

Written evidence submitted by the Immigration Law Practitioners Association (ILPA) (JRR 0024)

...it is fundamental to the rule of law that every citizen, perhaps above all the poor, the vulnerable, the disadvantaged, should be able to go to court to vindicate their rights or to defend themselves, whether to challenge excesses of Executive power, to protect private rights, to be compensated for wrongs, to secure family rights, or to defend themselves if prosecuted. Lord Neuberger, President of the Supreme Court¹

... [judicial review] *can be characterised as the rule of law in action*... Ministry of Justice²

SUMMARY

In this response: we consider the evidence that has been provided by the Government. We invite the Committee to ask the Government for such evidence as it holds on the likely effect of the proposals, the data that has been collected from legal aid funding applications, the data on judicial reviews that settle pre and post permission, the outcomes of judicial reviews and the extent to which the Government concedes allegedly unmeritorious cases and in what circumstances.

We set out how the Immigration Bill foregrounds and increases reliance on judicial review and on human rights and the limitations of this approach, taken alone and in conjunction with the cuts to legal aid. Human rights set important limits to the powers of the State, but cannot bear the full weight of the constitutional settlement. We highlight the implications of attacks on judges and lawyers for the rule of law. No Government department gains greater protection from challenge under the proposals to “transform” legal aid than the former UK Border Agency and these proposals would further insulate the former Agency from challenge. We discuss the Bill, ranging more widely than the appeals provisions over other areas where the only challenge will be by judicial review. We draw attention to drafting that could preclude the bringing of human rights appeals out of country and ask the Committee to enquire when the Bill will be amended. We ask the Committee to clarify whether eligibility for legal aid will lapse when a person leaves the UK because they are removed, as proposed in the Bill, before their appeal has finally been determined.

We go on to discuss standing and third party interventions providing examples from the field of immigration including the Joint Committee’s own work on what became the *HSMP Forum* case.

We consider costs of judicial review being “at risk” in cases funded by legal aid and invite the Committee to revisit Lord Justice Jackson’s proposals that qualified one-way costs shifting be introduced in judicial review cases and that non-governmental organisations bringing challenges in the public interest be eligible for qualified one-way costs shifting. We discuss the former UK Border Agency’s conduct as a litigant and how this affects costs. We touch on wasted costs. We address protective costs orders and suggest that the Committee ask for information about the costs incurred by claimants and defendants in Aarhus Convention cases.

We review the question of procedural as opposed to substantive defects in decisions with reference to asylum cases and invite the Committee to ask the Government to explain what is proposed to be included within ‘procedural defects’.

We examine the question of the public sector equality duty.

¹ Judges and Policy: A delicate balance”, speech to the Institute of Government, 18 June 2013, available at www.supremecourt.gov.uk/docs/speech-130618.pdf

² *Transforming Legal Aid*, Ministry of Justice 2013, paragraph 21 of the consultation paper.

Finally we address proposals for leapfrogging, with reference to the Special Immigration Appeals Commission and the Committee's work on it.

INTRODUCTION

1. The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on the Administrative Court and Court of Appeal User Groups, on the Immigration and Asylum Chambers of the Tribunals Presidents' Stakeholder Group, on Ministry of Justice and other consultative groups.
2. ILPA has submitted evidence to the Joint Committee's enquiry into the implications for access to justice of the Government's proposed legal aid changes³ which should be read with this response, especially re the Committee's request for evidence on "the combined effect of these proposals and (1) the Government's proposals to reform legal aid, in particular the proposed introduction of a residence test and (2) the provisions in Part 2 of the Immigration Bill reducing rights of appeal against immigration decisions."
3. ILPA's briefings on the Immigration Bill are all available at <http://www.ilpa.org.uk/pages/immigration-bill-2013.html>

The Evidence Base

4. We invite the Committee to ask the Government for such evidence as it holds on the likely effect of the proposals. The Ministry of Justice consultation paper *Judicial Review: proposals for further reform* (the "2013 consultation") was remarkably thin when it came to evidence.
5. In the 2013 consultation the Government states it does not have comprehensive data on those involved in judicial review proceedings and cannot assess the effects of the proposals on those with particular characteristics.⁴ There is a section on the form submitted with each application for legal aid in judicial review claims that deals with protected characteristics.⁵ **We invite the Committee to ask for the data that has been collected from funding applications.**
6. It was stated in the 2013 Consultation paper that the proposals are part of measures proposed to "prevent abuse of judicial review", that judicial review is "sometimes used as a delaying tactic in cases which have little prospect of success", that delays and costs associated with judicial review hinder actions the executive wish to take and that "weak judicial reviews are being funded, undermining public confidence in the legal aid system"⁶, but no evidence or examples were provided. This despite our having identified in our response to the 2012 consultation *Judicial Review: Proposals for Reform* (the "2012 consultation")⁷ that the statistics provided were incomplete and had the potential to mislead:

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

³ Available at <http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-into-the-implications-for-access-to-jus>

⁴ 2013 Consultation paragraph 207.

⁵ <http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/civapp1-version-15-april-2013.pdf> see page 2.

⁶ 2013 Consultation paper, paragraph 5, 6 and 7(iii) respectively.

⁷ ILPA's 24 January 2013 response is available at www.ilpa.org.uk/data/resources/17007/13.01.24-ILPA-response-to-Ministry-of-Justice-consultation-on-Judicial-Review-proposals-for-reform.pdf

“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.⁸

7. In its response to the 2012 consultation, the Public Law Project requested the data underpinning the Government’s proposals. In May 2013, when *Transforming Legal Aid: delivering a more credible and efficient system*⁹ was released the Public Law Project made a further request for statistics¹⁰ and was informed by the Ministry of Justice that these could not be provided for reasons of cost¹¹. **We invite the Committee to request this data.**
8. The Government acknowledges where claims for judicial review are withdrawn before any decision on permission there is evidence that many cases may be settled on terms favourable to the claimant, as described by Bondy and Sunkin in 2009¹². However the Ministry of Justice consultation paper states that the Government:
...wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that prolonged legal battle can involve.¹³
9. It is normal to consider delay and cost when considering settling a case; that does not mean that the underlying case is weak. The Government has not yet provided any evidence about the extent to which it concedes allegedly unmeritorious cases and in what circumstances. **We urge the Committee to enquire further into this.**
10. In the statistical report the Ministry of Justice released on 25 June 2013, data was provided showing that in cases of civil representation for immigration and nationality, 70% of cases where proceedings were issued had a benefit to the client.¹⁴ This figure includes claims issued in the Court of Appeal and Supreme Court as well as the High Court. The data on judicial review “end points” provided by the Government shows cases recorded as concluding at particular stages of proceedings¹⁵ but does not include any data on outcomes. Legal Aid lawyers have to provide such data when a legal aid certificate is discharged so it is held. **We suggest that the Committee ask for this data.**
11. The Joint Committee recognised the lack of data on the transfer of judicial review cases over to the Tribunal and recommended safeguards be introduced to protect certain cases by keeping them in the High Court:
We are aware that there has still been no systematic review by the Government of the exercise by the Upper Tribunal of its judicial review jurisdiction generally, and there is therefore no evidence before Parliament of how the Upper Tribunal is performing that significant judicial role. We urge the Government to consider amending the Bill to insert additional safeguards ensuring that immigration

⁸ Paragraph 5, ILPA response to 2012 consultation.

⁹ Ministry of Justice, April 2013.

¹⁰ Public Law Project, Data relating to judicial review, 22 May 2013, see (accessed 26 October 2013): www.publiclawproject.org.uk/documents/FOIA_82534_%20legal_aid_consultation_april%202013_judicial_review_permission_IA_and_EIA_30052013.pdf

¹¹ See the 30 May 2013 letter from the Ministry of Justice available at http://www.publiclawproject.org.uk/data/resources/127/FOIA_82534_-legal_aid_consultation_april-2013_judicial_review_permission_IA_and_EIA_30052013.pdf (accessed 26 October 2013).

¹² Bondy, V and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, June 2009.

<http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf>

¹³ 2013 Consultation, paragraph 12.

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

¹⁵ Statistics Release Legal Aid Statistics, 9 September 2013, Table 6: Legal Aid Agency Judicial Review end-point code data, 2011-2012 and 2012-2013 (page 10) available at (accessed 26 October 2013): www.gov.uk/government/uploads/system/uploads/attachment_data/file/238115/legal-aid-statistics-090913.pdf

*and nationality cases in which human rights such as life, liberty or freedom from torture are at stake continue to be decided by high court judges.*¹⁶

12. We are unaware of any review that has taken place since that proposal last year. Judicial reviews within the Tribunal are subject to extensive delays with, in contrast to the Administrative Court, little active management pre-permission. The impact of the transfer of immigration and asylum judicial reviews that took place on 1 November is not yet known and should be obtained before consideration is given to further changes.

HUMAN RIGHTS, LEGAL AID, JUDICIAL REVIEW, THE IMMIGRATION BILL AND THE RULE OF LAW

“The first thing we do, let's kill all the lawyers.” Henry the Sixth, Part II, Act IV, Scene ii

13. In the Immigration Bill alternatives to judicial review (i.e. substantive merits appeals) as the way to challenge decisions of the former UK Border Agency are stripped away, as are alternatives to human rights arguments as the grounds of challenge (e.g. the removal of ‘not otherwise in accordance with law’ as a ground of appeal). The Bill foregrounds and increases reliance on judicial review and on human rights.
14. Judicial review is not an all-purpose substitute for a review of the merits of a decision and moreover in many cases those who aspire to bring such a challenge will not be eligible for legal aid with which to do so, in some cases because of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and in some cases because of the residence test proposed in *Transforming legal aid*, not to mention the funding proposal that applications for judicial review be “at risk” at the outset. It is said in the Appeals Impact Assessment for the Immigration Bill¹⁷ that displacement onto judicial review cannot be quantified and therefore cannot be costed. But the “sensitivity analysis” in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission, which would be an extraordinary increase. In 2011 there were 8,711 immigration and asylum judicial reviews¹⁸ and only 4,630 reached the stage of a decision on permission.

Human rights

15. Human rights set important limits to the powers of the State, but cannot bear the full weight of the constitutional settlement. Not every illegal act, failing to respect the limits parliament has set, breaches a person’s human rights. Human rights do not form a sealed system, carrying within them all that is needed for their vindication, as is made clear in the preamble to the Universal Declaration on Human Rights:
- “...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”*
16. The European Court of Human Rights has referred to “the notion of the rule of law from which the whole Convention draws its inspiration.”¹⁹

¹⁶Joint Committee on Human Rights, Legislative scrutiny: Crime and Courts Bill, 26 November 2012, page 8 www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/67/67.pdf (accessed 27 October 2013).

¹⁷ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249120/appeals_impact_assessment.pdf

¹⁸ See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at <http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf>

¹⁹ *Commission Communication to the Council and Parliament*, 12 March 1998, COM (98).

17. Compliance with the rule of law, including administrative law, rules and practice has a value that overlaps with human rights' compliance but which is also a discrete area of concern.

Independence of the judiciary and of lawyers

The historic justification, and primary duty, of any civilised government is to ensure the defence of the realm from foreign threats and the rule of law at home ...If it cannot provide those timeless and fundamental features, a government is not worthy of the name... Securing the rule of law at home requires, amongst other things: a high quality and independent judiciary; an accessible and effective court system; and an accessible, high quality, independent legal profession.²⁰

18. The independence of the judiciary and lawyers who act without fear or favour are essential elements of the rule of law. We trust that the profession will withstand personalised attacks on judges and lawyers by those in Government but such attacks should always be regarded with concern. Just before the Ministry of Justice consultation was published the Secretary of State for Justice and Lord Chancellor wrote in the Daily Mail:

... [judicial review] is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change. We will protect the parts of judicial review that are essential to justice, but stop the abuse.²¹

19. The Secretary of State for Justice's article casts claimants as 'countless Left-wing campaigners', judicial review as their 'promotional tool', and lawyers as cynical entrepreneurs benefiting financially from this 'lucrative industry'. While the language of the consultation paper is different, the characterisation, unsupported by evidence, is similar. The purported 'abuse' of judicial review is summarised as: "... [t]he Government wants to ensure that judicial review ... cannot be used simply to campaign against, frustrate or delay decisions²² .

Legal aid

20. No Government department gains greater protection from challenge under the proposals to "transform" legal aid than the former UK Border Agency²³. These proposals²⁴ would further insulate it from challenge. It is a reasonable assumption that it will be some time before the Immigration Bill's compatibility with human rights can be tested through judicial review litigation.
21. Under Part 1 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, legal aid remains available for applications and appeals under the Refugee Convention and based on Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the European Convention on Human Rights and related provisions. It is no longer available for other human rights appeals, including appeals on the grounds of a breach of Article 8, the right to respect for private life and family life.
22. ILPA set out in its evidence to the Joint Committee's enquiry on legal aid²⁵ which cases in the immigration and asylum field would be deprived of legal aid to bring a judicial review under the

²⁰ Lord Neuberger, Judges and Policy: A delicate balance", speech to the Institute of Government, 18 June 2013, available at www.supremecourt.gov.uk/docs/speech-130618.pdf

²¹ *The judicial review system is not a promotional tool for countless Left-wing campaigners*, Daily Mail on 5 September 2013: www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html (accessed 26 October 2013).

²² Consultation, paragraph 8.

²³ See the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the proposals set out in *Transforming Legal Aid: next steps for reform* Ministry of Justice, 5 September 2013. For ILPA's 5 September 2013 summary of the proposals, see <http://www.ilpa.org.uk/resource/20909/ilpa-summary-of-the-governments-conclusions-on-the-transforming-legal-aid-consultation-5-september-2>

²⁴ *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.

²⁵ *Op.cit.*

Transforming Legal Aid proposals. There is proposed an exception for persons seeking asylum and limited exceptions for some, but not all, refugees, some but not all trafficked persons and some but not all survivors of domestic violence. The protections for trafficked persons and for survivors of domestic violence do not extend to judicial review²⁶. They are very limited. Legal aid may thus be denied to persons at risk of a breach of Articles 2, 3, 4 and 8 of the Convention, read alone and with Article 13, with the attendant risk of violating positive obligations to trafficked persons as set out in cases such as *Silladin v France* (Application no. 73316/01) and *Rantsev v. Cyprus and Russia*, (Application. no. 25965/04).

23. Challenges to refusals of funding are themselves brought by way of judicial review which would be subject to the residence test. Thus justice would be hermetically sealed against those subject to the test giving rise to a risk of breaches of Article 13 read with the rights in question²⁷.

The Immigration Bill

24. Scenarios in which the only challenge will be by way of judicial review include, but are not limited to, the appeals provisions of Part II and we have ranged a little more widely here.
25. **Clause 2** of the Immigration Bill introduces Schedule 1 which includes the proposal that immigration officers' power to use reasonable force be extended so that it applies in the exercise of all their powers under the immigration acts, present and future.

26. In 2011 the Government opened a new 'Pre-departure Accommodation' facility for families called "Cedars". This is a detention centre and operates under detention powers. Concerns have been raised by the treatment of families at the facility by Her Majesty's Chief Inspectorate of Prisons, including regarding the use of force against pregnant women.²⁸ The 2012 report of the Chief Inspector of Prisons on Cedars found:

HE.18 Substantial force had been used in one case to take a pregnant woman resisting removal to departures. The woman was not moved using approved techniques. She was placed in a wheelchair to assist her to the departures area.

When she resisted, it was tipped-up with staff holding her feet. At one point she slipped down from the chair and the risk of injury to the unborn child was significant. There is no safe way to use force against a pregnant woman, and to initiate it for the purpose of removal is to take an unacceptable risk.

27. The Inspectorate recommended that the Secretary of State did not use force against pregnant women or children save in situations where there is a risk of harm to self or another. The Home Office rejected the recommendation and instead the Agency offered a consultation. It was only in the face of a legal challenge by way of judicial review, *R (on the application of Yiyu Chen and Others) v Secretary of State for the Home Department* (CO/1119/2013), that it backed down. On 12 February 2013 Mr Justice Collins granted an injunction prohibiting the Secretary of State's from using force against the four claimants (a pregnant woman and three children, all at risk of an enforced removal). On 22 February 2013 the Secretary of State reinstated the former policy from Chapter 45 of the Enforcement Instructions and Guidance, which states that the UK Border Agency cannot use force against pregnant women, save to prevent harm.
28. Proceedings in parliament do not appear to have kept pace with these developments. The Government response to the Home Affairs Select Committee Eighth Report of session 2012-2013: The work of the UK Border Agency (April - June 2012) states:
The UK Border Agency would prefer that pregnant women, vulnerable adults and under 18s who form part of family groups in Cedars left the UK voluntarily and compliantly. It would not be practical to consider a blanket ban on the use of physical intervention on pregnant women and under 18s as this

²⁶ Paragraphs 73 and 77 respectively of ILPA's evidence.

²⁷ Paragraph 28 of ILPA's response.

²⁸ (2012) Report on an announced inspection of Cedars Pre-Departure Accommodation.

*might encourage non-compliance and render the Agency unable to maintain effective immigration controls.*²⁹

29. Bhatt Murphy solicitors, who acted for the claimants in *Chen*, wrote to the Home Affairs Select Committee on 28 March 2013, saying:

We are concerned that the policy position set out in that response [the government's response, described above] directly contradicts the assurances which have been given to the Court and the parties in this action, which is now reflected in policy guidance published on the UK Border Agency's website, and upon which the Claimants have been invited by the Home Secretary to withdraw their claim for judicial review.

30. There is a risk of breaches of Articles 2 and 3, alone and read with Article 13. Excessive use of force may give rise to damages claims but even where the person would otherwise be eligible for legal aid, the one year wait that will result from the residence test puts people outside the time limit for bringing claims under the Human Rights Act³⁰ which may have the effect of denying a remedy in violation of Article 13 of the European Convention on Human Rights.
31. The same problem arises, *a fortiori*, where the remedy for the unlawful act of a public authority is judicial review, where the time limit is promptness and in any event within three months of the illegality giving rise to the claim.
32. **Clause 3** of the Bill³¹ requires the Secretary of State to give consent to release on bail at a hearing if removal directions are in force requiring the removal of the person within 14 days of the decision that the person is to be released on bail. What appears to be in contemplation is that an independent tribunal judge of the First-tier Tribunal has determined that a grant of bail would be appropriate. If this is correct, that tribunal judge will no doubt have been made aware by the Secretary of State's representative at the hearing that removal is imminent. Thus it is proposed that where the tribunal judge does not come up with the Secretary of State's desired conclusion, she can say to the tribunal "your decision has no effect". The only challenge will be by way of judicial review of the Secretary of State's refusal to give consent. Nothing on the face of the clause prevents the Secretary of State from making removal directions, cancelling and resetting them so that she retains control over whether the person is released on bail. The Home Office is required to act reasonably but as the clause is written there would be no option to hear a bailing hearing if removal directions had been set and she had not consented, so it would be difficult to ascertain whether she had acted reasonably or not.
33. Many detainees have no lawful residence in the UK. Not all fall within the asylum exception to the proposed legal aid residence test; they may be asking to remain in the UK on the basis of other human rights such as the right to respect for private life and family life.
34. In clause 3 it is also proposed that tribunal procedure rules must make provision for the dismissal without a hearing of bail applications made within 28 days of a previous decision to dismiss a bail application unless the appellant can demonstrate a material change of circumstances. The only way to resolve disputes over whether a change is material will be by way of judicial review. Bail applicants reliant on the Home Office providing an address for release³², but who are forced to wait for 28 days before re-lodging where "material change in circumstances" is disputed, will lose the bail accommodation when it lapses (it is valid for 14 days only) and can expect to wait for weeks or months for a new bail address to be granted before they can apply again for release.

²⁹ See also HL Deb, 10 April 2013, c313W per the Lord Taylor of Holbeach: *The recommendation in the report by HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency.*

³⁰ Human Rights Act 1998, s 7(5): one year less one day from the incident giving rise to the claim.

³¹ All references are to Bill 128 as amended in the Public Bill Committee.

³² Those seeking bail accommodation under section 4 (1)(c) of the Immigration and Asylum Act 1999

35. In some cases the alternative to a bail application hearing is to challenge the lawfulness of detention by an application for judicial review but detainees not eligible for legal aid may have no funds to bring such a judicial review.
36. The UK Border Agency has, not once but four times, been found to have breached Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment, for its treatment of mentally ill persons in detention³³ and other cases have settled or are ongoing. In one of these cases, *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin), the judge speaks of the “callous indifference” to Mr BA’s suffering.
37. In 2012 there were 208 incidents of what statistics call “self-harm” (which includes attempted suicide) requiring medical attention and 1804 detainees formally recognised as being at risk of such harm³⁴. Statistics are not collected on those who in this category who do not require medical attention. This type of case, where detention is immediately injurious to the health, including mental health of the detainee illustrates why it is important to preserve prompt access to the Tribunal. There are risks not only of breaches of Article 5, but also of breaches of Articles 2 and 3, taken alone or with Article 13.
38. **Clauses 4 to 10** of the Bill deal with biometric information and further provision is made in Schedule 8. The Secretary of State has not justified the retention of biometric information beyond the 10 year long stop for which provision is made in the UK Borders Act 2007. Part 4 of Schedule 8 of the Bill (paragraph 7) provides for removal of the provisions of section 143 of the Immigration and Asylum Act 1999 that provide for the destruction of fingerprints of Commonwealth citizens as soon as reasonably practicable and that they shall be retained for no longer than 10 years. Paragraph 10 of Schedule 8 would remove provisions of section 126 of the Nationality, Immigration and Asylum Act 2002 which provides, inter alia, that regulations must make provision for information to be destroyed at the end of 10 years beginning on the day on which it is obtained, thus allowing for data to be retained indefinitely. Challenges to the retention of fingerprints would be by way of judicial review. There is a risk of a breach of Article 8 read alone or with Articles 13 and 14.
39. In **Clause 11** of the Bill a right of appeal is denied on all but human rights or protection grounds. A right of appeal against a range of immigration decisions was created by the Immigration Act 1971, following the recommendations of the *Report of the Committee on Immigration Appeals*³⁵. The Committee recommended that there should be a right of appeal because of the ‘basic principle’ that:
...however well administered the present [immigration] control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man’s whole future should be vested in officers of the executive, from whose findings there is no appeal... The safeguards provided by such a procedure serve not only to check any possible abuse of executive power but also to private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration which are in themselves of great value. We believe that immigrants and their relatives and friends need the same kind of reassurance against their fears of arbitrary action on the part of the Immigration Service.
40. If a mistake has been made on, for example, an application to extend leave as a spouse, the appellant could say “Your decision is not in accordance with the law; you have made a mistake

³³ *R (HA) (Nigeria) v SSHD* [2012] EWHC 979; *R (S) v SSHD* [2011] EWHC 2120 (Admin); *R (D) v SSHD*, [2012] EWHC 2501 (Admin); *R (BA) v SSHD* [2011] EWHC 2748 (Admin).

³⁴ Response to Freedom of Information of information requests, see <http://www.ctbi.org.uk/96>. See also the evidence of the Association of Visitors to Immigration Detainees to the Home Affairs Select Committee for its report on Asylum, Seventh report of session 2012-2013, HC 71, 8 October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VI_RT_HomeAffairs_ASY-73.htm. See also HL Deb, 27 June 2012, c71W.

³⁵ August 1967, Cmnd. 3387.

on my application. You said I had not demonstrated a knowledge of English to the requisite level but I had, you read my certificate wrongly”. Or the appellant could say “You are not allowing me to remain with my husband. Your decision interferes with my private life under Article 8 of the European Convention on Human Rights. For that decision to be lawful you must show that as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. You cannot show that it is necessary or proportionate because under your own immigration rules you got the decision wrong. You read my certificate wrongly. Your rules say I should be allowed to stay. You made a mistake and refused me. The interference with my private life is not in accordance with the law; therefore I should be allowed to stay.”

41. Appeals will be refracted, quite properly but at length, through the prism of human rights. A person who has a wrong decision but who does not have a right of appeal on protection or human rights grounds will have no option other than not to challenge the decision before any independent decision-maker or to bring a judicial review.
42. The Government says that an internal “administrative review” will correct errors. This is a red herring. At the moment, in every case where there is an appeal, the file goes to a Presenting Officer, an official in a different part of the Home Office, at a more senior grade than that of Executive Officer, the current preferred grade for caseworkers, who will conduct the appeal. That official can say to his/her managers “the decision is wrong, we should not be fighting this appeal.” Some cases are conceded. But even with this existing administrative review, according to Table 8 in the Appeals Impact Assessment issued with the Bill³⁶, 49% of “Managed Migration” (work and students) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed³⁷. At any stage before the decision on those appeals the former Agency could have reviewed, or did review, its own decision. The only conclusion to be drawn is that the former Agency continues to stand in need of independent oversight. This will continue to be the case for some considerable time. We recall the Home Secretary’s March 2013 damning (and accurate) verdict on the “closed, secretive and defensive UK Border Agency which, she said:
*...struggles with the volume of its casework, which has led to historical backlogs running into the hundreds of thousands; the number of illegal immigrants removed does not keep up with the number of people who are here illegally...the agency has been a troubled organisation since it was formed in 2008, and its performance is not good enough.
 ...it has conflicting cultures and all too often focuses on the crisis in hand at the expense of other important work; the second is its lack of transparency and accountability; the third is its inadequate IT systems; and the fourth is the policy and legal framework within which it has to operate. ... The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, ...UKBA has been a troubled organisation for so many years. ...it will take many years to clear the backlogs and fix the system ...*³⁸
43. The Joint Committee’s reports, pertaining to immigration, asylum, trafficking, implementation of human rights judgments and legislative scrutiny bear out that analysis. The work of the Joint Committee is particularly in point because of the gravity of matters with which it is concerned.
44. The Secretary of State’s description continues to fit that part of the Home Office dealing with immigration and asylum cases today. We now experience a demoralised management and workforce floundering. Ms Sarah Rapson, interim Director General of UK Visas and

³⁶ Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249120/appeals_impact_assessment.pdf

³⁷ *Tribunal Statistics Quarterly (including Employment Tribunals and EAT): April to June 2013* Ministry of Justice, 12th September 2013, Table 2.5 ‘Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2013/14.

³⁸ Hansard HC Deb 26 Mar 2013 : Column 1500ff.

Immigration, told the Home Affairs Select Committee in June “Is it [the organisation] ever going to be fixed? I think I answered that question from you earlier. I don’t think so.”³⁹

45. The Appeals Impact Assessment itself illustrates our concerns. It says that where a claim is made on the basis of Article 8 “...the refusal of that claim will have (sic.) a right to appeal unless the case in question relates to an overstayer, where there is no right of appeal. This is wrong; an overstayer has a right of appeal on the grounds of Article 8.
46. Appeals on the grounds of race discrimination in breach of the Equality Act 2010 will also disappear and there will be no direct way of challenging discrimination by the former Agency before the Tribunals. To bring such a challenge it would be necessary to start separate proceedings, in the County Court or High Court. There is a potential breach of Articles 13 and 14 of the Convention read with one of the other Articles, often Article 8.
47. Where an appeal on asylum or human rights grounds remains it is proposed that a new matter can only be raised before the Tribunal if the Secretary of State consents to this. The factsheet on appeals published with the Bill⁴⁰ says that this will ensure that these matters are considered by the Secretary of State before they are considered by the Tribunal but the Bill does not impose any obligation on the Secretary of State to consider a matter after having objected to the Tribunal’s dealing with it. It is not fanciful to envisage persons being left in limbo: the Court of Appeal cases of *R (Mirza) v SSHD* [2011] EWCA Civ 159 and *R (Daley-Murdock) v SSHD* [2011] EWCA Civ 161 were challenges to the Secretary of State’s practice of refusing applications but not making a decision to remove against which it would be possible to appeal finally to resolve the matter. This has now been considered further in *Patel et ors, Anwar and Alam v SSHD* [2013] UKSC 72, 20 November 2013.
48. As we read the Bill a drafting error means that as it is currently drafted it will not be possible to bring an appeal against a decision to refuse entry to the UK on human rights. This is because the new section 82 inserted by Clause 11 imports the definition of a human rights claim that is contained in section 113 of the Nationality Immigration and Asylum Act 2002. This reads:

“...human rights claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights.”
49. If that definition is read into new 82(1)(b) the only appeal right on human rights grounds is in-country. The Home Office has confirmed that this is not the intention, but has yet to amend the Bill. **We invite the Committee to ask when the Bill will be amended.**
50. Clause 12 creates a power for the Secretary of State to certify a human rights claim when she considers that it will not breach the UK’s obligations under the Human Rights Act 1998 to remove a person before their appeal has been heard. This extends the provisions of section 54 of the Crime and Courts Act 2013 introduced for national security cases. The Secretary of State will be able to certify a claim *inter alia* (for the definition is not exhaustive) on the grounds that to remove the person before their appeal has been heard will not cause them serious irreversible harm. In the Bill as presented to parliament the Secretary of State could certify claims made by ‘foreign criminals’ as defined, persons who are not British citizens who have been sentenced to at least 12 months in prison or have been convicted of an offence that has caused “serious harm”

³⁹ Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm>

⁴⁰ Factsheet 5, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249102/Factsheet_05_Appeals.pdf

(not defined) or are persistent offenders. This was changed in Committee to cover all those subject to deportation, viz:

- Persons who are not British citizens who are 17 or over, have been convicted of an offence punishable by imprisonment and have been recommended for deportation by a court at the point of sentencing; or
- A person whose deportation the Home Secretary deems conducive to the public good or
- A family member of such a person.

51. Thus a person could have been sentenced to a shorter period than 12 months, or not convicted of any crime at all. A family member could be of impeccable character; their character is irrelevant.

52. As we understand the Memorandum on Human Rights issued with the Bill⁴¹, it is anticipated that the section would not be used for those claiming asylum or that removal would breach Articles 2 (right to life) or 3 (prohibition on torture) of the European Convention on Human Rights, but could be used in Article 8 (family life) cases. However:

- The clause is not so restricted on its face. While human rights standards would restrict it, the risk is that the point at which a person finds out they have not been applied and a person has been returned e.g. in breach of Article 2, comes too late.
- It cannot be assumed that removal of a person from the UK to a destination where they do not face harm will not cause them or someone else serious irreversible harm. Taking them from the UK might have that effect. For example if they are suicidal, or have mental health problems. If a child is involved, including a very small child, can we be confident that the sudden departure of a parent and subsequent separation will not cause serious, irreversible harm, let alone be contrary to the best interests of a child.

53. The clause as drafted would permit a certificate to be issued when an appeal had been lodged, and indeed where the tribunal or a higher court had already started to hear the appeal. This would allow one party to proceedings to pull the plug on those proceedings at any time and is contrary to the interests of justice and undermines the authority of the tribunal or court.

54. A person who fears removal will be entitled to bring a judicial review of the certificate where the question of serious irreversible harm will be litigated. In cases where this is done, would it not be quicker to hear the appeal? In cases where this is not done, if the Home Office gets it wrong, then the person will be returned to face "serious irreversible harm".

55. We recall the words of Lord Justice Sedley in *BA (Nigeria) v SSHD* [2009] EWCA Civ 119 (26 February 2009):

*"The fact is that, especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal."*⁴²

56. And the comments of the Constitutional Affairs Committee in 2005⁴³:

"78. In its Annual Report of 2001/02, the Council on Tribunals stated that the introduction of non-suspensive appeals was "capable of leading to unfairness and injustice". The Council highlighted some of the "considerable practical problems" that may result:

⁴¹ Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf

⁴² See also footnotes omitted but the text can be read at

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21110.htm>

"The requirement to conduct appeals from abroad will make it more difficult for adjudicators to assess the evidence of appellants. It will also make it more difficult for appellants to have face-to-face discussions with their advisers and to present their cases satisfactorily. Costs will inevitably be greater. And there could be serious problems with regard to the status and safety of tribunal users in the countries from which they are appealing."[70]

[...]

79. Mr Justice Richards has also described non-suspensive (out-of-country) appeals as "plainly a very serious disadvantage as compared with an in-country appeal." [71] As many asylum appeals turn on questions of credibility, it is particularly disadvantageous for the applicant to be absent from the oral hearing. ...

Success rate

80. In its memorandum to this inquiry, the DCA stated:

"As of 17 April 2003, provisional IAA figures show that 56 out-of-country appeals had been lodged with the IAA. 42 of those have so far been dismissed and one withdrawn. None has been successful."[73]

81. We recommend that the Government investigate the fairness of the non-suspensive appeal system, given the extremely low success rate of appellants' appeals under that system.

57. Under the proposed residence test, a person outside the UK will not be eligible for legal aid. ILPA raised with the Ministry of Justice the question of persons whose case was ongoing at the time when they left the UK but had no response, leading us to fear that eligibility will lapse when the person leaves the UK. **We ask the Committee to seek clarification of this point.**
58. Take the example of a person who is deported, leaving their partner and small child behind the UK. Serious irreversible harm may be done, for example to the child, by the separation. But suppose it is not. Nonetheless, there is an interference with the family life. Is it proportionate? It is unlikely to be in the best interests of the child. It separates the family. It leaves the partner as sole carer, possibly forced to give up work to care for the child and possibly for that reason dependent upon State support for the first time. It makes it more difficult for the person to succeed in the appeal and the family be reunited. The appellant has no control over the length of the separation which will depend upon how long the appeal takes to be heard and, if the appellant wins, how long it takes to implement the decision. The implementation of allowed appeals is an area that has seen some of the very worst Home Office delay.
59. In the case of a protection appeal or human rights appeal as defined the claim must be brought from within the UK if the person is in the UK when refused unless it is certified:
- under s 94(1) of the Nationality Immigration and Asylum Act 2002 as clearly unfounded
 - under s 94(7) of the Nationality Immigration and Asylum Act 2002 on the basis that the appellant passed through a third country en route to the UK and that third country should properly hear the claim for asylum.
60. Appeal against revocation of protection status must be brought from within the UK if the person is in the UK at the time of the revocation, otherwise from outside the UK. The certificate can be issued before the appeal starts, or while the appeal is in progress. Thus the Secretary of State can pull the rug out from under her opponent. It is objectionable that one party to an appeal can control the proceedings in this manner.
61. Certificates under section 94 carry with them many problems. There is a presumption of certification if the appellant comes from a State that has been designated by the Secretary of State as one in which there is in general no serious risk of persecution. In *R(JB (Jamaica)) v SSHD* [2013] EWCA Civ 666 (12 June 2013) the majority of the Court of Appeal held that the certification of Jamaica was unlawful because of the risk of persecution of gay men there. Lady Justice Black said:

The question is whether the Secretary of State was entitled to conclude that "there is in general [in Jamaica] no serious risk of persecution of persons entitled to reside" there. Bearing in mind the proportion of the population affected, the fact that the entirety of that sector of the populace is at risk, and the failure of the state to offer sufficient protection, even making full allowance for the margin of appreciation to be afforded to the Secretary of State, I do not consider that she was. [...]

62. The Secretary of State is currently appealing the case to the Supreme Court.
63. If a person contends that the Secretary of State has wrongly certified his/her claim the remedy will be by way of judicial review but many persons will fall foul of the residence test.
64. There are also unlawful limitations on judicial review in "safe third country" cases. Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 provides:

"(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—

 - (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,.*
 - (b) from which a person will not be sent to another State in contravention of his Convention rights, and.*
 - (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.*
65. The question is the same in throughout the schedule but relates to removal to different countries in different parts. It is:

...for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—

 - (a) from the United Kingdom, and.*
 - (b) to a State of which he is not a national or citizen.*
66. The Court of Justice of the European Union has criticised deeming a country to be safe in *NS v UK* C-411/10 and C-493/10 holding:
 2. *European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.*

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.
67. Yet the deemed safety provisions of UK law remain on the statute book.
68. Under **Clause 13**, appeals in cases before the Special Immigration Appeals Commission are preserved but expressly limited to judicial review principles. The Explanatory Note makes clear that this is to avoid their being the subject of judicial review: "It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court."
69. We disagree. There are no closed material procedures on judicial review. The starting point has been to keep cases involving national security out of the High Court, where any judicial review would be heard in open court. The way this has been done is by ensuring that the administrative decision can be challenged by way of an appeal, but before the Special Immigration Appeals Commission, where closed material procedures apply.
70. Giving a person a right of appeal rather a challenge by way of judicial review would normally give them a wider challenge. Rather than a procedural remedy, which looks at the way in which a

decision is taken, an appeal on merits of the decision looks at facts and law and at the substantive outcome. By clause 13 that benefit of judicial review is removed, because the appeal before the tribunal is limited to principles that would be applied in judicial review proceedings.

71. The Special Immigration Appeals Commission is empowered to hold closed material procedures on grounds which extend significantly beyond national security interests. Before the Special Immigration Appeals Commission, the adoption of a closed material procedure is required (not allowed, but required) not only “in the interests of national security” but also, “in the interests of the relationship between the United Kingdom and another country.” In addition the Secretary of State can certify that the information on which the decision was based should not be made public because this is “otherwise in the public interest.” These additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents. In the Special Immigration Appeals Commission, the procedure rules (rule 4)¹² include a general duty to ensure “that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. In proceedings before the Special Immigration Appeals Commission is that there is no requirement for the Secretary of State first to consider making a claim for public interest immunity.
72. The Special Immigration Appeals Commission Act 1997 gives power to the Lord Chancellor to make procedure rules for SIAC including rules that may⁴⁴:
- “(a) make provisions enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,*
 - (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,*
 - (c) make provision about the functions in proceedings before the Commission of [a special advocate], and*
 - (d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.”*
73. The procedures adopted under these rules mean that a person before the Special Immigration Appeals Commission may be excluded from written and/or oral evidence which is considered by the Commission and upon which the Commission may rely in making its decision on the appeal or application. A Special Advocate may be appointed “to represent the interests of the appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.”⁴⁵ However, the Special Advocate “...shall not be responsible to the person whose interests he is appointed to represent.”⁴⁶
74. At the time when the Special Advocate may communicate with the individual and/or his or her legal representative, neither the Special Advocate, the individual nor the legal representative have had sight of the undisclosed evidence. Once the Special Advocate is aware of that evidence, there is no opportunity for communication on the undisclosed evidence, no opportunity for wholly confidential communication and in practice often no communication at all between the Special Advocate and the individual and/or his or her legal representative. The court’s ability to do justice is fundamentally impaired by this procedure. The individual is denied knowledge of the case being made against him or her, and denied the opportunity to challenge the evidence on which that case is based. Allegations against him or her contained in that evidence or case are unknown to the individual. Hence, inadequacies in that evidence or case cannot be identified, and evidence that would undermine or answer allegations cannot be put forward.

⁴⁴ Section 5(3), Special Immigration Appeals Commission Act 1997.

⁴⁵ *Ibid.* s 6(1).

⁴⁶ *Ibid.* s 6(4).

75. We recall the comments of the Joint Committee on Human Rights:

*After listening to the evidence of the Special Advocates, we found it hard not to reach for well-worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening...has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.*⁴⁷

76. The Special Advocates⁴⁸ who provided evidence to the Constitutional Affairs Committee in February 2005⁴⁹ indicated that:

"It is one of the Special Advocates' most important functions to ensure that as many as possible of the documents relied upon by the Home Secretary are disclosed to the appellant, whether in whole or in part or in gist form."

77. In other words, the Special Advocate is able to assist the appellant/applicant where the Special Advocate is able to persuade the Commission that the material should not remain secret. For so long as the material remains secret and the proceedings closed, the ability of the Special Advocate to assist the applicant/appellant is severely limited. This the Special Advocates emphasised, stating that:

"We do not consider that the existence of one case in which the detainee's appeal was allowed demonstrates, as a general proposition, that the use of Special Advocates makes it 'possible... to ensure that those detained can achieve justice'. Nor should it be thought that, by continuing in our positions as Special Advocates, we are impliedly warranting the fairness of the SIAC appeal process. We continue to discharge our functions as Special Advocates because we believe that there are occasions on which we can advance the interests of the appellants by doing so. Whether we can 'ensure that those detained achieve justice' is another matter. The contribution which Special Advocates can make is, in our view, limited by a number of factors – some inherent to the role and others features of the current procedural regime."

78. Nicholas Blake QC, giving evidence to the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, described what happens after judgment is given:

*If the special advocate thinks there is an error of law in the closed judgment, he gets permission to say, to pass the message out to the other team to say 'I think that you should be appealing, I can't tell you why'. ... So there is a sort of open appeal. 'We think there is something wrong but we don't know what it is.' And then the court goes into closed session, so it is antithetical to every [institute] of due process and open justice.*⁵⁰

79. The then Lord Chancellor and Secretary of State for Justice claimed that the extension of the closed material procedure constitutes an extension of justice. At the time of the Justice and Security Bill, he said of the measures to extend the use of closed material procedures that "Of course it's less than perfect, but at the moment the alternative is silence."⁵¹ But the use of closed

⁴⁷ Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.

⁴⁸ Nicholas Blake QC (now Sir Nicholas Blake, High Court judge), Andrew Nicol QC (now High Court Judge) Neil Garnham QC, Angus McCullough (now QC), Phillipa Whipple (now QC), Tom de la Mare (now QC), Jeremy Johnson (now QC), Daniel Beard (now QC) and Martin Chamberlain (now QC).

⁴⁹ See submission at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we11.htm>

⁵⁰ Evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

⁵¹ 'Secret justice bill not perfect, says Ken Clarke', The Guardian, 29 May 2012.

material procedures is not an alternative to silence. On the contrary, it is a means for the State to use silence against a party to proceedings, ensuring that that party is denied the opportunity to hear (or see) the allegations against him or her and on the basis of which he or she stands to be condemned by the court. Justice manifestly is not seen to be done, and cannot be said to be done where the allegations against a party cannot be challenged by him or her.

80. A report of an ILPA/Redress seminar in 2006, attended by lawyers with experience of the Special Immigration Appeals Commission and of the Special Advocate Procedure, recorded:

It might have been benign at the outset to use a specially cleared advocate...to be able to have access to closed material – it has been acknowledged by Strasbourg that there are legitimate security concerns. However, what is in place now is not what was envisaged then. At least then, in article 3 [of the European Convention on Human Rights] cases concerning a national security issue against the individual, if argument was about risk on return then that would be able to be played out in open court with an advocate quite properly representing their client. Since then much has changed. The reality now is that the Government's changes are taking the real argument into a closed arena. There is no basis for or justification whatsoever for arguing about risk on return on the basis of diplomatic assurances made in closed session.⁵²

81. **Clause 14** (Article 8 of the ECHR: public interest considerations) inserts a new part 5A *Article 8 of the ECHR: public interest considerations* into the Nationality Immigration and Asylum Act 2002: which sets out matters to which the Courts must have regard in Article 8 cases.
82. Human rights are rights of the individual against the State. The European Convention on Human Rights enjoins upon decision-makers a fact-sensitive analysis of each case. The Convention is a living instrument, constantly developing. If the Secretary of State wishes to take issue with the approach of the courts, it is open to her to do so, by pleading her case before the courts.
83. The language of public interest is found nowhere in Article 8. Parliament can set down what it considers to be in the public interest, although in making reference to this in the course of proceedings under Article 8 it will be necessary for the Home Secretary to identify the particular interest(s), one or more of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others, that she seeks to protect by her action.
84. Parliament should not, we suggest, try to set down its view of what constitutes the scope of the private interest (to family life and private life as per Article 8(1)) in the broad and general terms found in this clause or to structure the way in which the balance between private interest and public interest is struck (see the references to 'little weight' in the clause; that is the job of the judiciary. Human rights judgments require an analysis that looks at the facts of the particular case. The Human Rights Act 1998 assigns that task to the judiciary. That task cannot be carried out in advance of the specific facts of a particular case being known. What will be the effect on this child of the deportation of this parent? Rules applied to people in different circumstances than the mischief aimed at can have disproportionate outcomes, as illustrated by, for example by *R (Quila & Anor) v SSHD* [2011] UKSC ([2010] EWCA Civ 1482), in, the case on raising the age for marriage with a non-EEA national to 21, which was found to be unlawful.
85. Weighing private rights against public interest, that is the job of judges. It is assigned to them by the Human Rights Act 1998. There is a clear and principled division between the legislature, which has decided that Article 8 is directly enforceable in the UK; the Executive, which is required to apply Article 8 when taking decisions; and the judiciary, which is required to interpret the requirements of Article 8 and apply them in the context of individual decisions.

⁵² A report of the seminar can be read at <http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf>.

86. Lord Bingham for the House explained this very carefully in *Huang v SSHD; Kashmiri v SSHD* [2007] UKHL 11; [2007] 2 AC 167:
- 20. In an article 8 case ... the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*
87. In *EB Kosovo* [2008] UKHL 41 Lord Bingham quoted the passage above and then said:
- The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*
88. See also *AA v UK* (App No, 8000/08) 20 September 2011, European Court of Human Rights, Fourth Chamber "...the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case..."
89. There is much to criticise in the Secretary of State's approach, apart from her putting the provisions in statute at all. Is it so obvious that it is always in the economic interests of the UK that a person be financially independent? What of a carer? It is contrary to the former UK Border Agency's obligations under s 55 of the Borders, Citizenship and Immigration Act 2009 and the UN Convention on the Rights of the Child to substitute the tests of whether it would 'not be reasonable' to expect a child to leave the UK or whether the effect of a family member's removal on a child would be 'unduly harsh', for the test of the best interests of that child. It is equally contrary to those obligations to limit the children whose interests are to be taken into consideration to British children and those who have lived in the UK for seven years or more. No provision is made for settled children who have lived in the UK for less than seven years.
90. We do not attempt herein a detailed commentary on the Human Rights Memorandum issued with the Bill. We do give a couple examples of problems. For example the case of *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34. ILPA highlighted in our 2011 response to the consultation on family migration, which preceded the writing of immigration rules addressing Article 8, that the presentation of the case in the consultation was misleading. It is also misleading in the Human Rights Memorandum. It is cited in the context of a discussion on precariousness without explaining that the applicants in da Silva were successful, despite Ms da Silva's having remained unlawfully in the Netherlands and having established her private life and family life when her status was precarious. The Supreme Court describing the case in *ZH (Tanzania)* [2011] UKSC 4 at 20 as:
- ".. a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making".*
91. Just when the definition of Article 8 is to be changed so dramatically by the Immigration Bill, those who will be trying to challenge these definitions will in many cases be unrepresented persons with no entitlement to legal aid.

STANDING AND THIRD PARTY INTERVENTIONS

92. It is proposed to limit the range of persons and groups who are entitled to bring a judicial review and to modify the rules to discourage the involvement of interveners and third parties.
93. Article 34 of the European Convention on Human Rights and section 7(1) of the Human Rights Act 1998 set out a test of being a "victim" of a violation of human rights to bring a human rights

claim. A different test of standing is required in judicial review cases because public law is not only (or even primarily) concerned with the vindication of rights, but about a broader public interest in lawful government and the correction of public wrongs. Sedley J (as he then was) put the point succinctly in *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121:

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

94. Repeated reference is made in the Ministry of Justice Consultation paper to the proper purpose for judicial review being a vital check on the lawful exercise of public power.⁵³ Claimants for judicial review have long been required to have a sufficient interest in the matter⁵⁴ Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644E-G said:

*...it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and to get the unlawful conduct stopped.*⁵⁵

95. There are situations in which no individual is appropriately placed to bring a claim. This may be where it is the cumulative effect of Government action that is the proper subject of challenge or that reveals its illegality and the effect on any one individual will not be sufficient to demonstrate this, or where any one affected party is not prejudiced to the extent that he or she would go to the expense and bother of proceedings. In cases where there are general concerns about a policy or practice, a non-governmental organisation may be better placed to identify and evidence a claim to bring about a better and quicker resolution to the unlawful public action. For example, we frequently see the Home Office settle cases where a complaint is made against a particular practice, but fail to change the practice or the causes of the problem. The changes made to legal aid will mean that many individuals who are directly affected by Government action will be precluded from seeking judicial review. In these circumstances, public interest challenges are likely to be the *only* recourse against unlawful executive action in many cases.
96. One example of judicial review being used in this way was *R(Medical Justice) v SSHD* [2011] EWCA 1710 in which the Court of Appeal upheld the High Court's decision that the Home Office policy of giving little or no notice of removal directions to certain categories of persons was ultra vires because it abrogated the constitutional right of access to justice. Those affected by that judgment include persons who will not qualify for legal aid because of the residence test.
97. In 2004, *R (RLC) v SSHD*⁵⁶ was a challenge to the accelerated asylum procedures at Harmondsworth detention centre. 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 policy setting out the circumstances in which it would be appropriate for the Home Office to take a case out of the fast track or enlarge the time frames. A subsequent challenge to the lawfulness of accelerated procedures is currently underway in *R (Detention Action) v SSHD*⁵⁷. That nearly a decade has elapsed between the two proceedings, despite many

⁵³ See e.g. 2013 Consultation, Foreword; paragraph 1; paragraph 21.

⁵⁴ Senior Courts Act 1981 s 31(3). See the work of the Law Commission that preceded this: *Remedies in Administrative Law* Cmnd. 6407 (49 of 1976), and Law Commission Working Paper no 40 of 1971. See subsequently Law Commission Working Paper no 226 of 1994.

⁵⁵ See also *Ex p Bulger* [2001] EWHC Admin 119 at paragraph 20 and *Walton v The Scottish Ministers* [2012] UKSC 44.

⁵⁶ [2004] EWCA Civ 1296.

⁵⁷ Proceedings commenced in 2013.

changes to accelerated procedures over the years is evidence that such proceedings are not undertaken lightly.

98. In *How Many JRs are too many?*⁵⁸ Bondy and Sunkin exclude environmental challenges (which were not within the scope of the Government consultation) and cases brought by the Equality and Human Rights Commission, which has been given a statutory power to bring proceedings. They found in their database of 502 final hearing decisions in judicial reviews heard in a 20-month period between July 2010 and February 2012, only four cases where it could have been said that the claimant had no apparent direct and tangible interest⁵⁹.
99. That the same organisation that successfully brought judicial review proceedings also lobbies to achieve the same goal politically does not make the unlawful government action any less unlawful. There are examples among the organisations that have, over the years, provided evidence to the Committee. For example the *HSMP Forum* consisted of persons affected by changes to the Highly Skilled Migrant Programme. The changes, implemented without transitional provisions and resulted in persons being prejudiced who had been required to make long-term commitments to the UK as part of their application. Despite the recommendations of the Joint Committee on Human Rights' enquiry⁶⁰ and meetings with the then Minister for Immigration, those affected were only able to obtain a remedy via judicial review⁶¹. When the same individuals were further prejudiced by the Government's decision to change the rules on settlement, HSMP Forum again successfully took proceedings on their behalf.⁶²
100. We consider that any suggestion that non-governmental organisations start proceedings, irrespective and careless of merits, for the purpose of mere publicity is inaccurate. Duties of directors and trustees are as much engaged when committing resources to litigation as for any other purpose.
101. Whilst Article 6 of the European Convention on Human Rights does not apply to determinations of the entry, residence and expulsion of aliens, there is no such restriction on Article 47 of the Charter of Fundamental Rights of the European Union. Where a case falls within the scope of EU law, therefore, the cumulative effects of the lack of legal aid combined with restrictive standing rules may violate the standards of effective judicial protection required by Article 47.

Individual concern

102. The existing rules on standing give the court more than adequate power to prevent abuse of judicial review, whether for campaigning or other purposes. For example, where a claimant is acting out of ill will or improper purpose, granting him or her standing would amount to an abuse of process⁶³. There is a direct link between the importance of the issue and the grant of standing under the current rules⁶⁴.

⁵⁸ V. Bondy and M. Sunkin, 'How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform'' UK Const. L. Blog (26th October 2013) available at <http://ukconstitutionallaw.org> (accessed 27 October 2013).

⁵⁹ *Children's Rights Alliance for England v SSJ* ([2012] EWHC 8 (Admin)), *British Pregnancy Advisory Service v SSH* ([2011] EWHC 235 (Admin)), *Child Poverty Action Group v SSDWP* ([2011] EWHC 2616 (Admin)) which was a challenge to reforms to housing benefit scheme, *Medical Justice v SSHD* ([2010] EWHC 1925 (Admin)).

⁶⁰ *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>

⁶¹ *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC 711 (Admin).

⁶² [2009] EWHC 711 (Admin). See also *R (BAPIO Action Ltd) v SSHD* [2008] UKHL 27.

⁶³ *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546 [2004]

Intervention

103. As we understand paragraph 90 of the Ministry of Justice consultation paper the Government's concern is that were the rules on standing tightened, there would be an increase in applications to intervene. We not consider that there is such a neat correlation. The purpose of an intervention is to assist the court. Interventions are only permitted if they will assist the court⁶⁵. The United Nations High Commissioner for Refugees has intervened in a number of cases before the UK courts. The interventions and the way in which the courts deal with them are often closely studied around the world⁶⁶. Government ministers can and do intervene, see e.g. *R(G) v London Borough of Southwark* [2009] UKHL 26 (*Secretary of State for Children, Schools and Families intervening*), *Birmingham City Council v Ali and others* [2009] UKHL 36 (*Secretary of State for Communities and Local Government intervening*).

104. The rules of the Supreme Court make express reference to "submissions in the public interest"⁶⁷. Lady Hale commented in her speech to the Public Law Project conference on 14 October 2013⁶⁸ "...the invitation is a very open one, but not I think abused." She described the wide range of options open to the courts:

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

105. Lady Hale highlighted that in the case of an intervention by a public body such as the Equality and Human Rights Commission, 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.

COSTS

106. It is proposed that lawyers are only paid by legal aid for work carried out on judicial review cases where permission is granted, or exceptionally in the Legal Aid Agency's discretion; and that restrictions be placed on the availability of Protective Costs Orders which can currently be made by courts to limit the possible costs exposure for a claimant in a case judged by the court to be brought in the public interest.

107. We agree with the President of the Supreme Court, Lord Neuberger that the cause of the delays in the Administrative Court complained of is largely historic, due to the transfer of asylum and immigration cases from the Administrative Court to the Upper Tribunal. He went on to say "The cost-cutting proposals risk deterring a significant number of valid applications, and will save a pathetically small sum⁶⁹."

1 WLR 1761 at [23].

⁶⁴ See, e.g. *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386.

⁶⁵ See *To Assist the Court: Third Party interventions in the UK*, Justice, October 2009.

⁶⁶ See e.g. *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 3, *Al-Sirri v SSHD* [2012] UKSC 54, *HJ (Iran) & HT (Cameroon) v SSHD* [2010] UKSC 31 (07 July 2010). For further examples see http://www.refworld.org/type_AMICUS_UNHCR_GBR...0.html#SRTop21 (accessed 27 October 2013).

⁶⁷ The Supreme Court Rules 2009 (SI 2009/1603) (L. 17)), R 15(1)(a). Cf. Supreme Court Practice Direction 3.

⁶⁸ *Op.cit.*

Costs on permission at risk subject to discretionary awards

108. Costs risk being transferred to Her Majesty's Courts and Tribunals Service by these proposals⁷⁰. Costs may be recoverable from the defendant, even if permission is not granted. A defendant who makes an offer of settlement is not automatically obliged to pay the claimant's costs and the question of costs often comes before the court. Lord Justice Jackson had proposed that one-way costs shifting be introduced in judicial review cases was that where a defendant settled the case after the claim had been issued then, subject to the claimant having complied with the pre-action protocol, the defendant should normally pay the claimant's costs. He also proposed non-governmental organisations bringing challenges in the public interest being eligible for such qualified one-way costs shifting⁷¹. ILPA supported and continues to support both proposals. **We recommend that the Committee ask the Ministry of Justice to look again at these proposals.**
109. We do not consider that the proposal for discretionary awards of costs addresses the principal mischief of the proposals. The proposal addresses the problem of lawyers not being paid at the end of the day. There is already a solution to that problem, which is not to take the case. The mischief that we and others responding to the *Transforming Legal Aid Proposals* urged the Ministry of Justice to address was that, for fear that they will not get paid at the end of the day, the lawyer will not take the case in the first place. It was the effect on clients, rather than the effect on lawyers' that we sought to highlight.
110. At the meeting convened by the Ministry of Justice at the Royal Courts of Justice on 28 October 2013 to discuss these proposals, one legal representative commented that if he took 10 judicial reviews and did not get costs in just one, that could be enough to push his firm from breaking even to making a loss. There is a risk that good lawyers will leave the field.
111. Under the proposals here, providers will have to bear all the costs of a case, including disbursements such as expert and court fees, until a claim for payment is finally determined by the Legal Aid Agency under the discretionary scheme⁷². Immigration practitioners will be disadvantaged by their frequent need to use interpreters when advising clients and taking instructions and that many claims are now within the Tribunal system where they are currently taking far longer to process than cases still within the Administrative court.
112. ILPA's evidence and that of the Public Law Project⁷³ about the Exceptional funding Scheme to the Joint Committee's enquiry into legal aid provide reason to predict a low uptake of 'at risk' work. As the Civil Justice Council has stated:
- "[T]he proposal would deny payment in a case with real merit but that just failed to get permission. ... The proposal carries the danger that it will act as a barrier to access to justice as lawyers and other advice providers will err on the side of caution where the appeal is ambitious but not one with little or no merit – perhaps only bringing cases with a predicted 70/30 or more prospect of success, when the proposal intends to remove funding only where the case fails at 51/49 or less."*⁷⁴

⁶⁹ Justice – Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity Lord Neuberger, President of The Supreme Court Tuesday 15 October 2013, available at www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf (accessed 27 October 2013).

⁷⁰ See *Transforming Legal Aid* paragraphs 3.75 and 3.76.

⁷¹ *Review of Civil Litigation Costs, final report*, Lord Justice Jackson, December 2009, Chapter 30, paragraph 5.1.

⁷² At present a claim can be submitted for a payment on account after three months from a certificate's date of issue, and up to two interim payments on account may be requested in a 12 month period Legal Aid Agency, 2013 Standard Civil Contract Specification, paragraph 6.22 www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf

⁷³ Written Evidence to the Joint Committee on Human Rights in response to enquiry into the implications for access to justice of the Government's proposed legal aid reforms, Public Law Project, 26 September 2013

113. Those who have no option but to give up their challenge or to represent themselves will be placed in an unequal position against the State, which will continue to be legally represented. As such the proposal is contrary to Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.
114. In cases against the Home Office it is very often the case that no reply at all is received to a pre-action protocol letter until proceedings are issued. See the Home Office witness statements in *Jasbir Singh v SSHD* [2013] EWHC 2873 (Admin) (appended hereto).
115. These problems overlies longer standing problems at the initial decision-making stage and with the Home Office's conduct as a litigant before the tribunal, including the "closed, secretive and defensive" culture described by the Home Secretary⁷⁵ and evidenced by, for example, lack of disclosure⁷⁶. Very often it is only at the judicial review stage, when Treasury Solicitors and counsel are instructed, that full disclosure is given and the Secretary of State's case made clear. Addressing these matters would reduce the amount of new material appearing for the first time at the permission stage and increase the likelihood of matters being clear-cut at that stage.
116. The claimants' lawyers have a duty to recover costs from a defendant in a case that is successful and so reimburse the legal aid fund (or not make a claim on it).⁷⁷ In our experience, Government departments continue to resist agreeing costs orders in cases where the claimant has achieved all or most of what they sought in a settlement. The Home Office has recently been criticised for this by the Court of Appeal Civil Division (Lord Justice Jackson and Lady Justice Black) in *R(HE) v SSHD* (unreported) of 20 November 2013. The Court of Appeal was at pains to emphasise that this attitude causes the court and the claimant expense.
117. To avoid the uncertainty of costs not being paid on settlement, claimant lawyers may decide to push for a determination on permission in every hearing to have a more straightforward claim to the Legal Aid Agency. This again increase court costs and time all round.
118. The Government states that the permission test should be used as the threshold for legal aid as the provider is well placed to assess the strength of their client's case and the likelihood of permission being granted.⁷⁸ This does not reflect the reality of judicial review work, for example the duty of candour allowing the claimant access to documents the defendant has in their possession that are not disclosed pre-issue. Treasury Counsel told the Attorney General in their letter of 4 June 2013:
- ...especially in the early stages, the defendant is likely to have more information to enable it to assess the merits of a claim. Indeed, most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%. Sometimes we will have been proven wrong. No one has ever suggested that, in such cases, government bodies should be barred from defending a claim for judicial review. To take such an approach would quickly make the work of government impossible. Government lawyers do not undertake their work on the basis that they will only be paid if they have accurately predicted the outcome of the litigation. To require this of those acting on legal aid is, in effect, to severely cut their rates.*

⁷⁴ Civil Justice Council response to Ministry of Justice consultation paper: *Transforming Legal Aid*, June 2013, page, available at (accessed 26 October 2013): www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2Fconsultation+responses%2FCJC+response+to+MOJ+consultation+paper+Transforming+Legal+Aid.pdf

⁷⁵ HC Report 26 March 2013, col 1500ff.

⁷⁶ *R(Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin) (19 December 2008), subsequently *Walumba Lumba (Congo) v SSHD*; *Kadian Mighty (Jamaica) v SSHD* [2011] UKSC 12.

⁷⁷ Legal Aid Agency, 2013 Standard Civil Contract Specification, paragraph 6.58, available at: www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf

⁷⁸ 2013 Consultation, paragraph 123.

*Since the majority of successful claims are conceded pre-permission, to use permission as the test for whether payment is made may well reduce real rates even further. We are also concerned that the proposal will be counter-productive; there will be many more disputes about pre-permission costs, which will require substantial public money to resolve.*⁷⁹

119. Sir Stephen Sedley has echoed these concerns:

*The superficially attractive reason is that it will inhibit the making of long-shot or speculative claims at public expense, but it is supported by no evidence, and the argument advanced in support of it – that the claimant's lawyer 'is in the best position to know the strength of their client's case' – displays a depressing degree of ignorance about how judicial review works. More often than not, it is the defendant authority which holds most of the relevant cards, and in many cases it holds on to them for longer than it is supposed to, either because there is too little time for proper disclosure of documents or because sitting tight affords the best hope that the claim will go away. The departmental calculation is that indigent claimants' lawyers will be deterred from taking on all but sure-fire claims. In proposing that other claimants can be left to their own devices without injustice, the paper makes no attempt to confront the consequences: a plethora of claims made by litigants in person, clogging up the courts as judges try to discern arguable points in the chaos of paper, and costing public authorities large sums in irrecoverable costs as they attempt to respond to such claims.*⁸⁰

120. As Lord Neuberger has said:

*[I]t is vital for the Ministry to appreciate that any changes which are made to reduce legal aid and cut the cost of litigation are likely to have a knock-on effect on the cost of the courts. Less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge-time.*⁸¹

121. The Government states that legal aid would continue to be paid as now for the earlier stages of a case, to investigate the prospects and strength of a claim, including advice from counsel on the merits, and to engage in pre action correspondence⁸². We do not view this statement as reassuring. Investigative help is only granted where substantial investigative work is required to determine the prospects of a case, and this is deemed to be at least six hours of the solicitor's time or where disbursements (together with counsel's fees) are over £400.⁸³

122. The current arrangements for assessing the merits of a case to issue proceedings are robust. The Legal Aid Agency has greater scrutiny than ever before of applications for public funding in judicial review claims. The application process for legal aid itself demands that claimants pass a rigorous merits test⁸⁴. Devolved powers (now delegated functions) enabling the grant of an emergency legal aid certificate by providers were removed on 1 April 2013 in the majority of civil legal aid cases and for all immigration judicial review claims.⁸⁵ There is scrutiny over the initial grant of funding and requests for further funding. Lawyers are subject to audit at any time.

⁷⁹ Treasury Counsel to the Rt Hon Dominic Grieve QC MP, 4 June 2013, available at <http://legalaidchanges.wordpress.com/2013/06/06/46/> (accessed 27 October 2013).

⁸⁰ *Beware Kite-Flyers*, Stephen Sedley, London Review of Books, Vol. 35 No. 17, 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers (accessed 27 October 2013).

⁸¹ Lord Neuberger, *Judges and Policy: A delicate balance*, speech to the Institute of Government, 18 June 2013, available at www.supremecourt.gov.uk/docs/speech-130618.pdf (accessed 27 October 2013). See also *Response of the Judicial Executive Board to the Government's Consultation Paper CP14/2013, Transforming Legal Aid: Delivering a more credible and efficient system*, 4 June 2013 available at (accessed 26 October 2013): www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jeb-response-reform-legal-aid-june-2013.pdf

⁸² Consultation, paragraph 119.

⁸³ Legal Aid Agency, Lord Chancellor's Guidance under section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraph 6.11, available at www.justice.gov.uk/downloads/legal-aid/funding-code/lord-chancellors-guidance.pdf (accessed 26 October 2013).

⁸⁴ ILPA response to 2012 consultation, paragraphs 10-11.

⁸⁵ JR proceedings funding change, Ministry of Justice, 27 February 2013, available at www.justice.gov.uk/legal-aid/newslatest-updates/civil-news/jr-proceedings-funding-change (accessed 26 October 2013).

123. The Government has acknowledged that merits criteria are already in place to weed out weak cases. However, it states these measures are not sufficient, as the Legal Aid Agency is guided by the practitioner's assessment of the prospects of success.⁸⁶ We disagree. In the vast majority of cases, legal aid for judicial review is granted only where the prospects of success are at least 50%. We have to justify applications for funding with extensive submissions and supporting documents to secure a grant. It is perfectly possible for the Agency to trace any allegedly false certifications to outcomes as that data must also be recorded. Treasury Counsel agree that the existing merits test is sufficient, and is far more rigorous a discipline than that in place for decision makers:

*The requirement that a claim can only be funded where it meets a merits test already imposes a significant discipline on claimant lawyers which is not, at least in any formal sense, imposed on defendants to judicial review. The figures quoted at paragraphs 3.65-8 of the Consultation Paper do not suggest that legal aid is being granted in significant numbers of unmeritorious cases, and that is not our experience as Treasury Counsel defending such claims.*⁸⁷

124. In our response to the 2012 consultation we asked for the consideration of judicial review in immigration cases to be put in context of the UK Border Agency's conduct as a litigant. We highlighted *inter alia* as examples of the consistently poor management, service delivery and decision-making of the UK Border Agency⁸⁸:

- The practice of serving immigration decisions at the same time as or after detention and service of removal directions, leading to urgent applications for judicial review with little or no time for compliance with pre-action protocol procedures (see the evidence cited by Silber J in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin) at paragraphs 50-54);
- The consistent failure of the Agency to abide by court decisions, for example the refusal of the UK Border Agency to grant permission to work to asylum seekers with outstanding 'fresh claims' in line with the Court of Appeal's decision in *R (ZO (Somalia)) v SSHD* [2010] UKSC 36, despite the fact that there was no stay of the Court of Appeal's order);
- The delay in amending rules and/or guidance to caseworkers to implement such decisions, for example such as occurred following the decision of the Court of Justice of the European Union in *Ruiz Zambrano* (Case C-34/09).

125. We highlighted the complexity of immigration law and the frequency of change, that there had been six Acts of Parliament in this field since 2002; in 2012 there were nine statements of changes in the Immigration Rules (there have been 10 so far in 2013) and ten judgments were handed down by the Supreme Court in immigration-related cases. Lord Taylor of Holbeach, in the debate on the current Crime and Courts Bill 2012, observed:

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

126. In immigration cases, a common ground for challenge by way of judicial review is the extensive delay in decision-making by the Secretary of State for the Home Department. A report by the Independent Chief Inspector of Borders and Immigration this year found the same issues of lengthy delay in family migration cases:

*Once again, I was concerned to find that the Agency had a backlog of cases amounting to 14,000 requests from applicants to re-consider decisions to refuse them further leave to remain. This had been growing by approximately 700 cases a month. In addition, there were a further 2,100 cases where people were awaiting an initial decision on their application for further leave to remain. Some dated back nearly a decade. This is completely unacceptable...*⁸⁹

⁸⁶ Consultation, paragraph 122.

⁸⁷ Treasury Counsel to the Rt Hon Dominic Grieve QC MP, 4 June 2013, *op. cit.*

⁸⁸ ILPA response to 2012 consultation, paragraph 8.

⁸⁹ *The Independent Chief Inspector's Report on an inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnerships*, published 24 January 2013, available at (accessed 27 October 2013): <http://icinspector.independent.gov.uk/wp-content/uploads/2013/01/marriage-and-civil-partnerships-FINAL-PDF.pdf>

127. The Chief Inspector criticised fundamental errors in decision making, for example on Art 8:
*5.50 ... the Agency had, as part of its reasoning, stated that the applicant could return to their country and apply for entry clearance and therefore any interference would be proportionate. ... Given the House of Lords' judgment, which envisaged that it would be relatively rare for such a requirement to be proportionate, we were concerned to find that the Agency had felt it appropriate to adopt this approach in 20% of the relevant cases in our sample, particularly as two of these cases involved a child.*⁹⁰
128. For cases attracting a right of appeal, the poverty of decision-making was clearly shown in the ratio of successful appeals in the Tribunal:
8.12 Data provided by the Agency showed that between April 2011 and March 2012, the majority of people whose application had been refused appealed against this decision. According to data from Her Majesty's Courts and Tribunals Service, over 50% of applicants who appealed against the refusal of their application were successful...
*8.13. ... The Agency needs to improve the quality of its initial decision-making, to avoid the cost of unnecessary legal challenges and to reduce the proportion of allowed appeals where its refusal decisions are challenged. Better initial decisions would also remove the uncertainty and associated stress placed on applicants and their families while an ultimately successful legal challenge is on-going.*⁹¹
129. The Chief Inspector's report mentioned above did not consider decision making in relation to Article 8 of the European Convention on Human Rights after the changes introduced by the Immigration Rules in 2012⁹². However, in the sample of in-country applications considered for pre-rule change cases, there was no evidence that Article 8 had been considered *at all* in 15% of the sample, which of itself does not inspire confidence.⁹³
130. ILPA has given evidence to the Joint Committee on the Secretary of State's failures to comply adequately with court decisions on Article 8 of the European Convention on Human Rights in the drafting of the Immigration Rules when they were changed in 2012⁹⁴. Members have experience of errors in decisions made by caseworkers on Article 8 to this day, despite the decisions of the Upper Tribunal about the approach they should be taking. The only remedy against such poor decision making if no right of appeal is granted is judicial review.
131. Sir Stephen Sedley has argued that money could be saved from a more robust "polluter pays" approach with the Defendant, and by charging for use of courts in major litigation:
*...the consultation paper has nothing to say about public authorities which play the judicial review system at public expense. Most defendant authorities whose lawyers tell them they are in trouble will settle a claim; but others, given the same advice, will take a chance on opposing the grant of permission to proceed, in the hope that a judge will take their side. It would be straightforward to propose that a public body which unjustifiably resists the grant of permission in a viable case should pay the costs of doing so; but the consultation paper has nothing to say about this, or about penalising late disclosure, or about other ways of saving public funds.*⁹⁵
132. The Government acknowledges that costs decisions must be made on "particular facts"⁹⁶. It is hard to see how this can be done without the case file. If staff at the Legal Aid Agency are to take

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Statement of Changes in Immigration Rules HC 194, inserting new Appendix FM into HC 395.

⁹³ The Independent Chief Inspector's report on an inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnership, *op.cit.*, paragraph 5.42.

⁹⁴ ILPA to the Joint Committee on Human Rights re implementation of Human Rights Judgments, 6 October 2013 paragraphs 64-80 www.ilpa.org.uk/data/resources/21075/13.10.07-ILPA-to-JCHR-re-implementation-of-human-rights-judgments.pdf

⁹⁵ Beware Kite-Flyers, Stephen Sedley, London Review of Books, [Vol. 35 No. 17 · 12 September 2013](http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers) pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers

on exhaustive analyses of case files to determine whether discretionary payments can be made, delays, already problematic, are likely to increase.

Wasted costs

133. Wasted costs orders are held to be appropriate where a lawyer “lends his assistance to proceedings which are an abuse of the process of the court” and is guilty of improper, negligent or unreasonable conduct. As set out in the consultation paper, such orders are made⁹⁷.
134. There are challenges for the current wasted costs regime, but the proposals would do nothing to address them. In contrast to concerns that lawyers are penalised for the failings of clients is concern that clients may be penalised for the failings of lawyers. There is concern at the prospect that the sorts of representatives against whom such orders would be made would pass costs onto claimants, who are already struggling to pay. It would be too simplistic for the Ministry of Justice to regard this simply as a matter for the regulators of the representatives to police. The Ministry of Justice in setting the rules, and the courts in applying them, must take account of how they will operate in practice, whom they affect and who is put at risk.
135. Awards of costs against a claimant’s representatives can result in unscrupulous representatives assisting a person to prepare an application (and charging for this) but not signing their name to anything and hiding behind the unrepresented claimant.
136. The proposals militate against streamlining the wasted costs order process because they appear to envisage widening the grounds on which the order could be made and to encompass the question of assessment of the merits of the case. This raises the prospects of the case being litigated again at the costs stage.

Protective costs orders

137. The proposals in the 2013 consultation paper do not appear to have been considered in the round. Those who fulfil the proposed requirements for standing would not be eligible for a protective costs order and vice versa.
138. The consultation paper does not attempt to quantify how many protective costs orders would not be awarded if the requirement were to have no private interest whatsoever and thus the scale and impact of the proposed change. Research by the Public Law Project and University of Essex, found that between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a protective costs order had been granted. Only three were not environmental cases. The organisations concerned were Child Poverty Action Group, Medical Justice (the case on notice of removal discussed above) and Children’s Right Alliance, all respected organisations and all working with individuals ill-placed to bring a challenge themselves. This does not suggest that there is any widespread problem or indeed that there is a problem at all.
139. To the extent that the proposal is intended to address the perceived (but not evidenced) mischief of judicial reviews being brought ‘by groups who seek nothing more than cheap headlines’ (foreword to the 2013 Consultation paper), adequate and proportionate protection is already provided to public authorities and public resources by the requirement to obtain permission. It is in the public interest that where the court, at whoever’s behest, has identified an arguable error of law the claim should be fully considered by the court.

⁹⁶ Consultation paragraph 126.

⁹⁷ Consultation paper paragraph 147.

140. A body of case law has developed about protective costs orders. A private interest is a relevant factor when deciding whether or not to grant such an order, but is not decisive⁹⁸. If however there is no public interest in the case being brought, then a protective costs order will not be granted. The relative strengths of the public and private interest may be relevant in the weighing up of whether to grant a protective costs order. There may also be cases where a protective costs order is necessary for a State to give effect to its positive obligations under, for example, Arts 2, 3, 4 and 13 of the European Convention on Human Rights.
141. Service providers in particular will often have a private interest in matters to do with particular services but may for that very reason be best placed to address the question of public wrong. In her speech to the Public Law Project conference, Lady Hale gave the example of *Age UK in R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC and another intervening)* [2009] EWHC 2336 (Admin) [2010] ICR 260.
142. A protective costs order is just that. It is set at a level that an organisation can pay and if it loses the organisation will be liable to pay the other sides costs up to the sum of the order. A wide range of orders can be given: there may be costs protection but permission to recover costs from the other party in the event of losing, or the order may be that there be no order as to costs. Or the costs a party is required to pay if it loses may be capped. In *Compton* [2009] 1 WLR 1436, a hospital closure case, the protective costs order required the claimant to seek pledges from the local community. Protective costs orders are already a flexible tool.
143. As we understand it, it is necessary to disclose who is funding the litigation when applying for a protective costs order. A witness statement indicates that, for example, lawyers are acting pro bono or that a charitable funder has agreed to cover disbursements. If a funder is offering to indemnify the claimant against the other side's costs if the claimant loses, this would have to be disclosed. The court may consider that the proposed claimant and/or any funder could offer more and press them on this.
144. We are aware that there is a cross cap in Aarhus Convention claims, where the defendant's liability is capped at £35,000⁹⁹ and the claimant's at £5,000¹⁰⁰. We consider that there are circumstances where it is not appropriate to cap the defendant's costs liability. The imbalance of power and resources between the parties when one is a Government department and the other has been able to satisfy the court that it is sufficiently at risk for a protective costs order to be justified, is very great. The claimant is limited by what they can afford and the protection they can secure. A defendant Government department is in a position to incur costs that it cannot recover. Further protection against paying the other side's costs increases this imbalance. **It would be helpful for the Committee to ask for information about the costs incurred by claimants and defendants in Aarhus Convention cases, to understand how the caps have influenced their behaviour.**
145. The Supreme Court Practice Directions provide at paragraph 6.9.6 "Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal" and in our experience other courts tend to follow this approach. There are reasons for not turning this into a rigid rule. An intervener intervenes to assist the court. The intervention may save time and money, in the instant case but also in cases that will come after which will benefit from the clearest and most informed judgment in the lead case¹⁰¹. An intervener may save the parties money, having to hand evidence or legal argument that they would have needed to marshal. In cases where one of the parties is unrepresented, an intervention may make it unnecessary for the Attorney General to appoint an

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

⁹⁹ Civil Procedure Rules Rule 45.43.

¹⁰⁰ *Ibid.*

¹⁰¹ See e.g. *Lassal* C-162/09.

‘advocate to the court’ at the behest of the court to assist the court¹⁰². An intervener that will struggle to bear its own costs may for that reason be reluctant to intervene if it has no prospect of recovering them and this may lead to the most useful and desirable intervener being reluctant to participate. The courts should retain powers to allow interveners to claim their costs. We concur with the analysis given by Lady Hale in her speech to the Public Law Project Conference on 14 October 2013:

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

146. It may be difficult to disentangle in a particular case whether costs would have been incurred in any event. If the intervener had said less, might the claimant or defendant have needed to say more, or put in more evidence, etc? We do not consider that the question of “additional” costs is straightforward and the time that could be spent trying to sort it out to give rise to costs comparable to, or in excess of, those that are the subject of dispute. The current approach is pragmatic and efficient.
147. The court has powers to limit the amount of evidence the intervener is allowed to adduce and can confine an intervener to written argument, keeping additional costs under control. Rule 6.9 of the Rules of the Supreme Court limits interveners’ written submissions to 20 pages. A situation in which only the wealthy and those such as Government departments able to commit significant funds to the intervention, would be able to intervene is undesirable.
148. There is a substantial body of case law to address the question of funders. It is not straightforward for a funder to reconcile respect for its charitable purposes and proper use of its funds, with the ‘hands off’ approach required of a pure funder. A commercial funder will be expected to meet adverse costs, see e.g. *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055. But the situation is different where a “pure funder”, assisting for compassionate or charitable reasons, is concerned. The court retains a power to order a contribution but this will be rare¹⁰³.
149. Not only do the courts have powers to depart from the usual “no order as to costs” when permitting an intervention¹⁰⁴, they also have power to make provision for liberty to apply if a party becomes concerned by the order as to costs in the course of the litigation. They also have all their wasted costs powers against interveners.
150. We have experience of deliberating whether or not to bring or to intervene in cases and also of discussing with other organisations whether they should bring or intervene in cases. Costs are not the first consideration; the first consideration is the merits. Why does the case need to be brought? Is there an individual or another organisation better placed to bring the case? What are the risks of litigating the point at all? In the case of an intervention, have we anything to bring to the proceedings that cannot be contributed by a party? We are mindful of it being open to the parties to use our evidence or to ask us for witness statements, so we are looking for something over and above this. Is another organisation better placed to intervene?
151. Only if we have satisfied ourselves that this would be an appropriate case for an intervention by us, do we consider costs. This consideration does not start with the question of protective costs orders but with whether there are barristers and solicitors who might be willing to act for us *pro bono* or on terms that we can afford. We then consider the question of costs protection. We

¹⁰² See e.g. Rules of the Supreme Court, rule 35.1.

¹⁰³ See *Hamilton v Al Fayed* (No. 2) [2003]QB 1175.

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

would always seek costs protection when looking to bring a case. This is a question of what we can afford and also, as a not for profit organisation, of using our funds in accordance with our objects and purposes and in a prudent manner. If we did not get costs protection it is unlikely that we would proceed. In the case of an intervention we would seek agreement from the other parties not to seek their costs or, failing this, confirmation from the court that there will be “no order as to costs”. Without costs protection it is unlikely that we should proceed to intervene.

152. We are not alone and we have seen a number of organisations decline to proceed with a case, to intervene or to proceed with an intervention because of concerns about costs even where they thought that the case was very strong. The risks of losing appeared small, but the enormity of loss in the case of a risk meant that that risk could not be taken.
153. From the cases we see it now appears more frequent, if not routine, that Treasury solicitors do not consent to “no order as to costs” in cases involving interventions.

PROCEDURAL AS OPPOSED TO SUBSTANTIVE DEFECTS IN DECISIONS

154. The proposal is to reduce the potential for delay by strengthening the courts’ powers in cases where a procedural defect has been established which would have made no difference to the outcome had the correct procedure been followed. The Government is considering lowering the threshold to include cases where it is not necessarily certain that the defect would have made no difference, and/or by bringing forward the point at which the “no difference” question is considered, so that applications for judicial review can be rejected on this basis at the permission stage.
155. Rights to procedural protection are not to be lightly denied. The propriety of lowering the threshold from inevitability to probability has not been tested against the requirements of Article 6 of the European Convention on Human Rights and, for matters within the scope of EU law, Article 47 of the Charter of Fundamental Rights of the European Union. Although Article 6 does not apply to decisions on the entry, residence and expulsion of migrants,¹⁰⁵ there is no such restriction on Article 47 of the EU Charter. Moreover Article 5(4) of the European Convention on Human Rights provides protection to persons in immigration detention and there are implied procedural rights in Articles 3 and 8 of the Convention. The changes to the ‘no difference’ principle proposed in the Ministry of Justice consultation are unlikely to be immune from challenge on EU and/or Strasbourg human rights grounds. Changes would likely add momentum to the arguments for the extension of the protection of Article 6 to cases involving entry, residence and expulsion, arguments canvassed in the dissenting opinions in *Maaouia v France*¹⁰⁶
156. Paragraph 99 of the 2013 Consultation appears to criticise the use of judicial review to challenge ‘a procedural defect rather than a substantive illegality’. But judicial review is a procedural remedy. Substantive merits may be examined only insofar as a decision is irrational or a violation of human rights. The Administrative Court hearing a judicial review is not exercising an appellate jurisdiction but looking at the lawfulness, including the procedural propriety and fairness, of the decision-making. Arguably the discussion of the no difference principle in the consultation paper envisages judges turning their attention from the procedural to the substantive, but this would appear to run counter to repeated expressions of concern from the Executive that judges trespass on the roles of legislature and Executive. The point is made by Lord Bingham in *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344 thus:
- [i]n considering whether the complainant’s representatives would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the*

¹⁰⁵ See *Maaouia v France* (2001) EHRR 42.

¹⁰⁶ *Ibid.*

*substantial merits of a decision.*¹⁰⁷

157. There is also a practical problem. For a judge to undertake a full assessment at the permission stage, in particular one that respects the requirements of anxious scrutiny¹⁰⁸ necessary in the immigration and asylum field, full disclosure and evidential preparation would be necessary. Effectively, this would amount to a mini-hearing, which would add to cost and delay of procedural challenges rather than mitigate the problems identified in the Consultation.
158. As set out in the Consultation paper at paragraph 97, it is possible to argue “no difference” as early as in the Acknowledgment of Service letter. We have seen permission refused on the basis of “no difference” where it is clear that a procedural flaw has had no impact on outcome and there is no other reason, i.e. no general point of principle, to hear the claim.
159. We recall the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402:
*As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*¹⁰⁹
160. Appearances matter in judicial review. The words of Lord Widgery in *R v Thames Magistrates’ Court, ex p Polemis* [1974] 1 WLR 1371 are instructive:
It is...absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly no seen to be done, as on the afternoon in question here, it seems to me to be no answer to the applicant to say: ‘Well, even if the case had been properly conducted, the result would have been the same.’ This is mixing up the doing of justice with seeing that justice is done.
161. The “no difference” principle has been expressly disapproved in certain areas, the scope of which are unresolved – see *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269. In *AF (No 3)*, following the judgment of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625, the House of Lords confirmed that the ‘no difference’ principle does not apply to the non-disclosure of security-sensitive material containing the case against an individual at least in the context of control orders.
162. The concerns about impact expressed in the consultation paper are about delay and about the resources used to address these cases. Both are likely to be reduced by a prompt and detailed acknowledgement of service and by the early provision of all relevant information. Where it is clear that there has been non-compliance with a procedural requirement, the Government should set out at the earliest possible stage how it intends to address the error and within what timescale and give such undertakings as it is in a position to give as to its future conduct. This is far more likely to result in the matter being resolved pre-permission or, if it reaches the permission stage, to matters being clear-cut by then.
163. In the leading case in the immigration and asylum context – *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 the inevitability threshold was satisfied. Whilst rare, it is by no means an anomaly. But examination of cases in which decisions have been overturned on procedural grounds shows that a different outcome is often achieved following a proper procedure. In the *Rodriguez*¹¹⁰ case on the proper application of evidential flexibility the Secretary of State’s failure to apply binding policy was found to be unlawful in public law terms. The Upper Tribunal concluded (at para 28) that had the policy been applied, the application would have been successful. *Thakur (PBS – common law fairness)*¹¹¹ is an example of a case in which a

¹⁰⁷ See also *R (Smith)* [2006] EWCA Civ 1291 (at 3320-3321), *R (Shoesmith) v Ofsted and others* [2011] EWCA Civ 642 (at para 72)

¹⁰⁸ *R v SSHD, ex p Bugdaycay* [1987] AC 514.

¹⁰⁹ See also Lord Donaldson MR in *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260 (at 290).

¹¹⁰ [2013] UKUT 00042 (IAC).

procedural defect (failure to provide an opportunity to make representations) led to a different substantive outcome.¹¹² See also *Walumba Lumba (Congo) v SSHD*; *Kadian Mighty (Jamaica) v SSHD* [2011] UKSC 12.

164. For cases where the question of whether the decision would have inevitably been the same absent the procedural irregularity is anything less than clear cut, or where other issues are raised by the challenge, the question should be heard at a substantive hearing. **The Committee should ask the Government to explain what is proposed to be included within ‘procedural defects’** for this is not set out and needs to be. Does it include, for example, actual and/or apparent bias; and/or failure to apply a relevant and binding policy?

THE PUBLIC SECTOR EQUALITY DUTY

[T]he court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power” - it “must not shrink from its fundamental duty to ‘do right to all manner of people.’¹¹³

We consider that the proposals in the Consultation Paper will undermine the accountability of public bodies to the detriment of society as a whole and the vulnerable in particular.¹¹⁴

165. The proposal is that the statutory duty imposed on public bodies by the Equality Act, to have due regard to the need to eliminate discrimination would cease to be justiciable. An alternative being a non-judicial mechanism for resolving disputes about whether public bodies have complied with the duty.

166. The proposals arise from a report by the Independent Steering Group that conducted a review of the Public Sector Equality Duty. This review came out of the Government’s “red tape challenge”. The team were unable to provide comprehensive evidence on the number of judicial reviews that have involved the Public Sector Equality Duty to varying degrees as such information is not collected centrally.¹¹⁵ Although not mentioned in the 2013 Consultation, the review group found that a lack of clear guidance on how to implement the duty had led to the adoption of overly onerous practices by some public bodies,¹¹⁶ and respondents reported that case law was helpful in the absence of any formal guidance on the meaning of “due regard”, a term not adequately qualified in the Equality Act.¹¹⁷ It is therefore misleading to suggest that court challenges are the root of uncertainty. The review team also found that:

Although the number of Judicial Reviews (JRs) brought under the PSED is low, it is still a significant proportion of the overall number of JRs and there have been several high profile cases. In all the cases we have seen, the PSED is just one of a number of grounds, which suggests that these JRs would have arisen even in the absence of a PSED...¹¹⁸

167. Were the proposals implemented, the matter might thus end up being litigated twice.

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

¹¹¹ [2011] UKUT 00151 (IAC).

¹¹² See also *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC) and *R (Kizhakudan) v SSHD* [2012] EWCA Civ 56.

¹¹³ *R (Smith) v Ministry of Defence* [1996] QB 517 per Lord Bingham, then Master of the Rolls.

¹¹⁴ Treasury Counsel to the Rt Hon Dominic Grieve QC MP, 4 June 2013, *op cit*.

¹¹⁵ Government Equalities Office, *op. cit.* page 27.

¹¹⁶ Government Equalities Office, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013, page 16, 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

¹¹⁷ *Ibid*, p.28

¹¹⁸ *Ibid*, p.11

The regulatory bodies and inspectors also felt that some sectors cut corners as they were unlikely to be challenged. While fear of Judicial Review was thought to encourage compliance (or displays of compliance) in some areas, this was not thought to be the case in most sectors, as Judicial Reviews are rarely brought. It was thought this was possibly down to a lack of knowledge among citizens of the legal options available to them.¹¹⁹

169. Further:

Lawyers had found that threat of litigation alone could have a powerful effect in ensuring equality issues were effectively addressed by decision makers, negating the need for legal action.¹²⁰

170. At a meeting convened by the Ministry of Justice on 28 October 2013 in the Royal Courts of Justice to discuss these proposals, it was explained to the meeting by an expert in equalities law that of the six cases on the Public Sector Equality Duty that had succeeded since 2011, only one had resulted in the decision being taken again in the same terms.

LEAPFROGGING

171. Although not highlighted by the Joint Committee, the Committee has invited comments more broadly on the consultation and we have particular concerns at the prospect of a case going straight from the Special Immigration Appeals Commission to the Supreme Court. We consider that leapfrogging should always be with the consent of both parties. In the case of the Commission we make the additional points that it is a first-instance tribunal and primary finder of fact. Proceedings before the Commission are complicated by the withholding of information and evidence from a party to the proceedings, which are weighted against the appellant. Removing a tier of judicial scrutiny risks compounding, or at least removing opportunities to mitigate, this prejudice.

CONCLUSION

172. Less than 12 months ago the Government said:

4.16 ...These proceedings... represent a crucial way of ensuring that state power is exercised responsibly.

4.97 In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities. For example, a decision by a public authority to detain someone without sufficient reason would be a very important issue as the case concerns the litigant's liberty. ...

4.98 In general, we do not consider that the class of individuals bringing these proceedings is likely to be particularly vulnerable, although they may be where the judicial review concerns mental health or community care. However, where alternative forms of dispute resolution, such as complaints procedures or referral to an ombudsman, have not succeeded we do not consider that there are further appropriate alternative forms of advice or assistance to justify the withdrawal of legal aid.

4.99 We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained....¹²¹

¹¹⁹ *Ibid*, p.26

¹²⁰ *Ibid*, p.27

¹²¹ Proposals for the Reform of Legal Aid in England and Wales, November 2012, CP12/10 available at <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations>

173. What has changed?

174. The Government acknowledges that its proposals will have a differential impact on groups according to the race and religion/belief of members as most judicial reviews related to immigration and asylum matters.¹²² These claimants are challenging unlawful actions against them and have a constitutional right to equality of arms against public bodies. The Government's acknowledges that there "may also be other differential impacts on protected groups, for example if non-governmental organisations are not able to bring challenges in certain situations that may impact upon those with protected characteristics who might have benefited from the challenges".¹²³ The proposals on standing, intervention and costs orders will severely limit the ability of organisations to protect those who are least well-placed to protect themselves.

175. There will be an impact on Claimants who are no longer able to find legal aid assistance to bring their claims if providers cannot bear the level of risk contained within the new payment structure proposed by the Government.¹²⁴ Those Claimants will be forced to litigate in person, opening themselves up to debts in order to fund claims themselves. If they are forced into a position where they are unable to bring claims simply due to lack of legal aid funding this would be a "rank denial of justice and a blot on the rule of law".¹²⁵

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[/legal-aid-reform-consultation.pdf](#) (accessed 27 October 2013). See also Legal Aid Reform in England and Wales: the Government Response, Ministry of Justice, June 2011, <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf> (accessed 27 October 2013), at paragraph 112.

¹²² Consultation paragraph 209.

¹²³ Consultation paragraph 209

¹²⁴ *Ibid*, p.8 paragraph 25

¹²⁵ Lord Neuberger, "Justice in an age of Austerity", *op. cit.*