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MINISTRY OF JUSTICE 'Judicial Review: proposals for further reform'

Submission by Bail for Immigration Detainees 1st November 2013

INTRODUCTION

Bail for Immigration Detainees

BID is an independent national charity established in 1999 to improve access to release from immigration detention for those held under Immigration Act powers in immigration removal centres and prisons. BID provides immigration detainees with free legal advice, information, representation, and training, and engages in research, policy and advocacy work, and strategic litigation. BID is accredited by the Office of the Immigration Services Commissioner (OISC), and won the JUSTICE Human Rights Award 2010.

From 1 August 2012 to 31 July 2013, BID assisted 3367 people held in immigration detention. Many of our clients are referred on to public law firms for judicial review of the lawfulness of their detention. BID has made 30 such referrals in the last twelve months, most commonly on the basis of length of detention combined with a factor such as failure on the part of UKBA to obtain a travel document in a timely fashion to facilitate removal, failure on the part of the UKBA to observe its duty in relation to the safeguarding of children and promotion of their welfare when separated from their main carer by detention, and failure to provide adequate treatment for and release from detention detainees with severe mental ill health.

BID runs a bi-annual survey of legal representation across the UK detention estate, and aims to raise awareness of immigration detention through its research and publications, including "*The Liberty Deficit: long-term detention and bail decision-making. A study of immigration bail hearings in the First-tier Tribunal*", (2012). BID also works through advocacy with civil servants via a number of Home Office-convened stakeholder groups, and with politicians.

BID is an experienced third-party intervener. The domestic and European courts have granted BID permission to intervene in a number of cases raising important issues regarding immigration detention policy and practice, including: Mustafa Abdi v United Kingdom (European Court of Human Rights, Application 2770/08)[1]; Razai & Others v SSHD [2010] EWHC 3151 (Admin)[2]; SK (Zimbabwe) v

[1] The sequel to the Court of Appeal's decision in R(A) v SSHD [2007] EWCA Civ 804

[2] In which the court considered evidence indicating systemic difficulties with the Secretary of State's policy of providing accommodation for immigration detainees who are considered to be high risk.

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SSHD UKSC 2009/0022[3]; and Walumba Lumba (Congo) and Kadian Delroy Mighty (Jamaica) [2011] UKSC 12[4], and most recently by the Court of Appeal in the case of David Francis v SSHD ((2013/2215/A).

BID submitted a detailed response to the Ministry of Justice consultation 'Judicial Review: proposals for reform' in January 2013[5].

General points on this consultation

This consultation suggests further measures to reform funding and procedures for judicial review with a view to

> *"Tackl[ing] the burden that the growth in unmeritorious judicial reviews has placed on stretched public services…. In this paper the Government sets out a series of further reforms which, it states, seek to address three interrelated issues: i. the impact of judicial review on economic recovery and growth, ii. The inappropriate use of judicial review as a campaign tactic, iii. The use of the delays and costs associated with judicial review to hinder actions the executive wishes to take." (MoJ, 2013a: 6-7)*[6]
>
> *"But the use of judicial review has expanded massively in recent years and it is open to abuse. The Government is concerned about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made" (MoJ, 2013a: 3)*[7]
>
> *"Judicial reviews are brought by groups who seek nothing more than cheap headlines" (MoJ, 2013a: 3)*[8]
>
> *"A large number of these claims are weak or frivolous" MoJ, 2013b: 1)*[9]

[3] Where the court considered whether a breach of public law duty involves non-adherence to a published policy (and delegated legislation) requiring periodic detention reviews.
[4] Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.
[5] Available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html
[6] Ministry of Justice, (September 2013), '*Judicial Review: Proposals for further reform'*. Available at https://consult.justice.gov.uk/digital-communications/judicial-review
[7] Ibid.
[8] Ibid.
[9] Ministry of Justice, (September 2013b), Impact Assessment Reforms to Judicial Review IA No: MoJ 210. Available at https://consult.justice.gov.uk/digital-communications/judicial-review

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We wish to make a general point on the scope and tone of the reform proposals. Given that this is the second consultation on reform of judicial review within a few months, and despite the submission to the Ministry of Justice earlier in 2013 of detailed responses from learned and experienced judicial and legal bodies, the language used in this second consultation is extraordinary, and arguments for reform presented are partial, inaccurate, and subject to large margin of error. The consultation document and associated impact assessments offer an example of evidence-free policy making that does no credit to the Ministry of Justice.

At best the Government offers a highly partial characterisation of judicial review, focusing on the inconvenience caused to the executive by judicial review while completely ignoring the benefits of judicial review to individuals, to the maintenance of the rule of law, and to society at large.

> *"The Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate, or discourage legitimate executive action" (MoJ, 2013a: 7)*
>
> *"[Our] concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest." (MoJ, 2013a: 24)*
>
> *"In this paper the Government sets out a series of further reforms which seek to address three interrelated issues: i. the impact of judicial review on economic recovery and growth; ii. the inappropriate use of judicial review as a campaign tactic; iii. the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take" (MoJ, 2013a: 7)*

The proposal document appears to miss the point, which is that it is for the courts to decide whether executive action is legitimate. To put it another way, while "the elected government are best placed to determine what is in the public interest", it is the courts that are best placed to determine that the Government's intentions and the public interest have been truly and properly served.

The proposals ignore the safeguards offered by judicial review to the exercise of individual rights, the role of judicial review as a check on unlawful policies or the unlawful application of policies, and the use of judicial review by the government itself to develop clear boundaries to policies. It is in any case entirely legitimate to frustrate unlawful action through legal means such as Judicial Review. Positive findings are an example of the benefits of judicial review, which this consultation seems determined to ignore. One Ministry of Justice impact assessment notes a benefit from these reforms as being "defendants [the government] would gain from a reduction in JR volumes" (MoJ, 2013b: 3). We say this is highly convenient for the government, and comes at the expense of the rule of law.

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Looking for savings in the wrong places

We believe there is an overemphasis on the financial benefits to be gained from these reforms, despite the fact that the savings claimed for these reforms are small, the risks and uncertainties identified in the impact assessment documents are numerous, and the margin of error must be high. Over and over again throughout the impact assessments attached to these proposals the Government notes that "we have not been able to monetise the savings associated with this proposal".

Tackling inertia rather than delaying tactic

Far from being used as a delaying tactic, as the Ministry asserts, judicial review procedures are now an essential and routine legal tool to overcome the inertia of Home Office caseowners in immigration cases. It is becoming increasingly necessary to use judicial review proceedings to force the Home Office (UK Border Agency as was) to make decisions in immigration cases, or simply to respond to correspondence so as to prevent and avoid any unlawful consequences. Judicial review offers a degree of protection against poor quality decision making and administration on the part of the Home Office.

Judicial scrutiny is essential to ensure that government departments work fairly and efficiently. It has been estimated that up to one third of immigration applications for judicial review are to challenge potentially unlawful delays in Home Office decision making. Where individuals are held in administrative detention time is always of the essence since detention may become unlawful over time where the Home Office fails to act within a reasonable period.

The government argues that Judicial Review is being used as a delaying tactic, but fails to provide evidence for this or to deal with the contribution that poor decision making by government, including the well documented problems with Home Office decision-making, make to driving up the number of public law errors that must then be corrected via Judicial Review.

> *"The Government is concerned that there has been significant growth in the use of judicial review, and that this is sometimes used as a delaying tactic in cases which have little prospect of success" (MoJ, 2013a:(5)*

The Government offers only a partial and inaccurate characterisation of the use of Judicial Review, and this is especially relevant to immigration matters. The poor quality of Home Office immigration casework and huge backlogs in asylum decision-making has been extensively documented by the Independent Chief Inspector of Borders & Immigration[10]. In immigration law matters it is often only the initiation of Judicial Review proceedings that results in action being taken. For example, UKBA

[10] For further information on the quality of UKBA detention casework please refer to the joint thematic inspection report produced by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, (December 2012), '*The effectiveness and impact of immigration detention casework*' Available at http://bit.ly/UBdHRN

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has recently acknowledged to BID that in the context of extensive delays in the provision of Section 4 (1)(c) bail accommodation for detainees, which prevent applications for release if not removed after a reasonable period, it is only the initiation of Judicial Review that results in accommodation being granted to an individual.

For many immigration detainees and their legal representatives, Judicial Review is the only means of enforcing or clarifying relevant law and policy, and acts as a critical check on the power of the State. There is no evidence in the consultation document or the impact assessments that in conjunction with proposals to reduce access to Judicial Review, consideration has been given to tackling the triggers for increased use of Judicial Review such as poor quality Home Office immigration casework.

SECTION 4. 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. We see no problem with a case for Judicial Review being brought where the claimant has "little or no direct interest" in the matter.

The proposal misunderstands or misrepresents the constitutional role of judicial review.

> "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 issue or the 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 [permission to bring judicial review], the court's only concern is to ensure that it is not being done for an ill motive" (Sedley J in R v Somerset County Council, ex p Dixon [1998] Env LR 111 at 117-121)

As the Public Law Project (PLP) has pointed out, the proposed changes to the rules on standing

> "Concern *who* should be allowed to bring a claim for judicial review rather than the current arrangements which focus on the *substance* of a claim and the importance of getting a claim before the court so that public law wrongs can be identified and remedied" (PLP, 2013:1)[11]

[11] Public Law Project, (October 2013), '*Judicial Review: Proposals for further reform*'.

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While a claim for Judicial Review may be brought by an individual or group of individuals, there are circumstances where organisations with no direct interest in the matter, such as charities or NGOs, are nonetheless well placed to discern a broader pattern of potentially unlawful action or failure to act, on a national or local level, and to try to rectify the problem. So while a claimant organisation may have no direct interest, they may represent or provide services to a significant number of individuals who would benefit if the matter in question were to be resolved.

Individuals directly affected by unlawful action or failure to act on the part of the government may lack both the perspective and the means to bring a case themselves. Such individuals may be of limited mental capacity, or otherwise vulnerable. they may be unaware that they have been treated unlawfully as a result of government action, or that they are one of many that have been treated unlawfully as a result of a systemic public law failure. Others so affected may be outside the UK, or they may have been unlawfully removed from the UK

One of the Impact Assessments accompanying the consultation document notes:

> *"1.9 The Government is concerned that, over time, an increasingly generous interpretation of the requirement of "sufficient interest" has been given, so that a personal or substantive interest in the matter to which the application relates is no longer required. This has meant that individuals and groups with an interest in the general area, such as representative groups, have been able to challenge specific decisions, acts or omissions which do not affect them directly.*
>
> *1.10 The Government is concerned that this has allowed JRs to be lodged as part of sophisticated campaigning approaches, by Non-Governmental Organisations (NGOs) and pressure groups, which may bring cases to raise public awareness of the issue or of their organisation" (Ministry of Justice, 2013b: 6)*

However, the government offers no evidence of the scale of this apparent problem. The consultation document does not contain any examples of NGOs or campaigning groups making Judicial Review claims simply to "raise public awareness of the issue or of their organisation".

The government refers to NGOs and charities that might not be considered to have standing under these reforms as "losing public awareness benefits" (MoJ, 2013b: 2.17), as if NGOs and charities have only this aim in mind. The government continues: "cases which generate less public awareness might not be pursued in future" (ibid: 2.22). This is to completely misunderstand the motivation behind litigation work for many NGOs.

Raising awareness of an issue or the work of an organisation is not in any case of itself a bad thing. Indeed many government departments, such as the Home Office or Department of Health rely on

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such organisations acting as stakeholders to help review policies and their introduction and delivery, or to highlight systemic operations problems. NGOs and charities may resort to Judicial Review when attempts to remedy unlawful action or failure to act on a systemic scale are not successful despite stakeholder working with the relevant Department or Agency. Or they may resort to a campaign rather than turn to litigation.

The Government fails to note that the benefit to NGO claimants may include a declaration that a particular government policy is unlawful, or some other step on the way to corrective action where a government policy is found to be operated unlawfully, or not operated when it should be, or an unpublished secret policy is being operated.

The consultation document appears to be an example of evidence-free policy making. In relation to the proposal to reform the rules on standing, the Ministry of Justice impact assessment notes that "it has not been possible to monetise the impacts of this reform at this time", either in relation to costs or benefits (MoJ, 2013b: 2). More specifically, with relation to the perceived but evidenced problem of weak, frivolous and "campaigning" Judicial Review claims, the government acknowledges that "it has not been possible to monetise the value to these claimants of bringing JRs, e.g. of raising public awareness" (MoJ, 2013b: 2.17). Again, with reference to limiting standing, the government notes that

> "*Many of the costs and benefits …remain un-quantified due to a lack of information available on current practices and on the extent of behavioural changes anticipated following these reforms" (MoJ, 2013b:8)*

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 Government should not consider other options. The alternatives which the Government proposes to substitute for the current test for standing, the "sufficient interest test", are narrower tests, would disallow meritorious Claimants with no direct interest, and are not acceptable.

In our view the current tests that are applied by the courts, and the opportunities of all parties to a case to contest and argue the issue of standing, are sufficient. Adding obstacles to what has thus far not been a serious problem would seem to be unnecessary, especially since the government has failed to offer any evidence that there is a problem with the way the courts operate the "sufficient interest test".

The only possible outcome of any amendment via substitution to the rules on standing (currently contained in the "sufficient interest test", s3(1) Senior Courts Act 1981), which the Government is

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clear is being sought to prohibit those with no direct interest in a matter from bringing a meritorious claim would be to

i) Reduce the number of possible claimants in Judicial Review actions. Indeed the explicit aim of these proposals is to remove an entire category of claimant, those who fall into the ill-defined category of claimants with "little or no direct interest".
ii) Removing a category of claimant in this way would have the effect of raising the level of protection from challenge where unlawful action occurred for the government and its agents. This provision would put certain unlawful action on the part of the government beyond challenge.

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.

We repeat, the government offers no evidence of the scale of this apparent problem. The consultation document does not contain any examples to support the assertion that NGOs or other groups routinely and successfully receive permission to act as third party interveners in Judicial Review cases "as a campaigning tool", rather than to assist the court which they must in any case convince of the value of any contribution.

Third party interveners assist all three parties, the Claimant, the Defendant and the court. It is always open for either side to object or to obtain the court's agreement that an intervener should be refused permission to intervene.

It is clear that the courts already apply a test that considers whether or not a third party has information that is publicly available e.g. on its website that would be available to the court should this be needed. The attention of the court to such information could be brought by way of written submissions. But the court will benefit by such information being presented in a readily accessible manner so as to limit time and costs. Interveners, whose role is to assist the court, are normally bringing information to the court's attention that is not readily or publicly available e.g. statistical analysis of data arising from an organisation's casework experience or other information.

Organisations with clients directly affected by an unlawful policy, or the failure by the government or its agents to observe its own policy, will have the experience and knowledge to explain the legal implications that the issues at stake may have for members of the public who may form part of its membership or for whom its very existence (often its charitable purpose) may be concerned.

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Case study: child detention

In January 2011, following judicial review proceedings in the 'Suppiah' case,[12] the Administrative Court found that two families had been detained unlawfully. Liberty intervened in this case, and BID provided detailed evidence to support their intervention. In his concluding remarks, Justice Wyn Williams found that:

> 'The Claimants were detained unlawfully from the time that they were taken into custody until their release. Their rights under Articles 5 and 8 ECHR were infringed in the manner described earlier in this judgment; their rights under Article 3 were not infringed. 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. The cases of the two families involved in this litigation provide good examples of the failure by UKBA to apply important aspects of the policy both when the decisions were taken to detain each family and when decisions were taken to maintain detention after removal directions had been cancelled.'

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.'

This case was highly significant, both in terms of providing redress for the parents and children concerned, and in enabling judicial scrutiny of Home Office practice. Since the case was brought, there have been considerable improvements in the treatment of children and families who may be subject to immigration enforcement action. For example, 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, numerous

[12] *R (on the application of) Reetha Suppiah and others v SSHD and Interveners* [2011] EWHC 2 (Admin)

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steps have been taken by the Home Office to improve their practices in communicating the option of voluntary return to families, as an alternative to taking enforcement action.[13]

At paragraph 111, which is quoted above, Justice Wyn Williams refers to 'the detailed evidence of Mr. Makhlouf' which assisted him in reaching a view regarding the "long lasting harm" which immigration detention can cause to children. This refers to the evidence provided to the court by Pierre Makhlouf, BID's Assistant Director (Legal) as part of Liberty's intervention in the case. This is just one example of how the ability of NGOs to intervene in judicial review cases can be of vital importance in ensuring that the situation of vulnerable clients is properly evidenced. Limiting NGO's ability to intervene in such cases would therefore be highly detrimental.

As well as providing evidence to the court in this case, BID has for a long period campaigned for an end to the immigration detention of children. In May 2010, the coalition Government acknowledged the grave problems which BID and others had been highlighting for a number of years, by committing to ending the immigration detention of children.[14] Before the claimants in the Suppiah case were detained, BID had, for a number of years, been raising our concerns about Home Office decision-making on the detention of families with officials in detailed policy work, in an attempt to change Home Office practices and avoid the need for litigation.

BID's campaigning and litigation work are distinct activities. We gave evidence to the court in the Suppiah case to provide the court with the most comprehensive information we could, so that the claimants would be able to access justice, and the court could properly consider the legality of the Home Office's policies and practices. BID did not become involved in the case simply to seek publicity, and we agree that this would be an improper use of judicial review.

Furthermore, we do not agree with the implication of the wording of the consultation that either our involvement in this litigation or our campaigning work on child detention were somehow objectionable or undesirable activities. In the Suppiah case, in number of areas, the Home Office was able to provide very little information to the court about its own practices, so the information provided by BID and others was critical in enabling both the court and the Government to review the Home Office's actions. The separate processes of litigation and campaigning were vital in bringing about changes to the treatment of children which it is now widely acknowledged were badly needed.

[13] See for example Chapter 45 of the Home Office's *Enforcement Instructions and Guidance* http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/
[14] Cabinet Office (May 2010) *The Coalition: Our Programme for Government*, p21

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SECTION 7. 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. We do not agree that the LAA should have discretion in this matter as outlined in the consultation document.

In a partial concession to the concerns expressed by many respondents to the earlier consultation 'Judicial Review: Proposals for Reform (MoJ, 2012) the government now proposes:

> *"Payment to provider contingent on permission being granted, but with discretion for the LAA to pay providers in certain cases which conclude prior to a permission decision where the provider has been unable to secure a cost order or agreement as part of a settlement" (MoJ, 2013a: 32).*

This proposal seems illogical. The Government has not made a convincing case for making providers work at risk in this manner. The Legal Aid Agency already has the ability not to pay for work where an unmeritorious claim has been made. The approach proposed seems to be aimed at stopping any claimants whose chances of success may be good but not certain.

<u>Cost shifting</u>
This proposal merely shifts costs within the Ministry of Justice, from the courts and Tribunal to the Legal Aid Agency. As ILPA points out:

> "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 than make a well balanced merits assessment at the start that is kept under review at each new stage of the case" (ILPA, 2013:23)[15]

ILPA's view is that merits are best considered at the start of the case as now. We support this position.

[15] Immigration Law Practitioners' Association, (2013), '*Response to the Ministry of Justice consultation: Judicial Review – Proposals for Further Reform*'.

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Work must still be done at risk

The modified proposal still requires legal representatives to work at risk to a degree that is certain to act as a financial disincentive to legal aid providers. Yet the proposal document notes that

> *"The proposed discretion of the LAA to award payment in cases that conclude before a permission decision is made by the court is designed to ensure that legal aid providers do not refuse to take on genuinely meritorious Judicial Review cases more generally, given the risk of non-payment" (MoJ, 2013c:5)* [16]

The Government can't have it all ways. It is still seeking to dissuade legal aid providers from pursuing weak cases by making them work at risk with certain payments at the discretion of the LAA, while simultaneously begging the same providers not to refuse to "take on genuinely meritorious" cases. That is to completely ignore the dire financial situation facing legal aid providers in 2013. Legal aid providers will have to refuse work undertaken at risk, including "genuinely" meritorious cases, precisely because it is work carried out at risk. The government has been reminded of this problem by many learned and experienced contributors to the earlier consultation on Judicial Review reform (2013).

The Ministry of Justice makes the following assumption:

> "Where permission is not sought in the future this is assumed to apply only to weaker applications which probably would not have secured permission had they been pursued" (MoJ, 2013c: 6).

This is a big assumption to make. It is just as likely, indeed more likely, that providers will simply not seek permission for any Judicial Review case because the work must be carried out at risk. The discretion proposed for the LAA offers insufficient protection for providers: a discretionary provision such as this does not remove the element of risk, but merely highlights and diffuses the risk. Under these proposals both weaker and stronger applications for Judicial Review are equally disadvantaged. The government does not seem to grasp this basic equation.

Where payment is discretionary it probably won't be made: evidence from LASPO and Exceptional Funding Scheme

The LASPO Act 2013 provides exceptionally for legal aid to be approved for a case outside the scope of legal aid via the Exceptional Funding Scheme operated by the Legal Aid Agency. The experience of legal practitioners to date, especially in immigration matters, has been entirely negative. The success rate for non-inquest ECF applications to date has been extremely low, applications themselves must be made at risk, and the process is prolonged and complex. Nothing contained in

[16] Ministry of Justice, (2013c), *'Impact Assessment IA No: MoJ 215 Payment to providers to work carried out on an application for Judicial Review'*

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this consultation document offers reassurance that a discretionary funding system operated in relation to Judicial Review work done prior to permission would be any different.
The Public Law Project, in evidence to the Joint Committee on Human Rights enquiry into the implications for access to justice of the Government's proposed legal aid reforms, reported that

> "In total the [Legal Aid Agency] had received 213 applications for non-inquest cases. Of these, 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 [one] immigration case, funding was only granted after a pre-action protocol letter was sent" (PLP, 2013)[18]

Risks and uncertainties identified by MoJ suggest savings may be small or non-existent

A key plank of the Government's proposals is that "limited legal aid resources should be properly targeted…. If the legal aid system is to command public confidence and credibility" (MoJ, 2013: 32). In Impact Assessment MoJ 215 the potential savings to the public purse from this modification are identified as follows:

> *"there will be savings in the range of £1 million - £3 million from no longer paying legal aid providers in cases where permission is not granted" (MoJ, 2013c: 3)*

However the large number of risks and uncertainties identified by the Ministry of Justice in the associated impact assessment documents[19] suggest it is not clear that these revised proposals for [payment for permission work] would ever deliver any meaningful costs savings

Set against what the Ministry of Justice acknowledges may be savings as low as £1 million in relation to fees for pre-permission work, we also note the following in relation to the Legal Aid Agency (LAA):

> *"LAA end-point codes currently create uncertainty as to how many cases will be affected by the proposal" (MoJ, 2013c: 3).*
>
> *"We are unable to establish the exact cost of preparing permission applications" (MoJ, 2013c: 7).*
>
> *"Savings are also subject to the number of cases in which the LAA's discretion to pay the provider (in cases which conclude before permission is considered by the court) is exercised in*

[18] Public Law Project, (26 September 2013), '*Written evidence to the Joint Committee on Human Rights enquiry into the implications for access to justice of the Government's proposed legal aid reforms*'
[19] Ministry of Justice documents IA 210, IA 212 and IA 215. Available at https://consult.justice.gov.uk/digital-communications/judicial-review

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the provider's favour, and in which a provider obtains costs from the opponent" (MoJ, 2013c: 3).

For the Legal Aid Authority "there will be small ongoing costs as a result of having to consider whether to award payment in cases that conclude before a permission decision" (MoJ 2013c: 3) and "costs associated with the internal review process" (MoJ, 2013c:28).

And the risks and uncertainties identified extend to HM Courts & Tribunals Service (HMCTS). One Ministry of Justice Impact Assessment reveals:

"There is also a risk that [HMCTS] volumes could change in the future compared to the 2013/14 data, altering the costs and benefits presented here" (MoJ, 2013d: 36) [20]

There is precedent for this. For example, findings from a review exercise (the Fundamental Review of the First-tier Tribunal (Immigration & Asylum Chamber)) carried out in early 2013 are now having to be re-calculated and revised before publication due to an unforeseen rise in volumes in the FTT IAC since the review was undertaken at the start of 2013. The Ministry of Justice also acknowledges that

"There could be increased costs to HMCTS for example from an increase on oral renewals or rolled up hearings, from increased satellite litigation, or from more litigants in person" (MoJ, 2013c: 9)

The margin of error of the purposes savings achievable via the rebalancing of financial incentives is surely greater than the value of any nominal savings. For very small savings to the legal aid budget (£1-3 million), those reliant on legal aid will suffer while the Defendant in Judicial Review cases continues to face no cost restrictions. Indeed the Law Society Gazette recently reported that in the first six months of 2013 the government had doubled its spending with Treasury Solicitors over the same period in the previous year to £31.8million[21]. The cost of this consultation exercise to the Ministry of Justice, notwithstanding the opportunity cost to those responding to the consultation, likely exceeds the £1-3 million savings headlined for this element of reform.

Examples of cases which would be affected

For the reasons set out above, we believe that the proposed changes to the payment scheme for judicial review cases will reduce access to judicial review for immigration detainees with meritorious cases. BID regularly refers clients to solicitors who are able to commence judicial review proceedings

[20] Ministry of Justice, (2013), '*Impact Assessment Cumulative Legal Aid Reforms*'.
[21] Law Society Gazette, (September 30 2013), 'Government doubles TSoL spending'. Available at http://bit.ly/1hzHnvs .

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to challenge state actions where this is considered necessary. We set out below a number of examples of judicial review cases undertaken on behalf of BID clients. If the proposed reforms go ahead, detainees who have been subject to unlawful action on the part of the Home Office may well, in practice, not be able to access justice.

In addition to the examples below, we are aware of a number of cases where, through judicial review, unaccompanied children have successfully challenged age assessments which deemed them to be adults, and trafficked people have successfully challenged Home Office decisions that they were not victims of trafficking. Without recourse to judicial review, people in such situations can be wrongly detained and removed. Indeed, in 2012, the Refugee Council worked with 24 children who were wrongly detained as adults[22] and The Poppy Project has documented cases where trafficked women have been returned to their countries of origin by the UK authorities and subsequently re-trafficked.[23]

- Unlawful detention claims: family separation

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.[24] The unlawful detention of these mothers had serious consequences for their children's welfare. In the case of 'NXT', one of her children changed foster placements six times during her imprisonment and detention and experienced abuse and neglect. Following these judgments, in November 2011, the UK Border Agency Criminal Casework Directorate published six sets of guidance on the separation of families in the 'Modernised Guidance' section of the UK Border Agency website, which set out detailed procedures to be followed in such cases. It appears very likely that the Home Office decided to publish detailed guidance on this matter at least partly as a result of the 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.

- Judicial reviews to challenge removal from the UK

BID has worked with a number of parents who the Home Office who the Home Office has sought to remove or deport, despite this note being lawful or in their children's best interest. Judicial review is a crucial safeguard against such action, and legal aid funding must be retained for such cases.

[22] Figures from Refugee Council, (2012),,*'Not a minor offence: unaccompanied children locked up as part of the asylum system'*, Available at thttp://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf,
[23] The Poppy Project, (2008), '*Detained: prisoners with no crime - detention of trafficked women in the UK'. Available at http://i2.cmsfiles.com/eaves/2012/04/Detained-c1f762.pdf*
[24] *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)

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Case study

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.

- Judicial reviews challenging maltreatment of detainees

In January 2013 'The Guardian' reported on a case where 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"'* [25]

This woman's treatment was also criticised by the Prison's Inspectorate[26]. Despite having no published policy governing the use of force, and widespread criticism of their practices[27], the Home

[25] The Guardian, Friday 11 January 2013 , 'UK Border Agency rejects calls to stop using force on pregnant detainees: Government document outlines recommendations by prison inspectors as one detainee claims she was 'dragged like a dog''. Available at http://www.theguardian.com/uk/2013/jan/11/uk-border-agency-rejects-force

[26] HM Inspector of Prisons (2012) *Report on an announced inspection of Cedars Pre-Departure Accommodation*

[27] See for example: House of Commons Home Affairs Select Committee (2012) *The work of the UK Border Agency (April–June 2012) Eighth Report of Session 2012–13*

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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. This is just one example of the very many cases in which very serious harm to vulnerable detainees has only been prevented by an application for judicial review.

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?

We oppose any change to the current Protective Costs Regime.

In relation to costs, the Government is suggesting here that where there is an individual or private interest in a case a Protective Costs Order should not be available to the Claimant. But in relation to standing the Government takes the opposite view, arguing that only Claimants with a direct interest in the matter should be considered to have standing. To put it another way, Claimants who fulfil the requirements for standing would not be eligible for a costs order.

The Government is concerned that Protective Costs Orders are increasingly being issued where there are no exceptional circumstances in a case or when the Claimant is bringing a Judicial Review for his or her own benefit. But it appears particularly concerned about cases being taken by persons "who have a private interest in a judicial review claim" (para 162), and seeks to prevent "political and 'campaigning" judicial review claims from benefiting from PCOs.

We note that no evidence is offered by the Government in relation to the scale of the apparent problem, and the impact of any proposed change.

Where there is a wider public interest in a case we believe that a PCO should be available even if there is also an individual of private interest in the case. It is currently open to the court to specify a cap on the financial risk to both Claimant and Defendant, and if individual or private interest is present in addition to wider public interest the level of cap can be set to reflect this. It is also open to the court to examine the level of disclosure of assets.

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Where public interest in a case has been identified it would be contrary to the public interest for the relevant error of law to go unexamined on the basis that a 'political' or 'campaigning' Claimant has been denied costs protection.

Protective Costs Orders should remain available in Judicial Review cases that are brought by campaigning groups where organisations have standing, and where the case is of wider interest. The current PCO regime based on Corner House principles strikes the correct balance of fairness and flexibility.

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?

We do not think the current principles for making a PCO need to be modified. See our answer to Question 26.

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?

The Ministry of Justice impact assessment document IA 210 suggests that

> *"Third parties who may be interested in the issue being considered in the judicial review may seek to voluntarily intervene, by filing evidence or making representations at the judicial review hearing. This has the potential to increase costs for the claimant or the defendant. Third parties may be less inclined to intervene voluntarily if they were more exposed to the costs of their actions" (MoJ, 2013: 5)*[28]

Bail for Immigration Detainees is an experienced third party intervener. In our experience interveners are generally responsible for their own costs, and we have not encountered a situation where a claim for costs by a third party intervener has been made against either party to a case. Third parties are therefore already "exposed to the costs of their actions". If unreasonable

[28] Ministry of Justice, (September 2013b), Impact Assessment Reforms to Judicial Review IA No: MoJ 210. Available at https://consult.justice.gov.uk/digital-communications/judicial-review

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demands are made of interveners by either party, then it should be left open for the court to consider whether or not a costs order is appropriate.

It is considered good practice for third party interveners to seek permission from the court at an early stage in a case, so that the likely cost incurred by their intervention, if they receive permission, can be factored in to the management of a case by the court. It is for the court to weigh up in each case the relative merits of the contribution offered by the third party (or parties), the stage at which they have come forward to seek permission to intervene, the likely additional costs incurred by the Claimant, Defendant and the court as a result, and to grant permission and limit submissions as it sees fit.

Invariably at the outset of an indication by a third party that intends to apply for permission to intervene in a Judicial Review claim, the potential intervener informs both parties of their intention, outlines the nature of their intended contribution, and asks all parties to indicate their position in relation to costs. It is then for the third party to inform the court of their intended application for permission, while copying their application to both parties to the case. This provides ample opportunity for representations to be made by any party in respect of costs.

If a claim is made that the a third party intervener is likely to cause significant additional costs to the claimant or the respondent, there will normally be ample opportunity for any party to the case, including the third party intervener, for negotiation as to the reasons for, and the means by which such costs should be limited.

Where potential third party interveners are considered by the Defendant government department to have nothing to add to a case it is open to the Defendant to oppose the intervention and to the courts to either refuse permission to intervene, or to limit an intervention to being heard on the papers only. This is acknowledged in the consultation document at para 168.

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?

Option 2d in the Impact Assessment document MoJ IA 210[29] considers cost provision in relation to third parties, specifically the option where the court might currently require the unsuccessful party (Claimant or Defendant) to pay the costs of that third party.

This Impact Assessment notes at (2.37) that a benefit of such a change to defendants (public bodies would be that

[29] Ibid.

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> *"Under Option 2d, defendants would gain as they would no longer be exposed to third party costs in cases that defendants lose. In cases in which defendants are successful they may also be able to gain by recovering more costs if the court makes more costs awards against third parties" (MoJ, 2013c: 13).*

This question indicates a fundamental misunderstanding of the role of the third party intervener, which is to assist the court and all parties in a neutral manner, and the early point in any claim for Judicial Review at which cost implications for all parties will be considered.

We repeat our response at Question 31 above, which is based on our extensive experience as third party interveners. Interveners are generally responsible for their own costs, and we have not encountered a situation where a claim for costs by a third party intervener has been made against either party to a case. Third parties are therefore already "exposed to the costs of their actions". If a claim is made that the a third party intervener is likely to cause significant additional costs to the claimant or the respondent, there will normally be ample opportunity for any party to the case, including the third party intervener, for negotiation as to the reasons for, and the means by which such costs should be limited.

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?

We understand that the courts already have the power to award costs against non-parties (third party interveners). There would not seem to be any need for further powers.

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?
No.

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