REPRIEVE

EVIDENCE SUBMISSION BY REPRIEVE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

October 2020

Reprieve is a legal action charity which seeks to uphold the rule of law and the rights of those facing the death penalty, torture and other grave abuses. Reprieve has provided legal support to hundreds of prisoners on death row, victims of torture and the families of victims of extrajudicial killings. Reprieve also works to protect the UK's strong abolitionist stance on the death penalty and ensure overseas aid and assistance does not inadvertently contribute to the imposition of the death penalty anywhere else in the world.

EXECUTIVE SUMMARY

1. Reprieve welcomes the opportunity to submit to the Independent Review of Administrative Law. This submission is based on Reprieve's direct experience of supporting individuals to bring claims for judicial review, acting as direct claimants in claims for judicial review, as well as bringing public law claims in the Investigatory Powers and Information Tribunals.

2. This submission responds to the broad question posed by the Panel in its call for evidence as to "*how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law."* This submission also responds specifically to points 4(a),(c) and (g) of the Panel's terms of reference, namely whether procedural reforms are necessary to the burden and effect of disclosure, the duty of candour, and rules relating to interveners and standing.

3. Reprieve's submission is that the current administrative law framework and corresponding rules of procedure are necessary to ensure that judicial review of executive decision-making assists the executive to govern more effectively. This is for the following reasons:

    i. The Panel's call for evidence suggests judicial review seriously impedes the effective discharge of executive functions. Reprieve's experience is that the opposite is true. Public law challenges to the lawfulness of executive action lead to stronger policies and more effective executive decision-making. Judicial reviews brought by or with the support of Reprieve have led to significant policy changes which have helped protect British officials and agencies against complicity in the death penalty and torture.
    ii. The Panel's call for evidence positions legal challenges of executive action in opposition to effective governance by the executive. In practice, public law challenges have allowed Reprieve to work together with public bodies to clarify complex areas of law and assist them to give effect to the laws set down by parliament. Frequently, Reprieve and the relevant public body have agreed upon the question that needs to be decided by the Court and have worked together to resolve the question before the matter reaches court.
    iii. The Panel's call for evidence questions whether the law on standing ought to be reformed. The law on standing in its current form has allowed Reprieve to seek justice for the most marginalised victims of grave rights abuses who otherwise would not have any form of redress available to them. Reprieve has also been able to take action on behalf of further potential victims whose experiences have yet to come to light due to a lack of transparency surrounding abuses committed in the context of counter-terrorism.
    iv. The Panel's call for evidence queries whether procedural reforms to disclosure obligations and the duty of candour are necessary. Whilst disclosure of material in the course of public law proceedings brought by Reprieve has assisted the executive to formalise and codify

policies, procedural reforms are necessary to remedy the recent dilution of disclosure obligations under regimes such as Closed Material Procedures.

PUBLIC LAW CHALLENGES ASSIST THE EXECUTIVE AND STRENGTHEN FUTURE DECISION-MAKING

4. The Panel's call for evidence asks whether judicial review seriously impedes the proper or effective discharge of central or local governmental functions. On the contrary, public law challenges that Reprieve has been involved in have assisted public bodies to strengthen and clarify policies and assist with future decision-making.

5. In *R (on the application of (1) Zaw Lin (2) Wai Phyo) v National Crime Agency* [2016] EWHC Case No: C0/44812016 (*'Zaw Lin'*), Reprieve assisted two Burmese migrants who were sentenced to death in Thailand with unlawful assistance from the National Criminal Agency (NCA).

6. The NCA's provision of evidence to the Thai police was so significant that it may have directly contributed to the imposition of death sentences against Zaw Lin and Wai Phyo. By referring in court to the British government supplying this evidence, the Thai prosecution was able to suggest to the Court that the British government supported the prosecution. This legitimised an investigation and prosecution that was otherwise fraught with grave rights violations, including credible allegations of confessions extracted by torture. The NCA also kept its assistance secret meaning that the defence were "ambushed" with the additional evidence at trial without a fair opportunity to challenge the evidence.

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8. Reprieve assisted Zaw Lin and Wai Phyo to seek a declaration that the NCA's provision of evidence to the Thai police in this case was unlawful, on the basis that this assistance breached the NCA's obligations under the Overseas Security and Justice Assistance (OSJA) Policy. The OSJA Policy requires public bodies to complete an assessment of the human rights risk prior to providing assistance, and to take certain steps based on the outcome of this assessment. Zaw Lin and Wai Phyo alleged that the NCA had breached its obligations under the OSJA Policy by (a) failing to complete this assessment in respect of one piece of evidence it shared with the Thai police; and (b) following the completion of OSJA assessments for seven additional pieces of evidence, failing to seek death penalty assurances ahead of sharing these with the Thai police.

9. As part of its investigation, Reprieve sought confirmation from a number of other government authorities subject to the same obligations as the NCA under the OSJA Policy, as to whether they had provided assistance to the Thai police in this case. In contrast to the NCA, the stated position of these authorities, specifically the Home Office, the then-Foreign and Commonwealth Office and the Metropolitan Police, was that they could not provide assistance to the Thai police unless they had sought and received death penalty assurances.

10. The case was eventually settled. In the consent order, the NCA conceded that the assistance was provided unlawfully. In March 2017, the NCA revised its internal processes so that overseas assistance now requires a higher level of internal approval. Thus, as a result of this case, the NCA strengthened its internal policies and procedures to mitigate the risk of becoming inadvertently complicit in the death penalty in the future.

11. Public law challenges brought by Reprieve have also assisted the executive to develop stronger policies both on a domestic and regional level, putting the UK at the forefront of progressive

European policy to ensure that European pharmaceuticals are not exported for misuse in executions.

12. In *R (on the application of (1) Ed Zagorski (2) Ralph Baze v Secretary of State for Business Enterprise and Skills* [2010] EWHC (Admin) Case No. 11419 ('*Zagorski*'), Reprieve brought a claim for judicial review, which led the Government to review its policy on the export of drugs for lethal injection, and to ultimately impose an export restriction of these drugs – an act for which the-then Secretary of State for Business subsequently expressed personal pride.[i]

13. In October 2010, Reprieve discovered that a UK pharmacy had been exporting sodium thiopental for use in lethal injections in the United States. On 28 October, Reprieve wrote to the Secretary of State for Business asking him to impose an urgent control on exports of the drug to the US. On 29 October the Secretary of State stated that he would not control the export of the drug because of its use as a medicinal anaesthetic. In fact, the medicinal use of sodium thiopental in the US was minimal, and the product in question had not been approved by the US Food and Drug Administration for medicinal use in the USA.

14. On 2 November, Reprieve assisted Mr Zagorski and Mr Baze, two prisoners on death row in the United States whose executions might have taken place using drugs exported from the UK, to commence judicial review proceedings. Mr Zagorski and Mr Baze claimed that the decision not to impose an export control was unlawful as it was contrary to the statutory purpose of the regime governing export controls and it also exposed them to a real risk that they would suffer breaches of Article 2, 3 and 4 of the European Convention on Human Rights.

15. Within weeks of the claim being issued, on 25 November 2010, the Treasury Solicitors wrote to the court noting that they had advised the Business Secretary to reconsider his decision due to information coming to light which confirmed that the drug could not be lawfully imported for medical purposes such as anaesthetic, so any exports of sodium thiopental from the UK would have been for the purpose of executions. The Secretary of State for Business subsequently imposed an export control on the drug, preventing its export for use in executions, and the claim for judicial review was withdrawn. The UK's progressive policymaking on this issue led to Europe-wide reform as a similar export-control was later replicated across the European Union.[ii]

16. Reprieve recommends that the Panel preserves the amenability of public law decisions to judicial review by the courts and does not recommend any reforms that would limit the current scope of judicial review.

THE EXISTING FRAMEWORK FOR PUBLIC CHALLENGES ENABLES CLAIMANTS AND DEFENDANTS TO WORK TOGETHER TO CLARIFY THE LAW AND IMPROVE POLICIES

17. The Panel's call for evidence asks government departments whether judicial review seriously impedes the proper or effective discharge of central or local governmental functions, suggesting that legal challenges of executive action are antagonistic to effective governance by the executive. In practice though it is often in the interests of both the claimant and the defendant to clarify the correct interpretation of a law or to establish the lawfulness of a particular policy, and Reprieve has worked in partnership with the defendants in many of its cases.

18. In *Zaw Lin,* the NCA agreed with Reprieve's position and conceded the principle challenge from the outset, that it was wrong for the NCA to have decided not to seek death penalty assurances. The case continued to explore the question of the correct interpretation of "exceptional circumstances" under the OSJA policy, given the policy in question lacked clarity and was in the

interests of both parties to clarify. As set out above, these proceedings were resolved by consent and a full trial was therefore not needed.

19. In *Zagorski*, Reprieve and the Secretary of State for Business were able to work constructively together to identify whether there were any legitimate medical uses for imports of sodium thiopental in the US.

20. Following pre-action correspondence and disclosure processes, the Secretary of State for Business discovered that the basis for not placing an export control on sodium thiopental was mistaken, as the drug was not lawfully imported for legitimate medical use as an anaesthetic. As a result, the Secretary of State for Business reconsidered his decision and placed an export control on the drug, removing the need for the claim to be pursued further. [iii]

21. In R *(on the application of Ali Babitu Kololo) v (1) Secretary of State for the Home Department (2) Metropolitan Police Service (3) Secretary of State for Foreign and Commonwealth Affairs* [2018], Reprieve worked constructively with the defendants before the permission stage to agree a creative and tailored remedy that was in the interests of justice for all parties, in order to assist a very vulnerable man facing the death penalty.

22. This was a case in which a young father had been sentenced to death in Kenya with the involvement of the UK government, who had provided assistance to the prosecution. In 2013, Mr Kololo, a young father from the marginalised Boni/Aweer tribe in Kenya, who had had no formal education and worked as a woodcutter and honey-gatherer, was sentenced to death for his alleged indirect involvement in the murder of British national David Tebbutt and the kidnap of British national, Judith Tebutt, following a Kenyan police investigation that was supported by the Metropolitan Police Service (MPS).

23. Mr Kololo's trial was fraught with grave rights violations and there is strong evidence suggesting his innocence, so much so that Judith Tebbutt and her family have supported Mr Kololo's push for justice.

24. Although a complaint had been filed against the MPS police officer who assisted the Kenyan investigation, the MPS allowed the police officer in question to retire whilst the complaint was still pending. Reprieve was concerned that this would have prevented the police officer from facing misconduct proceedings, and therefore prevented a full investigation into the harm caused to Mr Kololo by the MPS' actions.

25. In 2018, Reprieve challenged the decision to allow the police officer to retire. Reprieve and the MPS agreed to negotiate in the hope of avoiding the claim proceeding to the permission stage. The MPS subsequently agreed to formally set out in writing that the retirement of the police officer would not affect the outcome of the investigation into his conduct. The investigation therefore continues, which may help Mr Kololo's appeal in the Kenyan courts, whilst at the same time the officer in question has been permitted to stay in retirement.

26. In light of the above examples of how Reprieve has worked constructively with defendants throughout public law challenges, we urge the Panel to take into consideration how the prospect of being judicially reviewed assists the executive to work in partnership with potential claimants to clarify the law and strengthen future-decision making.

27. **Reprieve again recommends that the Panel preserves the amenability of public law decisions to judicial review by the courts and does not recommend any reforms that would limit the current scope of judicial review.**

PUBLIC INTEREST GROUPS MUST HAVE STANDING TO BRING PUBLIC LAW CHALLENGES IN ORDER TO FOR THE MOST MARGINALISED IN SOCIETY TO ACCESS JUSTICE

28. The current law on third parties' standing to bring claims for judicial review and other public law challenges has allowed Reprieve to seek justice for the most marginalised victims of grave rights abuses who otherwise would not have any form of redress available to them and on behalf of further victims whose experiences have yet to come to light.

29. In *R (on the application of (1) Reprieve (2) Rt. Hon. David Davis MP (3) Dan Jarvis MBE MP) v the Prime Minister (Case No: CO/3952/2019)*, the decision of the government not to hold an independent judge-led inquiry into the UK's complicity in torture and rendition post-9/11 is being challenged by Reprieve and two Members of Parliament.

30. From 2001 onwards the UK was involved in hundreds of cases of torture and rendition.[iv] Many of these victims were tortured or remained in prolonged secret detention, without access to legal representatives. They and their families therefore had very little possibility of either investigating and uncovering who was responsible for their abuse, or taking legal action against any perpetrators.

31. Upon taking power in 2010 then-Prime Minister David Cameron promised to hold an independent, judge-led inquiry into these matters. Since then, however, the Government has sanctioned only piecemeal investigations which were undermined by a lack of independence.[v] Finally, in July 2018, the Cabinet Office conclusively confirmed the Government would renege on its promise of launching an independent inquiry.[vi]

32. The majority of those subjected to torture and rendition in this context have no way of knowing if the UK was responsible for their abuse. If Reprieve, Rt. Hon. David Davis MP, and Dan Jarvis MBE MP were unable to challenge the Prime Minister's refusal to hold an independent inquiry, these victims would forever remain in the dark as to the UK's role in their abuse and likely have no other form of redress.

33. In *(1) Privacy International (2) Reprieve (3) Committee on the Administration of Justice (4) Pat Finucane Centre v (1) Secretary of State for Foreign and Commonwealth Affairs (2) Secretary of State for Home Department (3) Government Communications Headquarters (4) Security Service (5) Secret Intelligence Service* [2020] IPT/17/86/CH ('*MI5 Crimes Guidance case*'), Reprieve challenged the lawfulness of a secret policy under which the Security Service purports to authorise its agents to carry out crimes, without any express limits on the Security Service authorising even the most serious offences.

34. The victims of Security Service agents' crimes are unlikely to know the true role of the perpetrator of their abuse, as there is no process to allow victims to be notified that their abuser was a Security Service agent.

35. While the Investigatory Powers Tribunal upheld the lawfulness of the Security Service's policy, in an unprecedented split judgment two dissenting judges found the policy to have no legal basis. Since the judgment, the government has effectively conceded the primary challenge in this claim by introducing a bill to put the policy on a statutory footing.[vii]

36. As the identities of many victims of crimes committed by agents are unknown, if Reprieve and other representative groups were unable to take the case forward, the legal basis of this secret policy could not be scrutinised and clarified, and the bill currently before Parliament may never have been brought forward.

37. Reprieve recommends that the ability of MPs and representative groups to bring challenges on behalf of vulnerable people or categories of people who are unable to bring a claim themselves is preserved and protected.

THE IMPORTANCE OF DISCLOSURE IN PUBLIC LAW CHALLENGES AND THE NEED TO PROTECT THE DUTY OF CANDOUR AND OTHER DUTIES OF DISCLOSURE FROM FURTHER EROSION

38. In its call for evidence, the Panel asks submissions to consider whether any procedural reforms to the duties of disclosure and the duty of candour are necessary.

39. It is Reprieve's submission that the existing disclosure framework does allow for a degree of accountability and public scrutiny. Significant disclosures in the course of public law challenges brought by Reprieve or with Reprieve's support have assisted parliament and the executive to formalise and codify policies and to legislate on matters of the utmost public importance. However, there remain real barriers that enable the Government to refuse to disclose material even where such disclosure is necessary to ensure a fair trial, undermining the vital constitutional principle of open justice.

40. In *the MI5 Crimes Guidance case*, it was disclosed that the Prime Minister had issued a secret policy governing oversight of crimes committed by agents. The existence of this policy was then placed before Parliament for the first time in March 2018,[viii] and the government has now brought forward a bill[ix] that would place in statute the regime surrounding authorisations for Secret Service agents to commit crimes within the UK. Disclosure in this case therefore subjected a previously secret policy to the scrutiny of Parliament for the first time.

41. Disclosure during public law challenges has also assisted Reprieve and the executive to take the necessary steps towards identifying further victims of the gravest rights abuses.

42. With evidence identifying hundreds of instances of UK complicity in torture and rendition, there are most likely many more individuals who faced mistreatment post-9/11 but who remain in the dark as to the UK's role. These individuals are entitled to redress under international and domestic law, and it is clearly in the interests of the executive to learn from these past mistakes to ensure that the same practices and policies are not repeated.

43. Disclosure during *R (on the application of (1) Reprieve (2) Rt. Hon. David Davis MP (3) Dan Jarvis MBE MP) v the Prime Minister (Case No: CO/3952/2019)* recently revealed that the intelligence agencies had in 2018 identified fifteen other potential cases of torture or rendition involving British intelligence agencies that may require further investigation.[x]

44. Were it not for the disclosure obligations placed on the executive in this case, the cases of these potential further victims of serious abuses may never have come to light, and justice could never be done.

45. Reprieve is however concerned by the recent dilution of disclosure obligations and the impact this may have both on assisting victims of serious abuses in the future and the ability of the courts to ensure a fair trial, even in cases that concern the investigation of fundamental rights violations.

46. In *R (on the application of (1) Reprieve (2) Rt. Hon. David Davis MP (3) Dan Jarvis MBE MP) v the Prime Minister (Case No: CO/3952/2019)*, the defendant has sought to have crucial parts of the case heard behind closed doors under Closed Material Procedures (CMPs) under the Justice and Security Act 2013. Instead of publicly defending the claim that there remains no further investigative obligation on the UK for its past involvement in torture and rendition, the defendant is seeking to have the case heard in CMPs. This is despite the fact that the evidence emerged of at least fifteen previously undisclosed cases where the UK may have been complicit in torture and rendition. [xi]

47. During CMPs, claimants, including victims of human rights abuses, are excluded and evidence kept secret. Once the judge has made a general declaration permitting the use of CMPs in a case, he or she loses all discretion in respect of specific pieces of evidence. The Court cannot order disclosure of material even when evidence is disclosed that a person has been subjected to torture at the hands of the British government, if the Government asserts that this is national security sensitive material. Only special advocates are permitted to see the material, yet they work under significant constraints, most notably a prohibition on speaking to the person whose interests he or she is representing, or their legal team. As such the administration of justice is always subordinated to the "sensitive" nature of the material.

48. In *Reprieve v Prime Minister,* the claimants have been denied a minimum standard of disclosure in a case about transparency and accountability for systemic human rights abuses. In *SSHD v AF* (No 3) [2009] UKHL 28, the House of Lords made clear that "*if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust*." As a result, where Article 6 of the ECHR applies, there is an "irreducible minimum standard of disclosure" which must be given to ensure that a fair trial is guaranteed.

49. However, in *Reprieve v Prime Minister,* the High Court held that this minimum standard of disclosure does not apply in this case. This is despite the fact that the direct victims of torture and rendition have no means of bringing a claim themselves: without any independent, public inquiry, they have no means of discovering that the UK played a role in their abuse. In addition, without a minimum standard of disclosure, the claimants cannot give effective instructions to the Special Advocates (who are permitted to see the CLOSED material), and the public cannot have confidence that the outcome of the CLOSED proceedings are fair.

50. When introducing CMPs in 2013, Ministers said that they were needed to "plug a small but serious gap in our civil justice system" and would be confined to civil cases involving national security.[xii] Nearly seven years on, secret courts are being used more widely than they were ever anticipated by Parliament. For example, in 2014 the Court of Appeal upheld an unprecedented secret trial of an individual on terror offences,[xiii] while the Supreme Court has since upheld two further cases in which CMPs have been used in entirely novel contexts – including in an ordinary criminal warrant sought by police where national security was not at stake.[xiv]

51. Since their introduction in 2013, the numbers of CMPs applied for and granted has continued to increase, doubling in 2015 – with the number of applications sought by Government reaching an all-time high in 2018.[xv] Further, no courts have revoked CMPs in any case since the Justice and Security Act 2013 was passed – despite the ability of courts to bring a case back out in the open touted as a safeguard against wrongful use of the procedures.

52. The Justice and Security Act 2013 requires the government to undertake a review of CMPs after five years of the legislation coming into force, but the government has failed to do so, having successively told Members of Parliament for two years that "discussions are ongoing" and a reviewer will be appointed "in due course".[xvi] The defendant's reliance on secret courts in *R (on the application of (1) Reprieve (2) Rt. Hon. David Davis MP (3) Dan Jarvis MBE MP) v the Prime Minister (Case No: CO/3952/2019)*, a case about greater transparency over the UK's role in some of the gravest abuses, demonstrates the need for an urgent review of their use.

53. In light of the above, Reprieve urges the Panel to consider procedural reforms that will protect against the further dilution of the duties of disclosure and recommend an urgent review of CMPs.

54. Reprieve recommends that the duty of candour and other duties of disclosure are protected from further dilution and that a public and transparent review of the Closed Material Procedures (CMPs) regime under the Justice and Security Act 2013 is undertaken.

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