ILPA response to Ministry of Justice Consultation on Judicial Review reform and financial information

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations including the Administrative Justice Forum.

ILPA participated in work when what became part 4 of the Criminal Justice and Courts Act 2015 was before parliament. The provisions of part 4 create a new requirement for judicial review claimants in the Upper Tribunal and the High Court to provide specified information concerning the funding of the judicial review with the application for permission (s. 85). They require the Upper Tribunal and the High Court to consider making costs orders against those who are not a party to the judicial review but have been identified as providing financial support (s. 86). The Act also places costs protection in judicial reviews before the High Court on a statutory basis and specifies the circumstances in which these 'costs capping orders' may be made (s. 88-90).

ILPA briefings on the Bill that became the Criminal Justice and Courts Act 2015, and briefings ILPA supported, can be found at http://www.ilpa.org.uk/pages/briefings-on-the-criminal-justice-and-courts-bill-2014.html

ILPA has had sight of the joint response of the Public Law Project and Justice in draft and refers the Ministry of Justice to it at a number of points in our response. We commend to the Ministry of Justice the analysis therein of sections 85 and 88 of the Criminal Justice and Courts Act 2015.

The current consultation concerns the provision to be made in rules in these areas when bringing the relevant sections come force. The Civil Procedure Rule Committee and the Tribunal Procedure Committee will be invited to make rules. ILPA recalls that in *R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin) (12 June 2015), the schedule to The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) was *ultra vires* the powers of the Tribunal Procedure Committee. In *The Lord Chancellor v Detention Action (Secretary of State for the Home Department an interested party)* [2015] EWCA Civ 840 the Court of Appeal upheld the judgment of Nicol J. It held, at paragraph 45 of the judgment, that "the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases…The system is therefore structurally unfair and unjust". ILPA is currently challenging Rule 13 of the main body of those rules by way of judicial review. Our response to this consultation is concerned to ensure that the relevant committees are not invited to make rules which are unlawful and will themselves give rise to judicial review.

FINANCIAL INFORMATION

Claimants will be required to provide specified information regarding the funding of the judicial review with the application for permission. It is proposed in the consultation paper that this take the form of a multiple choice declaration in which the claimant would be required to provide the following information (and additional information where applicable) verified by a statement of truth:

- the claimant is not a corporate body and intends to meet all likely liabilities arising from the claim from their own financial resources; in which case, no further information would be required;
- legal aid has been applied for and the application is pending or has been granted; in which case, the claimant need not set out further information as a result of these proposals (i.e. nothing additional to existing requirements under legal aid regulations);
- the claimant is a corporate body that has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review; in which case, no further information would be required;
- funding other than from the claimant's resources or legal aid; in which case, where the total contribution and/or likely contribution is in excess of the threshold the name and address of the contributor, and the size of the contribution, would need to be provided; and
- the claimant is a corporate body that is unable to demonstrate that it has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review; in which case, the names, addresses and interest in the claimant of its members would be required.

Contributors providing funding below a set threshold would not need to be identified.

1. **Do you agree that a multiple choice declaration is appropriate? Please provide reasons**

ILPA would in principle support a multiple choice declaration as this would be less onerous to complete and less of a burden for the court, but disagrees with the proposed approach to the information to be provided as set out below

2. Do you agree with the Government's proposed approach at paragraphs 52(a) to (e)?

In the final form of the consultation paper the approach is set out in paragraphs 51(a) to (e). ILPA does not agree with the proposed approach as set out in paragraphs 51(d) and (e).

The questions should be linked to and not go beyond what is required to implement the statute[1], which is to identify who has a controlling interest in litigation and may be liable for third party costs orders. This must be interpreted consistently with rights to privacy under Article 8 of the European Convention on Human Rights and with the right to a fair trial under Article 6 therein. The consultation[2] envisages acquiring information about those who could not

[1] Criminal Justice and Courts Act 2015 s 85 (amending s 31(3) of the Senior Courts Act 1981) and 88
[2] See paragraph 20.

be liable for third party costs orders. It is disproportionate to the purpose of the statute and under Article 8 of the European Convention on Human Rights to require details of all the members of a corporate body or identify contributors who do not have a controlling interest in the litigation. Information on individuals should only be required when they have a controlling interest in the litigation in their personal capacity or a direct financial interest in the litigation and might thus be liable for third party costs orders.

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.[3] But the 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.*

The content of the declaration, or guidance on its terms, must provide sufficient clarity on the face of the claim form to enable a claimant to sign a statement of truth. The requirements, particularly in relation to 'likely' information are too broad in scope and speculative to meet these principles.

3. Do you agree that there should be no requirement for the claimant to provide their estimate of costs? Please provide reasons

We agree.

Claimants should not be required to provide an estimate of the likely total cost of litigation. The claimant may only have information from the Defendant's reply to the pre-action protocol which may be limited. In normal civil proceedings, costs are only estimated once the defence is served so the provision of an estimate as a matter of course would be disproportionate in judicial review.

4. **Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 61?**

[3] See further *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] 1 WLR. 2807 and *Palmer v Royal and Sun Alliance Insurance plc & others* [2008] EWCA Civ 46.

No.

The issue is not costs management but the making of third party costs orders and is relevant when, and only when, consideration is given to making costs orders. As set out in the response of Justice and the Public Law Project, the earliest such stage is permission.

At the point where consideration is being given to making an order for costs, those against whom costs might be awarded would volunteer, or could be asked to provide, relevant information as would be normal at a point where submissions are being made on costs.

5. **Do you agree that the financial information requirements and approach to service the government proposes should apply to all applications? Please give reasons.**

No.

See the comments in response to the questions above, in particular question 2, which are relevant to the approach to all applications.

Bodies can organise their membership in a variety of ways. ILPA, for example, is a company limited by guarantee not having a shareholding capital and a charity. It has a board of trustees elected annually by the membership. It has c. 1000 members, these are individuals and organizations. Information about its committee of trustees and its accounts is publically available through Companies House and through the Charity Commission.

Trustees of charities and directors of companies could potentially see their personal information disclosed under the proposals. This may deter individuals from volunteering as trustees or being directors and may deter charities and companies from bringing litigation in the public interest. 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. We highlight in particular the position of charities. The conduct of trustees of charities is overseen by the charities commission and there is a considerable body of law applying to charities. Trustees of charities have important obligations when carrying out all their activities on behalf of the charity and we consider that this oversight means that additional potentially onerous and potentially deterrent obligations are not appropriate.

Charitable funders may also fear disclosure of their information. This may give rise to similar deterrent effects to litigation as funders may be hesitant to fund charities that conduct litigation in the public interest for fear of costs risks.

There are risks that the effect of the proposals in the consultation paper on the charitable and voluntary sector would be akin to implementing those proposals on standing set out in the 2013 consultation Jud*icial Review – Proposals for Further Reform* which the Government decided not to pursue. In its response to that consultation,[4] ILPA stated

[4] Available at http://www.ilpa.org.uk/resource/21180/ilpa-response-to-ministry-of-justice-consultation-on-judicial-review-proposals-for-further-reform-1- (accessed 11 September 2015).

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[5], those affected were only able to obtain a remedy via judicial review[6].

We cited *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.

FINANICAL INFORMATION THRESHOLD

Claimants will need to identify third parties who are providing funding for the judicial review but who are not themselves parties to the litigation when they apply for permission for judicial review. Third parties providing financial support lower than a specified threshold will not need to be identified by the claimant. The Government is proposing to set a single monetary threshold at £1500.

6) Do you agree with the proposal for a single threshold expressed in monetary terms? If not, please provide reasons and, if possible, an alternative.

For the reasons set out in the response of Justice and the Public Law Project, we do not consider that any disclosure requirement should be triggered by the provision of financial information alone. Financial support of more than £1,500, or some higher sum, does not in and of itself mean direction and control of litigation and does not in and of itself render an organisation liable to a third party costs order. Limitations on the disclosure requirements should better reflect the jurisprudence on third party costs.

We agree that it is inappropriate to seek a percentage of estimated litigation costs as these will not be known at the pre-permission stage.

---

[5] *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

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

7) Do you have any data on typical legal costs in the context of judicial reviews or typical contributions to judicial reviews?

As to costs we consider that information held by the Ministry of Justice, including the Legal Aid Agency, and other Government departments, is more detailed than anything we can provide.

A voluntary organization funding litigation out of its own reserves will frequently, although not always, secure representation *pro bono*. It will invest in kind. It will then be required to meet costs of court fees and disbursements. The latter will vary considerably depending upon the case. As to exposure to the other sides' costs, information about this can be gleaned by looking at the costs protection awarded by the courts in different cases.

8) Do you agree with the proposed threshold of £1500? If not, please provide reasons and, if possible an alternative?

See comments in response to question 6 above. The sum is not an indicator of direction or control.

We consider that the sum of £1500 is too low. The proposed threshold gives no comfort to large foundations, charitable funders or to organizations such as ILPA and those ILPA member organizations which bring litigation in the public interest.

We agree with Justice and the Public Law Project law project that there is no obvious reason why the threshold figure should be addressed by reference to costs at permission given that the duty on claimants extends to disclosing funding arrangements for the whole case, not just up to permission.

In a recent case brought by ILPA against the Government, Treasury solicitors agreed a cap of £2500 at the permission stage. Had ILPA not been granted permission and had costs been awarded against it, it would have expected to pay that sum out of its reserves in addition to its own expenditure. In the event the permission hearing lasted three hours. Permission was granted.

During the parliamentary debates on these provisions the House of Commons debated Lords' amendment 106D that would have allowed the court to have regard to the circumstances of the individual case and to retain the discretion to consider an application for judicial review even when third party financial information was not provided. The House of Commons accepted the Government's amendments in lieu which, as amendments 106B and 106C, were subsequently rejected by the Lords, that the means of third party funders would only have to be disclosed if the financial support to be provided exceeded or was likely to exceed a sum set out in rules of court or in the Tribunal Procedure Rules. The Lord Chancellor[7] indicated in the debates that the Government would consult on an appropriate threshold, taking as the starting point for the consultation a threshold of £1500. This was only a figure for consultation, for as the Lord Faulks emphasised.[8]

[7] HC Report 13 Jan 2015: col 810.

[8] HL Report 9 Dec 2014: Column 1766. See also his comments at col 1773 and those of the Lord Mackay of Clashfern at col 1769.

The Lords' debate was not just about that threshold; concern was expressed at those contributing "significant sums", certainly more than £1,500. Take, for example, the objection of the Lord Marks of Henley on Thames who said:

> *The Government's stated aim in these clauses, restated by my noble friend, has been limited to ensuring that wealthy people do not use impecunious applicants to pursue litigation as fronts, with no risk in costs to themselves. … That is an understandable aim, properly expressed by my noble friend, which no one could sensibly criticise. However, I remind your Lordships that the court already has the power to require information and make costs orders against non-parties in such circumstances….*
>
> *I have made it clear to the Government that I would be prepared to support the amendment in lieu if there were a clear statement that genuine supporters in this category who provided significant funds but did not wish to control the litigation would be protected.*[9]

See also the comments of Lord Carlisle of Berriew, Lord Berkeley of Knighton and Lord Thomas of Gresford.[10] The latter recalled

> "*..a proposal to opencast mine part of Gresford colliery at a time when there were about 260 bodies still buried in it as a result of the 1934 disaster. …Since the matter had not been properly advertised, we took it to judicial review. We could not, however, expect every member of the community to be involved, so a committee of about eight people was set up to instruct solicitors and counsel to appear on this judicial review. It is those eight people I am thinking about, who might be found liable for costs. I can tell your Lordships that even then—back in the 1970s or maybe the early 1980s—costs were a considerable issue for these people before becoming involved in this matter. The result was that the judicial review was successful.*
>
> *The county council advertised properly and the villagers —the community—then made contributions to the consultation that took place. Although the decision to permit opencast mining went ahead, it was with very stringent conditions. … The fear of costs was something that might have deterred that successful action altogether.*[11]

A judge can do nothing if the case is not brought in the first place and a £1500 threshold may mean that cases are not brought.

COSTS CAPPING ORDERS

Claimants may only apply for protective costs under the new costs capping orders regime once permission for judicial review is granted in the High Court. The Government proposes that more detailed information on the claimant's finances should be required for a cost capping order than that required in the above declaration of financial information provided at the pre-permission stage. This information would include a breakdown of the claimant's significant assets such as real property, and liabilities, their income and significant regular expenditure.

[9] HL Report 9 Dec 2014: Column 1766
[10] Column 1771-1772.
[11] *Ibid*., col 1772.

The Government additionally proposes that a corporate body, including a charity, should identify and provide basic information about its members, specifically their names, addresses and interest in and connection to the applicant. This information would be served on the defendant as well as the court. It is suggested that the court may consider whether it is appropriate for the claimant to seek further capital from members to cover costs. It is proposed that these requirements should apply in all applications and asks whether specific applicants, such as charities, should be excluded from some or all of these financial requirements.

9) Do you agree with the government's proposal for a more detailed picture of the applicants finances on application for a costs capping order than is required with an application for permission? Please provide reasons.

The financial information stated to be required for a cost capping order to be awarded is similar to that currently provided to the court in an application for costs protection. As we understand it, it is necessary to disclose who is funding the litigation when applying for a costs protection. 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.

10) Do you agree that the applicant should not be required to provide supporting documents? Please provide reasons.

Rules should not be prescriptive as to supporting documents. The court has power to require further information of an applicant in an appropriate case.

11) Do you agree with the government's proposal for the information on members which an applicant must provide when it is a corporate body unable to demonstrate that it is likely to have the resources available to meet liabilities arising in connection with the application for judicial review? Please provide reasons.

No.

The additional requirement that a corporate body identify and provide information about its members to both the court and the defendant is disproportionate to the purpose of the statute[12] and under Articles 8 and 11 of the European Convention on Human Rights.

The names, addresses and interest of the members of a corporate body are not relevant to the exercise of the court's discretion on costs. Membership of an organisation does not indicate a controlling interest in litigation. For example, as drafted, the proposals could potentially require ILPA to disclose details of its c. 1000 members (individuals and organizations) when seeking a costs capping order to bring litigation. We suggest that this would be as uninformative as it is intrusive. For example a large organization member may contain few members involved in immigration law work. The organization has agreed to pay ILPA's annual membership fee but

[12] See s 88(5) of the Criminal Justice and Courts Act 2015.

the resources it would allocate to this type of work may extend little beyond that. Were there any suggestion that its liabilities might do so, it would probably not join ILPA at all.

We agree with Justice and the Public Law Project that the guiding principle of rules made pursuant to s 88(5) of the Criminal Justice and Courts Act 2015 should be that information to be produced should not go beyond that which, were it not produced, would result in a court properly refusing a costs capping order. We consider that the proposals as to information on members do go beyond this.

We do not agree with the proposal in paragraph 99 of the consultation paper that a court might wish to consider whether a body "…might seek further capital from its members if it were to face costs at the end of the proceedings." ILPA members elect the trustees of the organization annually, pay membership fees annually and pay for ILPA training, thus contributing to ILPA's unrestricted funding. They are consulted annually on their views on priorities for the organization and also make their views known at working group and other meetings, face to face and in correspondence. If they do not support ILPA's approach to litigation or to any other expenditure they are able to bring this to the attention of the secretariat and trustees. In the final analysis, they are able to terminate their membership.

ILPA will determine what it can afford at any given time and what it can afford will depend upon the membership fees etc. it has raised. If a court considers that the costs protection is not reasonable given the association's level of reserves at any given time, it will not grant that protection. If ILPA's members want to litigate more, the association could indicate that it needs to raise membership fees to cover the costs of this. There is thus accountability built into the membership structure, along with the ability to plan and to prioritize work. To be required to go back and ask for contributions from members *post hoc* is not a requirement that has any such accountability built into it. It would not be responsible for trustees to undertake litigation on the basis that they might get contributions from members, which might be distributed unequally between members, should it lose the case it wishes to bring. Were that the decision to be taken, the only prudent course would be to decide not to litigate.

In practical terms we see no sensible way in which a court could attempt to determine what further capital ILPA's diverse membership might be willing and be able to contribute months or a year hence. The exercise would be one of pure speculation.

See also the response to question 5 and the particular attention drawn therein to problems for charities or voluntary organisations.

12) Do you agree that the financial information requirements and the approach to service which the government proposes should apply to all applications? Please provide reasons.

We agree that the financial information should be disclosed to the defendant and interested parties. We anticipate that they would require this to decide whether or not to oppose the application for a costs capping order.

We consider that the court should retain powers to withhold information from the defendant or interested parties in an appropriate case.

COSTS BENEFITS ANALYSIS, EQUALITIES IMPACT AND FAMILY TEST

The Government seeks views on its assumptions and conclusions in its impact assessment. These cover costs to claimants, benefits to the taxpayer, administrative costs of implementing the proposals, and transitional costs for legal service providers and the judiciary. The Government seeks views on the equalities impact on those with protected characteristics and ways to mitigate any negative effects. It also seeks views on the impact of the proposals on families, which is a consideration across all areas of Government reform.

The Government acknowledges that financial risks for claimants are increased as a result of costs capping orders only being granted after permission has been granted.

13. Do you agree with the assumptions and the conclusions outlined in the impact assessment?

answered with

14) Please provide any empirical evidence relating to the proposals in this paper. We are particularly interested in the costs associated with engaging in the judicial review process, the burden that these requirements would place on claimants and information on costs awards in judicial review cases.

As the comments above indicate, we do not consider that those preparing the documents have given sufficient attention to the structure of membership organisations, whether or not these are not for profits. This aspect of the impact assessment should be reviewed.

No specific consideration is given in the consultation as to the effect on non-departmental public bodies such as the Children's Commissioners intervening in litigation or to the effects on interventions by Government Ministers and departments, 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).*

Lady Hale in her speech to the Public Law Project conference on 20 October 2013[13] 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.

For empirical evidence see our responses above, *passim*. In its response to the 2012 Ministry of Justice consultation that preceded Part 4 of the Criminal Justice and Courts Bill, ILPA stated that the statistics provided in that document were incomplete and had the potential to mislead:

[13] *Who Guards the Guardians?* Available at http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians (accessed 26 October 2013). For example *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); *R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC and another intervening)* [2009] EWHC 2336 (Admin) [2010] ICR 260.

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 have been expected the statistics would be readily available to the Government if the proposals had been based on objective data. That lack of comprehensive data is also a feature of this latest consultation.

ILPA intervenes very rarely indeed. ILPA will normally give consent for its information to be used by members in litigation and similarly will provide to them 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.

15) What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

The consultation paper sets out

"Specific concerns were raised by respondents over the costs capping order and other financial measures:

a. on costs capping orders, which it was argued might cause fewer claims to be brought or arguments raised by or on behalf of individuals with protected characteristics. Costs capping orders tend to benefit groups with protected characteristics or organisations which represent them who are considered to be acting in the public interest; "

Little attempt has been made to explore these concerns or to take a positive approach toward ensuring that there is not disproportionate impact on those with protected characteristics.

We concur that cost capping orders tend to benefit groups with protected characteristics or organizations which represent them who are considered to be acting in the public interests. We cite the following examples

[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
[17] See the 30 May 2013Freedom of Information Act 82534 letter from the Ministry of Justice to the Public Law Project.

R (RLC) v SSHD[18] - 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 detained fast track for asylum applications or to enlarge the time frames.

R(Medical Justice) v SSHD[19] - 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 (([2014] EWHC 2245 (Admin)) and a separate judgment on relief ([2014] EWHC 2525 (Admin); *R (Detention Action) v SSHD* [2014] EWCA Civ 1270 and on the appeals point in *R(Detention Action v SSHD)* [2014] EWCA Civ 1634. 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. As a result the detained fast track has been suspended.

R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors [2015] EWHC 1689 (Admin) (12 June 2015), the fast-track procedure rules were *ultra vires* the powers of the Tribunal Procedure Committee. In *The Lord Chancellor v Detention Action (Secretary of State for the Home Department an interested party)* [2015] EWCA Civ 840 the Court of Appeal upheld the judgment of Nicol J. It held, at paragraph 45 of the judgment, that "the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases…The system is therefore structurally unfair and unjust".

ILPA intervened in litigation before the High Court this year which concerned persons under immigration control who were survivors of torture and of human trafficking and with mental health problems: *R(JM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015). Related cases *IK, Y, PU et ors* (CO 678/2015; 747/2015 and 814/2015) raise specific questions of trafficking and equality legislation. The Poppy Project, based at Eaves Housing for Women, which works with trafficked persons, intervened in those cases. These cases illustrate how interventions may happen in judicial reviews involving clusters of protected characteristics.

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 protected characteristics or circumstances arising from protected characteristics, such as being in immigration detention) to take proceedings themselves.

Lady Hale provided examples from other fields of law in her speech to the Public Law Project conference on 20 October 2013[20]. We also highlight the article by Varda Bondy and Maurice Sunkin *How Many JRs are too many?*[21].

---

[18] [2004] EWCA Civ 1296.
[19] [2011] EWCA 1710.
[20] *Who Guards the Guardians?* Available at http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians (accessed 26 October 2013). For example *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

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.

The Independent Steering Group that conducted a review of the Public Sector Equality Duty 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,[22] and respondents reported that case law was helpful in the absence of formal guidance.[23]

The review team reported that:

> *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.*[24]

These comments underline the importance of judicial review in improving the conduct of public bodies.

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*[25].

16) What do you consider to be the impacts on families of each of the proposed options for reform? Are there any Are there any mitigations which the government should consider? Please give data and reasons.

See responses above, passim. We have no data that pertains specifically to families.

---

face extradition); *R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC and another intervening)* [2009] EWHC 2336 (Admin) [2010] ICR 260.

[21] *Op. cit.*

[22] 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

[23] *Ibid*, p.28

[24] *Ibid*, p.27

[25] ILPA response to 2012 consultation, paragraph 13.