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Criminal Justice & Courts Bill: House of Commons Committee **13th March 2014**

Part 4: Judicial Review

1. As currently drafted, this Bill would place serious restrictions on immigration detainees' access to judicial review. Judicial review is a crucial safeguard, and examples are set out below of cases in which the courts have found that detainees including children have been held unlawfully.

Clause 50 Stand Part: Likelihood of substantially different outcome

2. Clause 50 provides that the courts must refuse relief if *'it appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.'* The courts already have the power to refuse relief where it is deemed *inevitable* that the outcome would not have been substantially different.[1] Obvious cases can be decided at permission stage.

3. Clause 50, however, would require judges to make decisions about the likely influence of the defendant's conduct at permission stage. This would turn permission hearings into 'dress-rehearsals' requiring full disclosure and evidential preparation, and incur unnecessary cost and delay. Furthermore, the *'highly likely'* test would draw judges into second guessing what may have happened if different procedures had been followed. The inherent dangers of such an approach are outlined in the judgment of *John v Rees* [1970] Ch345 at 402, where Megarry J states:

4. *'.. 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 answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'*

Clause 53 Stand Part: Interveners and costs

5. Clause 53 provides that the High Court or Court of Appeal *'must order the intervener to pay any costs specified'* by a party or interested party that have been incurred *'as a result of the intervener's involvement.'* It would be impossible for many NGOs including BID to pay such costs. This would mean that we would be prevented from intervening and providing crucial evidence to these courts.

6. Interveners must convince the court of the value of their involvement when seeking permission to intervene. The senior judiciary's response to the Government consultation on Judicial Review reform states: *'The court is already empowered to impose cost orders against third parties [interveners]. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties.'*[2]

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[1] See *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284
[2] Judiciary of England and Wales (2013) *Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'*

Case Study: Child detention

In 2011, following judicial review proceedings in the 'Suppiah' case,[3] the Administrative Court found that two families had been detained unlawfully. Liberty intervened in this case, and BID provided evidence to support their intervention. In his concluding remarks, Justice Wyn Williams found:

'The Defendant's current policy relating to detaining families with children is not unlawful. There is, nonetheless, a significant body of evidence which demonstrates that employees of UKBA have failed to apply that policy with the rigour it deserves.'

At paragraph 111, Justice Wyn Williams stated: *'On the basis of the evidence adduced by the Claimants and Liberty, no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children. That emerges with clarity from the observations of HM Inspector of Prisons, the Children's Commissioner, Members of Parliament, the Independent Inspector of UKBA and the detailed evidence of Mr Makhlouf [BID].'*

Since this judgment was handed down, there have been numerous improvements to Government policy on child detention. In paragraphs 31 - 40 of this judgment, Justice Wyn Williams is critical of the Home Office's failure to properly communicate the option of voluntary return to the claimants before their detention. Since this case was brought, the Home Office has improved their communication on voluntary return in family cases, and families are now given a minimum of 4 weeks to consider returning voluntarily or by 'self check-in' before any enforcement action is taken.[4]

Clause 54 Stand Part: Protective Costs Orders

7. Clause 54(3) provides that a protective costs order can only be made if permission to apply for a judicial review has been granted by the court. However, defendants and interested parties may accrue significant costs, in some cases exceeding £30,000, before permission is granted.[5] If an order cannot be obtained to protect claimant organisations against such costs risk, claims with substantial public interest will not be brought. For example, Medical Justice, a detainee support organisation, obtained a protective costs order and in 2010 successfully challenged a Home Office policy of removing certain groups without a minimum of 72 hours notice.[6] This notice period is crucial because it enables people to seek legal advice to challenge their removal, including in cases where removal would be unlawful.

Further examples of cases which would be affected

8. We believe that the Government's proposals would severely curtail access to judicial review for meritorious cases challenging detainees' removal, the legality of their detention or maltreatment in detention. We remind the committee that immigration detainees are held without time limit, in some cases for years. Where cases can be brought, the barriers to interventions contained in Clause 53 would limit the evidence available in some cases.

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[3] *R (on the application of) Reetha Suppiah and others v SSHD and Interveners* [2011] EWHC 2 (Admin)
[4] Home Office *Enforcement Instructions and Guidance* Chapter 45
[5] Jaffey, B. and Hickman, T. (2014) *UK Constitutional Law Association Blog* 'Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014' http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/
[6] *The Queen on the Application of Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin)

Maltreatment of Detainees

9. Recently, *The Observer* reported alleged sexual abuse of female detainees by staff at Yarl's Wood,[7] for which two custody officers have been dismissed.[8] This case, and the case cited below, highlight the importance of access to the court for detainees wishing to challenge maltreatment.

Case study: Use of force against pregnant women

In January 2013 *The Guardian* reported that force was used against a pregnant woman during an attempt to remove her from the UK: *'She said her body was covered in bruises after the incident.. an independent doctor warned that putting the woman on the plane without adequate monitoring while she was bleeding could lead to premature labour and ruptured membranes.'* [9]

This woman's treatment was also criticised by the Prisons Inspectorate.[10] Despite having no published policy governing the use of force, and widespread criticism of their practices,[11] the Home Office continued to use force against children and pregnant women to effect removals. This situation only changed as a result of a judicial review application in the case of *R (on the application of Yiyu Chen and Ors) v Secretary of State for the Home Department* CO/1119/2013. Shortly before a court hearing, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm. In this case, further harm to vulnerable detainees was only prevented by an application for judicial review.

Legality of detention

10. BID regularly refers detainees to solicitors to challenge the legality of their detention.

Case Study: Separation of families

In September 2010 and April 2011, following judicial review proceedings the High Court found that two single mothers, both clients of BID, had been unlawfully held in detention and separated from their children.[12] The unlawful detention of these mothers had serious consequences for their children's welfare.

One of the children in the latter case of 'NXT' changed foster placements six times during the mother's imprisonment and detention and experienced abuse and neglect. Following these judgments, in November 2011, the Home Office published six sets of guidance on the separation of families. These instructions set out detailed procedures to be followed in such cases, including steps to consider child welfare. It appears likely that the Home Office decided to publish guidance on this matter at least partly as a result of this litigation. The ability to bring judicial review proceedings in such cases is crucial in obtaining the claimant's release, providing them with redress, and challenging systemic problems in Home Office decision making.

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[7] *The Observer*, 14th October 2013, "Detainees at Yarl's Wood immigration centre 'facing sexual abuse'"
[8] Nick Hardwick, Chief Inspector of Prisons, Press release by HM Inspectorate of Prisons 29 October 2013, 'Progress made, but further improvements needed' http://www.justice.gov.uk/news/press-releases/hmi-prisons/yarls-wood-immigration-removal-centre
[9] *The Guardian*, Friday 11 January 2013 , 'UK Border Agency rejects calls to stop using force on pregnant detainees'
[10] HM Inspector of Prisons (2012) *Report on an announced inspection of Cedars Pre-Departure Accommodation*
[11] Home Affairs Select Committee (2012) *The work of the UK Border Agency (April–June 2012) Eighth Report of Session 2012–13*
[12] *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and NXT, R (on the application of) & Ors v Secretary of State for the Home Department [2011] EWHC 969 (Admin)

Judicial reviews to challenge removal from the UK

11. BID has worked with a number of parents who the Home Office has sought to remove or deport, despite this not being lawful or in their children's best interests. Judicial review is a crucial safeguard against such action.

Case study: challenging removal of a family

Faith was detained with her partner for 206 days after serving a prison sentence. Her four children were aged between one and eleven when she went to prison; the eldest child was a British Citizen. The children were extremely distressed, and some of them developed behavioural and health problems.

Three months into her detention, the Home Office wrote to Faith and her partner informing them that they intended to remove the parents and children together. The family had been separated for two years and five months. The Home Office noted the need for the children to *"re-establish their relationship with their parents before removal,"* and envisaged that this might happen at Heathrow Airport. It is extremely concerning to see that the Home Office thought it would be appropriate to reunite these extremely distressed children with their parents during the course of their forced removal.

This removal attempt was cancelled, and the Home Office arranged a new date for the family to be removed using the same method, but this was prevented by a judicial review application. The parents were subsequently released from detention and granted leave to remain in the UK.

Interaction of the Judicial Review reforms with other legislation

12. **Residence test:** The Government proposes to exclude people who are not lawfully resident in the UK, or have not been lawfully resident for 12 months, from access to many types of civil legal aid. If both the residence test and the proposed reforms to judicial review are introduced, people who are detained unlawfully will in practice often have no route to challenge their detention. Those who fail the residence test will not be able access legal aid to bring a civil claim for compensation for unlawful detention after their release.[13] Under the judicial review reforms, detainees' access to judicial review to challenge the legality of their detention would be severely curtailed.

13. **Immigration Bill:** Clause 12(3) of the Immigration Bill provides that *'foreign criminals.. can be deported first and appeal after, unless that would cause serious irreversible harm.'*[14] Given that 32% of deportation appeals succeed,[15] many people with valid appeals may be deported, including where they fear for their safety or return and/or have children in the UK. Judicial Review is offered as a safeguard, and yet the measures set out above would severely limit access to judicial review.

Bail for Immigration Detainees is a charity which provides immigration detainees with free legal advice, information and representation to secure their release. From 1 August 2012 to 31 July 2013, BID assisted 3367 detainees. **Contact:** Sarah Campbell, Research & Policy Manager: sarahc@biduk.org, 0207 650 0727

[13] Ministry of Justice September 2013 *Transforming Legal Aid: Next Steps, Annex B: Response to consultation,* Paragraph 125; Ministry of Justice February 2014 *Government response to the Joint Committee on Human Rights: The implications for access to justice of the Government's proposals to reform legal aid,* p11
[14] Home Office October 2013 *Immigration Bill Factsheet: appeals (clauses 11-13)* http://bit.ly/1gOp7y8
[15] Home Office 15/7/12 *Impact Assessment of Reforming Immigration Appeal Rights,* p7 http://bit.ly/1cygmWm