quickly make the work of government impossible.*** *Government lawyers do not undertake their work on the basis that they will only be paid if they have accurately predicted the outcome of the litigation. To require this of those acting on legal aid is, in effect, to severely cut their rates.*
>
> *Since the majority of successful claims are conceded pre-permission, to use permission as the test for whether payment is made may well reduce real rates even further.* ***We are also concerned that the proposal will be counter-productive; there will be many more disputes about pre-permission costs, which will require substantial public money to resolve***. [73] [Our emphasis]

As Treasury counsel highlight, there is no equivalent proposal that the defendant's lawyer should bear the financial risk of defending a claim and should be paid from public funds only if permission is refused. *In judicial review proceedings, the defendants' lawyers are always publicly funded.* That it is not appropriate 'to use the permission test as the threshold for provision of legal aid'[74] where the claimant is publicly funded can be illustrated by envisaging using the same test to determine whether Government lawyers should be publicly funded. It is likely that such a funding regime would leave public authorities unrepresented in a significant

[72] Consultation, paragraph 123.
[73] Treasury Counsel to the Rt Hon Dominic Grieve QC MP, 4 June 2013, available at http://legalaidchanges.wordpress.com/2013/06/06/46/ (accessed 27 October 2013).
[74] Consultation paper, paragraph 123.

number of judicial review proceedings. It is inconsistent with basic principles of fairness and equality of arms that public funding for legal representation should always be made available to one party (the defendant) but should only be available to the claimant if permission is obtained or the Legal Aid Agency exercises discretion in the party's favour.

As Lord Neuberger has said:

> *[I]t is vital for the Ministry to appreciate that any changes which are made to reduce legal aid and cut the cost of litigation are likely to have a knock-on effect on the cost of the courts. Less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge-time.*[75]

The implementation of a proposal that places payments "at risk" for providers carries a real risk of transferring and augmenting costs to defendant government departments, to Her Majesty's Courts and Tribunals Service and to the Ministry of Justice overall. The risk to the Courts is referred to in the Civil Credibility Impact Assessment, but no attempt is made to quantify the risk, or the reasons for, and extent to which, costs may rise in Her Majesty's Courts and Tribunals Service as a result of implementing this proposal. As Treasury Counsel have stated, this proposal will only lead to greater costs for the justice system. The Judicial Executive Board expressed its concern as follows:

> *22. Turning to pragmatic reasons: the consultation paper accepts that legal aid would continue to be paid for the earlier stages of a case. It suggests, however, that the costs of drafting and lodging an application for judicial review should be irrecoverable unless permission is granted. One possible effect is likely to be that the claimant will lodge a home-made application anyway (with perhaps a page or two drafted with the help of the solicitor). The defendant is then required to acknowledge service and the judge to make a decision on the papers, only this time without the assistance given by a competently drafted application.*
>
> *23. The second pragmatic reason is what may be described as the "double or quits" effect. If the refusal of permission means that the costs of drafting the application are irrecoverable, solicitors will almost inevitably advise the client to renew the application to an oral hearing, in the hope that permission will be granted and thus their costs will become recoverable from public funds. It is very rare for an application certified as totally without merit to succeed on renewal, but around 20% of paper applications not so certified are successful at an oral hearing. However, we believe that renewal should be dealt with in a manner similar to that applied to criminal appeals, namely if the renewal is successful a fee should be paid; if it is unsuccessful then no fee is payable. Although unmeritorious paper applications are a burden for the Administrative Court, unmeritorious oral renewals are a greater burden still: they take up a great deal of judge time and cause serious delay and often inconvenience to defendants.*[76]

If clients cannot find qualified, expert providers to take on their judicial review cases, they are still likely to try all means possible to bring the claims unrepresented. In immigration and asylum cases in particular the issues at stake concern fundamental rights and it is no exaggeration to say that in some such cases matters of life or death are at stake. In, for example, removal cases clients considering issuing judicial review claims may have nothing to lose by doing so and will bring these claims themselves if they cannot find lawyers who are willing to do so. Sir Stephen Sedley has echoed these concerns:

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[75] Lord Neuberger, Judges and Policy: A delicate balance", speech to the Institute of Government, 18 June 2013, available at www.supremecourt.gov.uk/docs/speech-130618.pdf (accessed 27 October 2013).

[76] Response of the Judicial Executive Board to the Government's Consultation Paper CP14/2013, *Transforming Legal Aid: Delivering a more credible and efficient system*, 4 June 2013 available at (accessed 26 October 2013): www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jeb-response-reform-legal-aid-june-2013.pdf

> *The superficially attractive reason is that it will inhibit the making of long-shot or speculative claims at public expense, but it is supported by no evidence, and the argument advanced in support of it – that the claimant's lawyer 'is in the best position to know the strength of their client's case' – displays a depressing degree of ignorance about how judicial review works. More often than not, it is the defendant authority which holds most of the relevant cards, and in many cases it holds on to them for longer than it is supposed to, either because there is too little time for proper disclosure of documents or because sitting tight affords the best hope that the claim will go away. The departmental calculation is that indigent claimants' lawyers will be deterred from taking on all but sure-fire claims. In proposing that other claimants can be left to their own devices without injustice, the paper makes no attempt to confront the consequences: a plethora of claims made by litigants in person, clogging up the courts as judges try to discern arguable points in the chaos of paper, and costing public authorities large sums in irrecoverable costs as they attempt to respond to such claims.* [77]

Measures already in place

The Government states that legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim, including advice from counsel on the merits of the claim, and to engage in pre action correspondence[78]. We do not view this statement as reassuring. There are limited circumstances when counsel can be paid for work pre-issue. Payments to counsel under legal help must be taken out of the standard fee and are usually not considered a disbursement.[79] Investigative help is only granted where substantial investigative work is required to determine the prospects of a case, and this is deemed to be at least six hours of the solicitor's time or where disbursements (together with counsel's fees) are over £400.[80]

The current arrangements for assessing the merits of a case to issue proceedings are extremely robust. The Legal Aid Agency has greater scrutiny than ever before of applications for public funding in judicial review claims. The application process for legal aid itself demands that claimants pass a rigorous merits test[81]. Devolved powers (now delegated functions) enabling the grant of an emergency legal aid certificate by providers were removed on 1 April 2013 in the majority of civil legal aid cases and for all immigration judicial review claims.[82] There is scrutiny over the initial grant of funding, requests for further funding and all providers are subject to audit at any time.

The Government has acknowledged that merits criteria are already in place to weed out weak cases. However, it states these measures are not sufficient, as the Legal Aid Agency is guided by the practitioner's assessment of the prospects of success.[83] We disagree. The Legal Aid Agency employs lawyers within the team that deal with applications for certificated work in immigration cases and they undertake merits assessments. In the vast majority of cases, legal aid for judicial review is granted only where the prospects of success are at least 50%. We refute the suggestion that applications are effectively "waved through" by the

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[77] *Beware Kite-Flyers*, Stephen Sedley, London Review of Books, Vol. 35 No. 17, 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers (accessed 27 October 2013).

[78] Consultation, paragraph 119.

[79] Legal Aid Agency, 2013 Standard Civil Contract Specification, paragraph 3.59 www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf (accessed 27 October 2013).

[80] Legal Aid Agency, Lord Chancellor's Guidance under section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraph 6.11, available at www.justice.gov.uk/downloads/legal-aid/funding-code/lord-chancellors-guidance.pdf (accessed 26 October 2013).

[81] ILPA response to 2012 consultation, paragraphs 10-11.

[82] JR proceedings funding change, Ministry of Justice, 27 February 2013, available at www.justice.gov.uk/legal-aid/newslatest-updates/civil-news/jr-proceedings-funding-change (accessed 26 October 2013).

[83] Consultation, paragraph 122.

Agency. We have to justify applications for funding with extensive submissions and supporting documents to secure a grant. Providers must certify their assessments in good faith, giving the roll number of the litigator applying for the public funding certificate. It is perfectly possible for the Agency to trace any allegedly false certifications to outcomes as that data must also be recorded.

Treasury Counsel agree that the existing merits test is sufficient, and is far more rigorous a discipline than that in place for decision makers:

> *The requirement that a claim can only be funded where it meets a merits test already imposes a significant discipline on claimant lawyers which is not, at least in any formal sense, imposed on defendants to judicial review. The figures quoted at paragraphs 3.65-8 of the Consultation Paper do not suggest that legal aid is being granted in significant numbers of unmeritorious cases, and that is not our experience as Treasury Counsel defending such claims. To require that even cases which meet a merits test will nevertheless be conducted at risk for a significant part of the proceedings is to create a fundamental asymmetry. The same applies to the possibility of funding important, but uncertain, cases. Far from "harmonising" payments to lawyers, the proposals will have the opposite effect. When coupled with significant reductions in rates, we are concerned that the effect will be to make work in this area unviable.*[84]

Ethical concerns

The Government proposed a restructuring of the Advocates' Graduated Fee Scheme in the Crown Court, in the consultation "Transforming Legal Aid". This would have harmonised the guilty plea, cracked trial and basic trial fee rates to the cracked trial rate, therefore encouraging earlier resolution of cases. Respondents expressed concerns that included the ethical problems that this system would throw up for representatives, who were in essence being asked to encourage clients to plead guilty, potentially going against instructions and their professional duties.

The proposal for judicial review claims is not dissimilar. Here, there is an incentive to push for a decision on permission as soon as possible, as soon as pre action protocol time limits are up, to decrease the time until payment. Parties will seek more judicial intervention, thus increasing costs and court time, rather than being prepared to let matters be resolved between the parties.

Alternatives to this proposal

Rather than seeking to penalise claimants, we consider that it would be more productive address the underlying problems that give rise to a claim for judicial review.

In our response to the 2012 consultation we asked for the consideration of judicial review in immigration cases to be put in context:

> *"a.* ***The conduct of the UK Border Agency as a litigant***
>
> - *The consistently poor management, service delivery and decision-making of the UK Border Agency. For just one recent example, refer to the Independent Chief Inspector of Borders and Immigration's recent report on his inspection of the handling of legacy asylum and migration cases by the UK Border Agency;*
> - *The consistent failure of the UK Border Agency to respond to pre-action protocol letters in a timely manner or at all;*
> - *The practice of the UK Border Agency in serving non-appealable immigration decisions at the same time as or after detention and service of removal directions, leading to urgent applications*

[84] Treasury Counsel to the Rt Hon Dominic Grieve QC MP, 4 June 2013, *op. cit.*

for judicial review with little or no time for compliance with pre-action protocol procedures (see the evidence cited by Silber J in R (Medical Justice) v SSHD [2010] EWHC 1925 (Admin) at paragraphs 50-54);

- *The consistent failure of UK Border Agency to abide by court decisions, for example the refusal of the UK Border Agency to grant permission to work to asylum seekers with outstanding 'fresh claims' in line with the Court of Appeal's decision in R (ZO (Somalia)) v SSHD [2009] EWCA 442, pending the appeal to the Supreme Court, despite the fact that there was no stay of the Court of Appeal's order (see Bahta11);*
- *The delay in amending rules and/or guidance to caseworkers to implement such decisions, for example such as occurred following the decision of the Court of Justice of the European Union in Ruiz Zambrano (Case C-34/09);*
- *The refusal to stay removal of like cases pending test case litigation save in cases where judicial reviews are actually issued (as has occurred for example in litigation about the safety of removal under the Dublin Regulation to Greece and Italy).*

b. ***The complexity of immigration law and the frequency of change.*** *There have been six Acts of Parliament in this field since 2002; in 2012 alone there were nine statements of changes in the Immigration Rules and ten judgments were handed down by the Supreme Court in immigration-related cases. Lord Taylor of Holbeach, in the debate on the current Crime and Courts Bill 2012, has observed:*

> *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them."*

c. ***Importance of what is at stake in immigration and asylum cases.*** *These cases were described by Lord Avebury in debate on the Crime and Courts Bill in July 2012 as 'the most sensitive of cases.' See further below.*

d. ***Complexity of appeal rights*** *(described by Lord Hope in BA (Nigeria) [2009] UKSC 7 as an "elaborate system") and the removal of appeal rights through frequent legislative amendment;*

e. ***Reduction in the availability of good quality legal advice*** *in light of the reduction in the availability of legal aid (and the forthcoming removal of legal aid from non-asylum immigration cases), reducing the likelihood of sound decision-making first time around and of individuals being able to access good quality legal advice about their prospects of success and alternative remedies."*[85]
[Footnotes have been omitted]

Were complaints handling in the Home Office better, it would be less necessary to have recourse to judicial review.

Case of M

M's solicitors having been unable to obtain any reply from the Home Office, M's MP enquired on her behalf about the delay in dealing with her application for indefinite leave to remain. The Home Office responded to the MP that M had failed to make an in-time (i.e. before her existing leave expired) application to extend her leave. The solicitors having previously obtained M's file through a subject access request (near routine in immigration cases because of problems such as the present one) had seen a copy of the application on the Home Office file. They drew this to the attention of the Home Office. The Home Office apologised to the MP. Not to M, who had been terrified that she had become an overstayer. Not to the solicitors, who were anxious that perhaps the application had never arrived with the Home Office. M's application was subsequently granted and she now has exceptional leave to remain.

In immigration cases, a common ground for challenge by way of judicial review is the extensive delay in decision-making by the Secretary of State for the Home Department. A

[85] ILPA response to 2012 consultation, paragraph 8.

report by the Independent Chief Inspector of Borders and Immigration this year found the same issues of lengthy delay in family migration cases:

> *Once again, I was concerned to find that the Agency had a backlog of cases amounting to 14,000 requests from applicants to re-consider decisions to refuse them further leave to remain. This had been growing by approximately 700 cases a month. In addition, there were a further 2,100 cases where people were awaiting an initial decision on their application for further leave to remain. Some dated back nearly a decade. This is completely unacceptable…*[86]

The Chief Inspector criticised fundamental errors in decision making, for example:

> *5.50 … the Agency had, as part of its reasoning, stated that the applicant could return to their country and apply for entry clearance and therefore any interference would be proportionate. … Given the House of Lords' judgment, which envisaged that it would be relatively rare for such a requirement to be proportionate, we were concerned to find that the Agency had felt it appropriate to adopt this approach in 20% of the relevant cases in our sample, particularly as two of these cases involved a child.*[87]

For cases attracting a right of appeal, the poverty of decision-making was clearly shown in the ratio of successful appeals in the Tribunal:

> *8.12 Data provided by the Agency showed that between April 2011 and March 2012, the majority of people whose application had been refused appealed against this decision. According to data from Her Majesty's Courts and Tribunals Service, over 50% of applicants who appealed against the refusal of their application were successful…*
>
> *8.13. … The Agency needs to improve the quality of its initial decision-making, to avoid the cost of unnecessary legal challenges and to reduce the proportion of allowed appeals where its refusal decisions are challenged. Better initial decisions would also remove the uncertainty and associated stress placed on applicants and their families while an ultimately successful legal challenge is on-going.*[88]

For those cases that do not attract a right of appeal, the claimants *will now* be denied their right to challenge unlawful decisions made in the same type of cases. The Chief Inspector has recommended simple steps to improve decision-making that can be adopted now. We agree with the Chief Inspector's comments about how improved decision-making by the Government should improve public confidence in the justice system.

The Chief Inspector's report mentioned above did not consider decision making in relation to Article 8 of the European Convention on Human Rights after the changes introduced by the Immigration Rules in 2012[89]. However, in the sample of in-country applications considered for pre-rule change cases, there was no evidence that Article 8 had been considered *at all* in 15% of the sample, which of itself does not inspire confidence.[90]

ILPA has given evidence to the Joint Committee on Human Rights in relation to the Secretary of State's failures to comply adequately with court decisions on Article 8 of the European Convention on Human Rights in the drafting of the Immigration Rules when they

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[86] The Independent Chief Inspector's *Report on an inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnerships*, published 24 January 2013, available at (accessed 27 October 2013): http://icinspector.independent.gov.uk/wp-content/uploads/2013/01/marriage-and-civil-partnerships-FINAL-PDF.pdf

[87] *Ibid.*

[88] ***Ibid.***

[89] Statement of Changes in Immigration Rules HC 194, inserting new Appendix FM into HC 395.

[90] The Independent Chief Inspector's report on an inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnership, *op.cit*, paragraph 5.42.

were changed in 2012[91]. Members have experience of errors in decisions made by caseworkers on Article 8 to this day, despite the decisions of the Upper Tribunal about the approach they should be taking. The only remedy against such poor decision making if no right of appeal is granted is judicial review.

Sir Stephen Sedley has argued that money could be saved from a more robust "polluter pays" approach with the Defendant, and by charging for use of courts in major litigation:

> *The reasons for the endeavour to stifle judicial review claims made by people without much money (the better-off will still have unimpeded access to the law, however undeserving their case and however exiguous their links to the UK) can be found in two main places. One is the consultation paper itself. If the government were truly concerned to reduce the unnecessary expenditure of public money on legal proceedings, the consultation paper would be looking at a number of things about which it is entirely silent. It could look, for instance, at the fact that, once they have paid a fee – the amount varies: £35 for a small money claim, rising to £1670 for a very large one, and £465 for a non-money claim – to set their case down for trial, major litigants get a court and a judge free of charge for as long as their litigation lasts. One may ask why a cost-conscious state is not thinking about the possibility, with appropriate limitations, of adding the cost of using the courts to the costs of the case.*
>
> *More immediately, the consultation paper has nothing to say about public authorities which play the judicial review system at public expense. Most defendant authorities whose lawyers tell them they are in trouble will settle a claim; but others, given the same advice, will take a chance on opposing the grant of permission to proceed, in the hope that a judge will take their side. It would be straightforward to propose that a public body which unjustifiably resists the grant of permission in a viable case should pay the costs of doing so; but the consultation paper has nothing to say about this, or about penalising late disclosure, or about other ways of saving public funds.*[92]

There could also be significant savings made if the Home Office improved its conduct once proceedings are issued as described above. See our response to question 15 above.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

No. See our response to question 19 for our more general objections to the proposals.

Additional burden on Legal Aid Agency

This is another example of cost shifting, not cost saving. The costs of assessing cases under the discretionary scheme will increase as it is more burdensome to review whole files at the end of a case rather than make a well-balanced merits assessment at the start that is kept under review at each new stage of the case.

The Government acknowledges that decisions must be made on "particular facts[93]". It is hard to see how this can be done without the case file. We have experienced the extensive delays in processing applications for funding where cases reach the escape threshold (where controlled work cases exceed three times the fixed fee) and are already noticing delays in processing applications as devolved powers (delegated functions) have been removed, along with systemic problems such as correspondence going astray received or letters being issued about funding being stopped because providers have allegedly not sent in applications in

[91] ILPA to the Joint Committee on Human Rights re implementation of Human Rights Judgments, 6 October 2013 paragraphs 64-80 www.ilpa.org.uk/data/resources/21075/13.10.07-ILPA-to-JCHR-re-implementation-of-human-rights-judgments.pdf

[92] Beware Kite-Flyers, Stephen Sedley, London Review of Books, Vol. 35 No. 17 · 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers

[93] Consultation paragraph 126.

time. An application submitted in July by one member was received back with a certificate in October. If staff at the Legal Aid Agency are to take on exhaustive analyses of case files to determine whether discretionary payments can be made, the delays overall are likely to increase, unless the Agency will be recruiting more staff. Either option will increase the administrative burden substantially and have costs implications.

> Case of B
>
> B is 16 years old. He is a looked after child and is considered very vulnerable. His solicitors issued a claim for judicial review in relation to his immigration case on his behalf. An emergency certificate was granted in August and the solicitor submitted forms and supporting evidence to the Legal Aid Agency for determination of an application for a substantive certificate. In September the solicitor received a letter stating that the forms had not been received back and the application was treated as abandoned and the grant of emergency legal aid had been cancelled. No claim for costs could be made and the solicitor could not charge their client privately. The managers of B's care home expressed concern about letters that B had received from the Legal Aid Agency stating he no longer had legal aid as he was worried by this. The solicitor rang the Legal Aid Agency and was told that letter had been automatically generated and the documentation had been received. These letters had been sent out in more than one case but should be disregarded. The substantive claim for funding was only considered in October, with a request for further evidence about means just as work was required to reply to the Defendant's summary grounds of defence. If the application had been refused at that point or notice to show cause why funding should continue have been placed on the certificate, the provider could not have done vital work to progress the claim. If more applications are taking 6-8 weeks to be considered already then there will only be further delay with the burden of work the discretionary payment system will place on the Legal Aid Agency.

If claims will be submitted post permission, the Agency staff will be effectively making determinations of the kind that a costs judge would be asked to make. The costs of training for them to reach this level of expertise would be prohibitive and has not been factored into the cost/benefit analysis. The Impact Assessment merely states there would be "small on-going costs as a result of having to consider whether to award payment in cases that conclude before a permission decision". [94] No attempt has been made to quantify these costs and in our opinion, no realistic assessment of the extent of costs has been made at all.

Specific criteria

The proposed list of criteria based on which applications to the Legal Aid Agency would be considered are in any event problematic, in particular point (iii): the reason why the client in fact obtained any redress, remedy or benefit they had been seeking in the proceedings. This is bound to involve the Legal Aid Agency considering why the other side a) gave the Claimant some / all of what s/he wanted but b) refused to agree an order for costs. This would seem to encourage Treasury Solicitors to employ an argument that settlement was on a "pragmatic basis" or due to "exceptional circumstances", which is already used in consent orders, even when a case has clear merit.

We are also concerned by point (iv). This requires crystal ball gazing by the Legal Aid Agency staff member assessing the application. Depending on the point at which settlement is achieved there may be little indication from the court about their position on the case. In these cases, the Legal Aid Agency will effectively be in the same position as it is in now, making an assessment on a case based on papers provided by the claimant, perhaps a defence provided by the defendant or the decision leading to challenge. We do not consider that a new procedure needs to be introduced if the outcome would be the same.

[94] Impact Assessment - Payment to providers to work carried out on an application for Judicial review, Ministry of Justice 215, 6 September 2013, page 3.

In our view, the merits are best considered at the start of the case as now. We suggest the reintroduction of delegated functions for immigration providers who have a good record of holding contracts with the Legal Aid Agency, not least to relieve the administrative burden on providers.

The Legal Aid Agency would be assisted in its work if it were to become the rule rather than the exception for defendant government departments to respond to letters before claim. Then both sides' arguments could be considered in relation to the funding application. Data must be kept by the Legal Aid Agency on how often defendants to respond to pre action correspondence, as this must be completed on every application form by claimant solicitors. As set out above, in our experience the Secretary of State for the Home Department rarely replies to pre action letters. This consultation process is an opportunity to encourage staff to try and save costs by engaging in the pre action process as this could go a long way to saving costs in the justice system by avoiding litigation. We are concerned that these proposals will encourage Claimant lawyers to rush towards issuing claims in order to achieve a decision on permission sooner, and this will ultimately discourage Defendants from complying with their pre action duties.

COSTS OF ORAL PERMISSION HEARINGS

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

No.

The interests of justice and of economy both favour retaining the current practice of awarding costs to the defendant for attending an oral permission hearing only in exceptional circumstances. The rationale for the practice was explained by Auld LJ in *R (Mount Cook) v Westminster City Council* [2003] EWCA Civ 1346, in the following terms (paragraph 71):

> *…if a defendant or other interested party chooses to attend and contest the grant of permission at a renewal hearing, the hearing should be short and not a rehearsal for, or effectively a hearing of, the substantive claim. The objects of the obligation on a defendant to file an acknowledgement of service setting out where appropriate his case are: 1) to assist claimants with speedy and relatively inexpensive determination by the court of the arguability of their claims; and 2) to prompt defendants – public authorities – to give early consideration to and, where appropriate, to fulfil their public duties. It would frustrate those objects to discourage would-be claimants from seeking justice by the fear of a penalty in costs if they do not get beyond the permission stage or to clog up that stage with full scale rehearsals of what should be the substantive hearing of a claim if permission is granted.*

There is nothing said in the consultation paper to indicate that that is no longer good reasoning. The proposed alteration in the costs regime will, rather than saving public money and court time, increase the likelihood of the court being 'sucked into lengthy and fully argued oral hearings that transform the process from an inquiry into arguability into that of a rehearsal for, or effectively, an expedited and full hearing of the substantive claim' (Auld LJ in *Mount Cook,* paragraph 73).

WASTED COSTS ORDERS

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do

you think would be an appropriate test for making a wasted costs order against a legal representative?

ILPA does not agree with the proposals for changes to the current wasted costs regime. ILPA agrees with the Public Law Project's analysis.

Paragraph 149 of the consultation paper reads as follows:

> *149. The Government considers that further changes should be made to rebalance the financial incentives which contribute to claimants' decisions whether or not to bring and pursue applications. Claimants and their legal representatives should weigh up the strength of their case against the likely costs.*

However, no explanations or any evidence are provide to demonstrate a problem with the way in the current system is working. Section 51(7) of the Senior Courts Act 1981 gives power to award wasted costs against a legal representative for any 'improper, unreasonable or negligent act or omission'. This is a broad power. Rights of audience in the Higher Courts are limited to barristers and some solicitors who are bound by their professional codes not to act or fail to act for any improper unreasonable or negligent purpose.

In paragraph 145 of the consultation paper reference is made to *Ridehalgh v Horsefield* [1994] Ch 205. Sir Thomas Bingham MR, giving the leading judgment, said:

> *Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved.*

Wasted costs orders were held to be appropriate in cases where a lawyer "lends his assistance to proceedings which are an abuse of the process of the court" and is guilty of improper, negligent or unreasonable conduct. As set out in the consultation paper, such orders are made[95].

It is stated in the consultation paper

> *150. The legal representative is in the best position to advise their client of the likelihood of success, first prior to the initial application on the papers for permission and then again at the oral renewal hearing.*

It is correct that the legal representative is better placed than the lay client. However, the legal representative forms a view on the information available to him/her. Very often it will be the respondent government department that is best placed to assess the merits of the case because they will hold all the information[96]. When this information is disclosed, the legal representative may change his/her view.

There are challenges for the current wasted costs regime, but these proposals would do nothing to address them. In contrast to concerns that lawyers are penalised for the failings of clients is concern that clients may be penalised for the failings of lawyers. There is concern at the prospect that the sorts of representatives against whom such orders would be made would pass costs onto claimants, who are already struggling to pay. It would be too simplistic for the Ministry of Justice to regard this simply as a matter for the regulators of the representatives to police. The Ministry of Justice in setting the rules, and the courts in

[95] Consultation paper paragraph 147.
[96] See Guidance on discharging the duty of candour and disclosure in judicial review proceedings, Treasury Solicitors, 2010.

applying them, must take account of how they will operate in practice, whom they affect and who is put at risk.

Awards of costs against a claimant's representatives can result in unscrupulous representatives assisting a person to prepare an application (and charging for this) but not signing their name to anything and hiding behind the unrepresented claimant. It is necessary to discuss with the regulators what can be done to mitigate such risks in practice.

Question 23: How might it be possible for the wasted costs order process to be streamlined?

See response to question 22 above. The proposals militate against streamlining the wasted costs order process because they appear envisage widening the grounds on which the order could be made, to encompass the question of assessment of the merits of the case. This raises the prospects of the case being litigated again at the costs stage.

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

No. A person should not be further deterred from challenging a wasted costs order. S/he will, we assume, be bearing his/her own costs of any hearing in any event.

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

On 2 July 2013 ILPA responded to the Tribunal Procedure Committee Consultation on the proposed Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2013 and amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008 and addressed the question of wasted costs. Please refer to that document[97].

Questions 22 – 25

Protective costs orders

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

ILPA is opposed to changes being made to the current criteria and procedure for granting protective costs orders and to the nature of the orders granted. ILPA agrees with the analysis of the Public Law Project of protective costs orders.

The proposals in the consultation paper do not appear to have been considered in the round. Those who fulfil the proposed requirements for standing would not be eligible for a protective costs order and vice versa.

[97] Available at http://www.ilpa.org.uk/data/resources/18287/13.07.03-ILPA-response-to-Tribunal-Procedure-consultation-re-proposed-Tribunal-Procedure-First-tier-Tribunal-IAC-Rules.pdf .

The Consultation paper does not attempt to quantify how many protective costs orders would not be awarded if the requirement were to have no private interest whatsoever and thus the scale and impact of the proposed change. Research by the Public Law Project and University of Essex, found that between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a protective costs order had been granted. Only three were not environmental cases. The organisations concerned were Child Poverty Action Group, Medical Justice and Children's Right Alliance, all respected organisations and all working with individuals ill-placed to bring a challenge themselves. This does not suggest that there is any widespread problem or indeed that there is a problem at all.

To the extent that the proposal is intended to address the perceived (but not evidenced) mischief of judicial reviews being brought 'by groups who seek nothing more than cheap headlines' (foreword to the Consultation paper), adequate and proportionate protection is already provided to public authorities and public resources by the requirement to obtain permission. If permission to claim judicial review is obtained, it means that the public authority has arguably erred in law. No public interest would be served and indeed it would be contrary to the public interest to deter, obstruct or preclude the bringing of such claims. It is in the public interest that where the court, at whoever's behest, has identified an arguable error of law the claim should be fully considered by the court.

As described above, judicial review is not primarily concerned with private interests, but public wrongs. A body of case law has developed about protective costs orders. A private interest is a relevant factor when deciding whether or not to grant a protective costs order, but is not decisive[98]. If however there is no public interest in the case being brought, then a protective costs order will not be granted. The relative strengths of the public and private interest may be relevant in the weighing up of whether to grant a protective costs order. Where a public wrong is at issue then whether the individual claimant wins or loses, his or her case may clarify the law for everyone. There may also be cases where a protective costs order is necessary for a State to give effect to its positive obligations under, for example, Articles 2, 3 and 13 of the European Convention on Human Rights.

Service providers in particular will often have a private interest in matters to do with particular services but may for that very reason be best placed to address the question of public wrong. In her speech, Lady Hale gave the example of Age UK in *R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC and another intervening)* [2009] EWHC 2336 (Admin) [2010] ICR 260.

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

See our response to question 26 above.

A protective costs order is just that. It is set at a level that an organisation can pay and if it loses the organisation will be liable to pay the other sides costs up to the sum of the order. A wide range of orders can be given: there may be costs protection but permission to recover costs from the other party in the event of losing, or the order may be that there be no order as to costs. Or the costs a party is required to pay if it loses may be capped. In *Compton* [2009] 1 WLR 1436, a hospital closure case, the protective costs order required the claimant to seek pledges from the local community. Protective costs orders are already a flexible tool.

[98] *Morgan v Hinton Organics* [2009] EWCA Civ 107.

If Government departments consider a challenge frivolous and without merit this will no doubt affect the resources they deploy in fighting it. In challenges in the field of immigration and asylum it is our experience that Government deploys strong teams, suggesting that it considers that it faces a strong and credible challenge. We are aware of no evidence that Government is deterred from fighting a case or is more prone to settle when the other side has a protective costs order and indeed from the cases we have seen in the field of immigration and asylum our experience is to the contrary.

In February 2011 ILPA responded[99] to the Ministry of Justice consultation *Proposals for reform of civil litigation funding in England and Wales.* We supported qualified one-way costs shifting being extended to judicial reviews and we also supported non-governmental organisations bringing challenges in the public interest being eligible for such qualified one-way costs shifting. That continues to be our position.

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

Our answer is "greater than what"? As we understand it, it is necessary to disclose who is funding the litigation when applying for a protective costs order. A witness statement indicates that, for example, lawyers are acting pro bono or that a charitable funder has agreed to cover disbursements. If a funder is offering to indemnify the claimant against the other side's costs if the claimant loses, this would have to be disclosed. The court may consider that the proposed claimant and/or any funder could offer more and press them on this. Thus we are uncertain as to the mischief that the consultation paper seeks to address. See also our response to question 33 below.

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

We do not consider that there should be a presumption that the court considers a cross cap protecting the defendant's liability to costs. It is of course open to the defendant in any case to ask for a cross cap.

We consider that there are circumstances where it is not appropriate to cap the defendant's costs liability. The imbalance of power and resources between the parties when one is a Government department and the other has been able to satisfy the court that it is sufficiently at risk for a protective costs order to be justified, is very great. The claimant is limited by what they can afford and the protection they can secure. A defendant Government department is in a position to incur costs that it cannot recover. Further protection against paying the other side's costs increases this imbalance.

We are aware that there is a cross cap in Aarhus Convention claims, where the defendant's liability is capped at £35,000[100] and the claimant's at £5,000[101]. It would be instructive to look at the costs incurred by claimants and defendants in these cases, to understand how the caps have influenced their behaviour.

[99] See http://www.ilpa.org.uk/data/resources/4120/11.02.502.pdf
[100] Civil Procedure Rules Rule 45.43.
[101] *Ibid.*

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

No.

It is the case now that those setting protective costs orders look at the means of the parties. A protective costs order makes it possible for a would-be claimant to litigate, but generally ensures that s/he is remains concerned about losing and paying costs. The sum that achieves that effect will be different for different organisations.

We see no reason why an organisation that has shown a government department to have been acting unlawfully should be worse off for having done so.

See our response to question 29.

Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

ILPA does not agree with the proposed changes applying to third party interventions and agrees with the analysis of the Public Law Project.

See our responses to questions 9 to 11 above.

It is our experience that the usual approach is indeed "no order as to costs". Indeed, the Supreme Court Practice Directions provide at paragraph 6.9.6 "Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal".

There are reasons for not turning this into a rigid rule. An intervener intervenes to assist the court. The intervention may well save time and money both in the instant case and those that will come after if matters are not adequately addressed. An intervener that will struggle to bear its own costs may for that reason be reluctant to intervene if it has no prospect of recovering them and this may lead to the most useful and desirable intervener being reluctant to participate. The courts should retain powers to allow interveners to claim their costs.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

We concur with the analysis given by Lady Hale in her speech to the Public Law Project Conference on 14 October 2013:

> *As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party (rule 46): if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for.*

As set out in response to question 11 above, Lady Hale drew attention to a number of ways in which the courts act to keep the costs of such interventions down.

We repeat that third parties intervene to assist the court. It is only if they are going to do so that their intervention is permitted. It is not desirable to set liability for costs at a level where the court will not benefit from that assistance. Of course it is not possible to read an intervener's arguments and any evidence in no time at all, and of course an oral intervention will take time, even if it takes very little time. As set out above, the intervention may save time and money, in the instant case but also in cases that will come after which will benefit from the clearest and most informed judgment in the lead case[102]. An intervener may save the parties money, having to hand evidence or legal argument that they would have needed to marshal.

In cases where one of the parties is unrepresented, an intervention may make it unnecessary to appoint an 'advocate to the court', appointed by the Attorney General at the behest of the court to assist the court[103].

It may be difficult to disentangle in a particular case whether costs would have been incurred in any event. If the intervener had said less, might the claimant or defendant have needed to say more, or put in more evidence, etc? We do not consider that the question of "additional" costs is straightforward and the time that could be spent trying to sort it out to give rise to costs comparable to, or in excess of, those that are the subject of dispute. The current approach is pragmatic and efficient.

The court has powers to limit the amount of evidence the intervener is allowed to adduce and can confine an intervener to written argument, both of which can be used to keep additional costs under control. Rule 6.9 of the Rules of the Supreme Court limits interveners' written submissions to 20 pages.

The power to award wasted costs lies against the representative of an intervener in appropriate cases.

Were this rule implemented it would mean that only the wealthy and those such as Government departments able to commit significant funds to the intervention, would be able to intervene.

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

As to claimants, a party must persuade the court to award a protective costs order and at the level requested, therefore it is likely to disclose much of this information anyway. There is perhaps some confusion when the consultation paper makes reference to "a statement of assets, including any third party funding". Much funding that charities and non-governmental organisations receive will be restricted funding, only to be spent for the purposes for which it is given. Those purposes will not normally include litigation since it is not straightforward for a funder to reconcile respect for its own charitable purposes and proper use of its funds, with the 'hands off' approach required of a pure funder. There is a substantial body of case law to address the question of funders. A commercial funder will be expected to meet adverse costs, see for example *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055. But the

[102] See e.g. *Lassal* C-162/09.
[103] See e.g. Rules of the Supreme Court, rule 35.1.

situation is different where a "pure funder", assisting out for compassionate or charitable reasons, is concerned. The court retains a power to order a contribution but this will be rare. See *Hamilton v Al Fayed* (No. 2) [2003]QB 1175. A fighting fund had backed Mr Hamilton's libel action. Mr Hamilton lost and Mr Al Fayed sought to pursue contributors to the fund for costs. Nine settled, the rest contested liability. The court held that as "pure funders" they were not liable and the reasoning is instructive and very pertinent. It was held (per Simon Brown LJ) that:

> *… the pure funding of litigation…ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to a relative but rather should extend to anyone…whose contribution (whether described as charitable, philanthropic…) is animated by a wish to ensure that a genuine dispute is not lost by default…or inadequately contested.*

See also our response to question 28 above.

As to whether the courts should be given greater powers to award costs against third parties, once again we ask "greater than what?" As set out above, not only do the courts have powers to depart from the usual "no order as to costs" when permitting an intervention[104], they also have power to make provision for liberty to apply if a party becomes concerned by the order as to costs in the course of the litigation. They also have all their wasted costs powers against interveners. See also our response to question 32 above, it may be difficult to disentangle costs.

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

We have experience of deliberating whether or not to bring or to intervene in cases and also of discussing with other organisations whether they should bring or intervene in cases. Costs are not the first consideration; the first consideration is the merits. Why does the case need to be brought? Is there an individual or another organisation better placed to bring the case? What are the risks of litigating the point at all? In the case of an intervention, have we anything to bring to the proceedings that cannot be contributed by a party? We are mindful of it being open to the parties to use our evidence or to ask us for witness statements, so we are looking for something over and above this. Is another organisation better placed to intervene?

Only if we have satisfied ourselves that this would be an appropriate case for an intervention by us, do we consider costs. This consideration does not start with the question of protective costs orders but with whether there are barristers and solicitors who might be willing to act for us *pro bono* or on terms that we can afford. We then consider the question of costs protection. We would always seek costs protection when looking to bring a case. This is a question of what we can afford and also, as a not for profit organisation, of using our funds in accordance with our objects and purposes and in a prudent manner. If we did not get costs protection it is unlikely that we would proceed. In the case of an intervention we would seek agreement from the other parties not to seek their costs or, failing this, confirmation from the court that there will be "no order as to costs". Without costs protection it is unlikely that we should proceed to intervene.

We are not alone and we have seen a number of organisations decline to proceed with a case, to intervene or to proceed with an intervention because of concerns about costs even

[104] See e.g. Rules of the Supreme Court, rule 46.3.

where they thought that the case was very strong. The risks of losing appeared small, but the enormity of loss in the case of a risk meant that that risk could not be taken.

From the cases we see it now appears more frequent, if not routine, that Treasury solicitors do not consent to "no order as to costs" in cases involving interventions.

We do not have any examples of wasted costs orders against third parties and interveners.

LEAPFROGGING

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

We have no objection to leapfrog appeals where both parties consent and where the permission of the courts is given in the appropriate form[105]. We do not consider that an approach by category is a helpful way of proceeding. The questions of whether a person is a risk to national security, an infrastructure project is significant or the outcome of a case will affect a large number of people may be issues in the case. We suggest that if the power to leapfrog is not to be at large then as now under section 15 of the Administration of Justice Act 1969, the criteria should be objective and uncontentious. The risk of placing a burden on the courts is high.

Given the nature of the proceedings before the Special Immigration Appeals Commission we consider it highly unlikely that either the parties would consent or the courts give permission for such an appeal to be leapfrogged. See our response to question 37.

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

See above. Provided the courts and the parties consent, we do not object to cases being leapfrogged. Criteria should be objective and uncontentious.

Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

No. The parties are giving up a hearing before a court and should not be forced to do this. There are plenty of incentives for the parties to consent, including cost, speed and ensuring that the case is heard by the Supreme Court. Of particular concern would be cases where one party consents and the other does not.

As to matters of case management, there is a risk of lengthy and protracted debate about the merits and demerits of leapfrogging a particular case. Requiring consent is procedurally more straightforward and more efficient.

[105] See Supreme Court Practice Directions 1, paragraph 1.2.17 and 3, paragraph 3.6.1.

Question 38: Are there any risks to this approach and how might they be mitigated?

See our response to questions 37 and 39.

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

See our response to question 37 above.

We have very particular concerns where cases from the Special Immigration Appeals Commission are concerned. The Commission is a first-instance tribunal and primary finder of fact. Proceedings before the Commission are complicated by the withholding of information and evidence from a party to the proceedings, which are weighted against the appellant. Removing a tier of judicial scrutiny risks compounding, or at least removing opportunities to mitigate, this prejudice.

It is desirable that the issues in a case have been narrowed as far as is possible before they reach the Supreme Court, so that the court can provide a clear, accessible and authoritative judgment that will assist judges, tribunal judges and other decision-makers in the future. There is a risk that without the winnowing that very often takes place in the Court of Appeal, considerable time and expense will be spent before the Supreme Court narrowing issues and clarifying questions. We recall Lord Neuberger's warning:

> *we Judges could do better…We are often pretty prolix. When we deal with the facts of a case, that is understandable, and it doesn't normally matter, because only the parties in the case are interested, and they often want the Judge to say precisely what he or she thinks happened, or who is to be believed and why. But when Judges deal with the law, we are often setting out principles which strangers to the particular case, lay people, lawyers and other judges, should be able to understand and apply. We seem to feel the need to deal with every aspect of every point that is argued, and that makes the judgment often difficult and unrewarding to follow. Reading some judgments one rather loses the will to live – and that is particularly disconcerting when it's your own judgment that you are reading.*[106]

Issues are not always clearly identified in the tribunals, as the Court of Appeal has highlighted[107]. Determinations are often prolix and the precise approach to points of law difficult to isolate. It is arguably not in anyone's interest that the Supreme Court be involved in extensive preliminary work prior to isolating the point of law it is to determine.

Where there is binding Supreme Court authority on a point it may be to everyone's advantage to have a judgment of the Court of Appeal that applies that authority and sets out the results to which it leads, before the Supreme Court considers whether it should depart from that authority. It is not obvious that it is more efficient to roll those tasks into one.

[106] Justice – Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity Lord Neuberger, President of The Supreme Court Tuesday 15 October 2013.
[107] A recent example is *ML (Nigeria) v SSHD* [2013] EWCA Civ 844

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

This question is unclear and the revisions to which it makes reference are unclear. As set out above:

- We have no objection to leapfrog appeals where both parties consent and where the permission of the courts is given in the appropriate form[108].
- We do not consider that an approach by category is a helpful way of proceeding.
- We consider that it is undesirable and inefficient to have protracted argument about whether or not to leapfrog the case and that consent is the most efficient way to proceed.
- There is a risk that without the winnowing that very often takes place in the Court of
  Appeal, considerable time and expense will be spent before the Supreme Court narrowing issues and clarifying questions and at the expense of the clarity of the final judgment.
- We have particular concerns at the prospect of a case going straight from the Special immigration Appeals Commission, a first instance tribunal and primary finder of fact, to the Supreme Court.

Question 41: If the Government implements any of the options for reforming leapfrog appeals should those changes be applicable to all civil cases?

The question is unclear. It appears to posit a single approach to all options. We refer you to our answers to questions 35 to 40.

Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

No. See our response to the Transforming Legal Aid consultation, in particular in answer to questions 5, 34 and 35[109].

The impact assessment restates the Government view that there has been a large increase in unmeritorious claims and unsuccessful judicial reviews that disproportionately frustrate and delay the implementation of government policy.[110] We reiterate our view that the Government has no credible evidence to back up this assertion. The Government even acknowledges in the impact assessment for the current consultation that:

[108] See Supreme Court Practice Directions 1, paragraph 1.2.17 and 3, paragraph 3.6.1.
[109] http://www.ilpa.org.uk/data/resources/18039/13.06.03-ILPA-response-to-Transforming-legal-aid.pdf
[110] Impact Assessment Ministry of Justice IA 212 6 September 2013, page 1.

> If around 85% (the Bondy and Sunkin figure above) of non-I&A cases withdrawn before permission were settled on terms favourable to the claimant, then of all 3,000 non-I&A applications in 2012, around 44% might initially not be regarded as unmeritorious, in the sense of either being granted permission (either initially or after an oral renewal), or being settled upfront on terms favourable for the claimant.[111]

We ask the Government to await the final report of Bondy and Sunkin based on data collected in the course of an empirical research study conducted jointly by the Public Law Project and the University of Essex, funded by the Nuffield Foundation on the effects and value of judicial review. The validity of the research by Bondy and Sunkin has been referenced in the consultation.[112] A recent article by these authors states:

> *One of the puzzles of the reform saga is that the government appears to know that the figures do not justify its concerns in relation to growth: indeed, in the current consultation Judicial Review: Proposals for further reforms which ends on 1 November 2013, the government cite official statistics which show that since 2007 the volume of non-immigration/asylum JRs issued has remained fairly stable at just over 2,000 per annum mark. (paragraph 10) Yet having given these figures the government repeat the growth mantra, saying that:*
>
> > *'…the use of JR expanded massively in recent years and it is open to abuse' (Foreword page 3)*
> >
> > *'…there has been significant growth in the use of judicial review, and …this is sometimes used as a delaying tactic in cases which have little prospect of success' (paragraph 5 page 5).*
>
> *And even: 'As the data illustrates, there is a large and growing number of judicial review applications'.*
> *It is as if growth in the use of judicial review is a mantra which cannot be dispensed with.*[113]

Impact on legal aid providers and small businesses

The Government accepts that legal aid providers will experience a fall in income from legal aid provision for Judicial Review cases where permission is not granted and expects this to be in the range of £1million-£3million per annum.[114] We question the accuracy of these figures.

The Government has calculated the cost of these proposals by using the full amount of an emergency certificate for public funding granted to claimants (£1,350) for each case that is refused at permission stage, amounting to at least £1 million per year.[115] The Government will have data on the actual level of payments requested for pre permission work so we are surprised it has not used these figures. Many cases result in claims below £1,350.

The Government has calculated the remainder of the potential savings from its proposal for a discretionary payment system using figures for cases in which proceedings were issued and there was no final hearing (315 cases in 2012/3, £0.4 million calculated saving) and cases under end point code E, "No proceedings have been issued or where a case is withdrawn or settled before the court makes an initial decision whether or not to grant permission"

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[111] Impact Assessment, Ministry of Justice 210, 6 September 2013, page 20.
[112] Consultation, paragraph 12.
[113] Bondy, V and Sunkin, M: How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform', 25 October 2013, http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/ (accessed 27 October 2013)
[114] Impact Assessment, *op.cit*, page 3.
[115] Impact Assessment, *op. cit*, page 7 paragraph 22.

(1,424 cases 2012/3, £1.9 calculated saving). [116] There is no information about the outcome codes that have been submitted to the Legal Aid Agency for these claims. The Government has not taken into account the fact that many will have settled and *inter partes* costs have been paid, so reducing to almost nil the impact on the Legal Aid fund. If the Bondy and Sunkin data is used then the majority of those claims in the withdrawn claim bracket would have had a settlement favourable to the claimant, and there is a high likelihood that financial settlement may have followed. This lack of clarity on the Government's part serves to overstate their case for savings.

At base level, only those claims where permission is refused will result in no payment at all, and we restate our concern that many of such claims are affected by Defendant conduct, for example, issuing new decision letters after the claim is issued. We believe that if actual data was used the potential savings from Legal Aid providers would be far below £1 million as claims do not reach £1,350 in each case. Therefore these proposals seem highly disproportionate in what they are trying to achieve when balanced against the gross impact on access to justice for claimants and the businesses of providers doing legal aid work. In our view the concerns raised in response to the plans for judicial review in "Transforming Legal Aid" are not mitigated in any way by the introduction of these amended proposals.

We agree with the President of the Supreme Court, Lord Neuberger:

> (i) The cause of the delays complained of is largely historic, thanks to the very recent removal of asylum and immigration cases from the Administrative Court to the Upper Tribunal, which the judges proposed in 2009. (ii) Cutting down time limits for JR applications may actually increase the work, due to rushed applications and many more requests for extensions of time. (iii) The cost-cutting proposals risk deterring a significant number of valid applications, and will save a pathetically small sum[117].

The assessment of the impact on providers is therefore wholly inadequate. The Government states if there is less judicial review work, providers' time will be "freed for other profitable activities".[118] We question what work it is referring to. We endorse our comments above about the impact of these proposals on providers when combined with the impact of those that have already taken place and are proposed for implementation in the near future, such as the residence test. The Government has commissioned independent research with the Law Society to look at the impact on providers doing work as duty solicitors, looking at the minimum level of work needed for businesses to remain viable[119]. If the Government has any commitment to small and medium business it should undertake independent research in the same way for civil practitioners to assess how they will remain viable once the combined cuts brought in under Transforming Legal Aid such as the residence test, and if proposals for judicial review are implemented, and that no change should be introduced in civil legal aid until this is undertaken.

We object to the assumptions used in order to conclude the potential impact on legal aid providers and any savings to be made by these proposals. The Government states it has assumed that providers should be incentivised to consider cases more carefully before

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[116] Impact Assessment, *op.cit.*, Table 2, pages 7-8.
[117] Justice – Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity Lord Neuberger, President of The Supreme Court Tuesday 15 October 2013, available at www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf (accessed 27 October 2013).
[118] Impact Assessment - Payment to providers to work carried out on an application for judicial review, Ministry of Justice 215, 6 September 2013, pages 8-9 paragraph 32.
[119] Ministry of Justice and Law Society commission duty work contract survey, Ministry of Justice, 26 September 2012, available at www.justice.gov.uk/legal-aid/newslatest-updates/crime-news/moj-and-law-society-commission-duty-work-contract-survey (accessed 27 October 2013).

issuing judicial review proceedings.[120] We disagree that providers are issuing unmeritorious claims or the implication that the Legal Aid Agency is allowing grants of legal aid to pursue them. These are serious accusations to make towards legal aid providers and their professional reputation and the professional abilities of staff within the Legal Aid Agency.

We object to the assumption that a discretionary test for cases that conclude before permission will ensure providers do not refuse to take on "genuinely meritorious Judicial Review cases more generally, given the risk of non-payment".[121] The Government's proposals would mean providers would not undertake claims that may have a genuine prospect of success. See the Civil Justice Council response to Ministry of Justice consultation paper: *Transforming Legal Aid*, June 2013 cited in response to question 19.

Impact on Claimants

There will be an impact on Claimants who are no longer able to find legal aid assistance to bring their claims if providers cannot bear the level of risk contained within the new payment structure proposed by the Government.[122] Those Claimants will be forced to litigate in person, opening themselves up to debts in order to fund claims themselves. If they are forced into a position where they are unable to bring claims simply due to lack of legal aid funding this would be a "rank denial of justice and a blot on the rule of law".[123]

Impact on Legal Aid Agency

The Government has not assessed the costs that the Legal Aid Agency will incur from carrying out discretionary payment assessments. It is stated that there will be 'on-going costs to the LAA as it will be at the discretion of the LAA whether to award costs in cases that conclude before a permission decision' but no estimate of the numbers of cases that will benefit from this discretionary award is made.[124]

Impact on remainder of justice system

The Government's proposals would shift costs onto the rest of the justice system as already stated. It states that courts may lose fee income if fewer permission applications are made[125] and acknowledges there could be increased costs 'for example from an increase in oral renewals or rolled up hearings, from increased satellite litigation, or from more litigants in person' but states this will be resolved as 'HMCTS operates on a cost recovery basis in the longer term'.[126] We do not see how the courts will recover costs from litigants in person and ask why no attempt has been made to quantify these costs.

Impact on Defendants

The Government states that defendants may gain from reduced legal costs if there is a reduction in the volume of weaker judicial review permissions sought, assuming that defendants do not recover all of their legal costs in cases that they win.[127] We would argue

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[120] Impact Assessment - Payment to providers to work carried out on an application for judicial review, Ministry of Justice 215, 6 September 2013, page 5 paragraph 10.
[121] Impact Assessment - Payment to providers to work carried out on an application for judicial review, Ministry of Justice 215, 6 September 2013, page 5 paragraph 10.
[122] *Ibid*, p.8 paragraph 25
[123] Lord Neuberger, "Justice in an age of Austerity", *op. cit.*
[124] Impact Assessment, *op. cit,* Table 1, LAA Judicial review end-point code data, page 8, paragraphs 27 and 28
[125] *Ibid*. page 8 paragraph 26.
[126] Ibid, page 9 paragraph 40.
[127] Ibid, Table 1, LAA Judicial review end-point code data, page 8, paragraph 31.

that if Claimants are forced into a position where they must seek decisions on permission in order to ensure that legal aid claims will be granted by the Agency then costs for the Defendant will increase as Claimants will not be incentivised to settle pre permission and Defendants will spend more money defending the claim for longer.

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence which tells us more about applicants for judicial review and their protected characteristics, as well as the grounds on which they brought their claim.

Yes.

We are concerned that the Government states it does not have comprehensive data on those involved in judicial review proceedings.[128] Equality data is submitted with each application for legal aid in judicial review claims. There is a specific section on the application form for public funding that deals with protected characteristics.[129] We therefore reject the suggestion that the Government is not able to understand the potential equality impacts of the proposals for reform. We ask for the data that has been collected for judicial review claimants from funding applications so that we can comment upon it and answer this question.

In the absence of that data we confine ourselves to saying that the majority of our clients would be affected by this proposal. We refer to the cases referenced in this response and in our response to the last consultation "Transforming Legal Aid". There we set out that the introduction of a residence test to determine eligibility for legal aid will affect a large number of persons with a protected characteristic as it directly relates to persons under immigration control and their status is connected to the characteristic of race. The residence test will prevent applicants bringing challenges, for example, the claimant in a recent case in the High Court.[130] She challenged the Government's decision that there are no reasonable grounds to conclude she was a potential victim of trafficking, and would not have come within the narrow exemptions to the residence test set out in the response to "Transforming Legal Aid". She was removed to Nigeria after the Home Office determined she was not a victim of trafficking. The court found the decision to be unlawful and the Government has been ordered to return her to the UK. This claimant would have failed the residence test as she was brought to the UK on a visitor's visa for six months by her trafficker and was not lawfully resident at the point where she applied for legal aid and did not have 12 months of lawful residence. The judgment found that the Home Office policy on "historical victims" of trafficking is itself unlawful.

The cumulative impact of cuts to legal aid and changes to judicial review must be assessed.

Despite this, the Government acknowledges that its proposals will have a differential impact on groups according to the race and religion/belief of members as most judicial reviews related to immigration and asylum matters.[131] These claimants are challenging unlawful

[128] Consultation paragraph 207.
[129] http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/civapp1-version-15-april-2013.pdf see page 2
[130] *R (Atamewan) v SSHD* [2013] EWHC 2727 (Admin).
[131] Consultation paragraph 209.

actions against them and have a constitutional right to equality of arms against public bodies. The Government's acknowledges that there "may also be other differential impacts on protected groups, for example if non-governmental organisations are not able to bring challenges in certain situations that may impact upon those with protected characteristics who might have benefited from the challenges".[132] The proposals on standing, intervention and costs orders will severely limit the ability of organisations to protect those who are least well-placed to protect themselves.

CONCLUSIONS

Judicial review is considered to be a "priority category" under the Legal Aid Agency's funding guidance, which only applies to a limited group of cases.[133] We agree with the view of the Government about the importance of judicial review in our democracy, expressed less than 12 months ago as follows:

> *4.16 In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*
>
> *4.97 In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities. For example, a decision by a public authority to detain someone without sufficient reason would be a very important issue as the case concerns the litigant's liberty. Similarly, a challenge to a decision to refuse a litigant a life-saving medical treatment on an irrational basis would be of great importance as their life is at risk.*
>
> *4.98 In general, we do not consider that the class of individuals bringing these proceedings is likely to be particularly vulnerable, although they may be where the judicial review concerns mental health or community care. However, where alternative forms of dispute resolution, such as complaints procedures or referral to an ombudsman, have not succeeded we do not consider that there are further appropriate alternative forms of advice or assistance to justify the withdrawal of legal aid.*
> *4.99 We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained. However, we do not consider that business cases are important enough for legal aid to be justified for public law challenges concerning business matters, and we propose that, as at present, legal aid should continue not to be available for public law in business cases.*[134]

And here:

> *112. The Government intends to retain legal aid for the more serious cases and proceedings which seek to hold public bodies to account for their decisions, such as judicial review*[135]

This is a view shared by the most senior judges. Lord Neuberger stated:

> *21. … [I]t is fundamental to the rule of law that every citizen, perhaps above all the poor, the vulnerable, the disadvantaged, should be able to go to court to vindicate their rights or to defend*

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[132] Consultation paragraph 209

[133] General Funding Principles, paragraph 4.9 available at www.justice.gov.uk/downloads/legal-aid/funding-code/Funding_code_Chapter_4_merits_costs_damages.pdf (accessed 27 October 2013).

[134] Proposals for the Reform of Legal Aid in England and Wales, November 2012, CP12/10 available at http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf (accessed 27 October 2013).

[135] Legal Aid Reform in England and Wales: the Government Response, Ministry of Justice, June 2011, http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf (accessed 27 October 2013).

themselves, whether to challenge excesses of Executive power, to protect private rights, to be compensated for wrongs, to secure family rights, or to defend themselves if prosecuted.

22. Let me start by stressing a point that I have made before and which I make no apology for making again. The historic justification, and primary duty, of any civilised government is to ensure the defence of the realm from foreign threats and the rule of law at home – i.e. to ensure its citizens are free from both foreign and domestic threats. If it cannot provide those timeless and fundamental features, a government is not worthy of the name, and all its other services, which are of far more recent origin, such as education, health, and welfare, become valueless. Securing the rule of law at home requires, amongst other things: a high quality and independent judiciary; an accessible and effective court system; and an accessible, high quality, independent legal profession.[136]

Lord Dyson, now Master of the Rolls, said in *R (Cart) v Upper Tribunal* [2011] UKSC 2 who said:

There is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review.

Lord Bingham, then Master of the Rolls, said in *R (Smith) v Ministry of Defence* [1996] QB 517:

[T]he court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power" - it "must not shrink from its fundamental duty to 'do right to all manner of people.

The Government's own Treasury Counsel have said:

As barristers who regularly act for central government departments in public law cases, we are well aware of the ways in which judicial review claims, some meritorious, and others not, can prove a source of frustration for government. But we have all had experience of cases which have exposed serious errors in government decision making, often in circumstances where officials and Ministers would not, with hindsight, have wished those errors to have gone uncorrected.

More prosaically, but no less importantly, judicial review provides a prompt and efficient remedy for many persons affected by government action in large numbers of cases, often of critical importance to them, which are conceded by public bodies at an early stage, and at little cost either to the public body or the legal aid fund. By ensuring that officials are accountable to the law, judicial review provides a powerful corrective to poor decision making, the importance of which goes well beyond the relatively small number of cases which get near a court.

We consider that the proposals in the Consultation Paper will undermine the accountability of public bodies to the detriment of society as a whole and the vulnerable in particular.[137]

Adrian Berry
Chair
ILPA
1 November 2013

Appendices

Mr James Packer, Duncan Lewis, to Mr Justice Ouseley, Administrative Court re delay in judicial review cases by the Secretary of State for the Home Department, 25 July 2013

Response from Mr Daniel Hobbs, Home Office of 12 September 2013

[136] Lord Neuberger, Judges and Policy: A delicate balance", speech to the Institute of Government, 18 June 2013, available at www.supremecourt.gov.uk/docs/speech-130618.pdf
[137] *Op.cit.*

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