Islington Law Centre (ILC) Immigration Team response to the Independent Review of Administrative Law

For over 45 years, Islington Law Centre (ILC) has been a key resource for the local community. Its Immigration team provides legal advice and assistance to a range of people, prioritising cases involving unaccompanied children, destitute families and vulnerable adults (for example, victims of trafficking). The team frequently take on complex applications and appeals, including Judicial Reviews.

The Immigration team includes two specialist ILC-hosted projects which have a national reach.

a) The Migrants' Law Project (MLP) is a legal and public legal education project which promotes fair treatment and access to justice for migrants, refugees and asylum seekers in the UK through the use of public law; and
b) The Migrant and Refugee Children's Legal Unit (MiCLU) aims to uphold and improve the rights of asylum seeking, refugee and other migrant children and young people across the UK through a mix of individual casework, strategic litigation, legal education, and policy analysis and comment.

Introduction:

ILC adopts and endorses the submission of the Public Law Project to the Independent Review of Administrative Law Panel (the Panel).[1] Where we have no specific response to add to that submitted by the Public Law Project, we have omitted the questions.

ILC's Immigration team's response focuses on our experience of representing children, young people and vulnerable adults through the immigration/asylum process, from the beginning of the process up to its conclusion, and of assisting clients who have been previously unrepresented or poorly represented. Our work involves representing clients from an initial application through to appeals and, where necessary, through the process of Judicial Review. We are also experienced in bringing cases in the public interest. For example: MLP represented Detention Action in a challenge to the policy and practice of detaining asylum seekers for the determination of their claims within the Detained Fast Track process (DFT); MiCLU represented the Children's Society in its challenge to bring back into scope legal aid for unaccompanied and separated migrant children who need non-asylum legal advice; and a solicitor from the Immigration Unit represented a client in the joint case of Gudanaviciene and Ors challenging the Lord Chancellor's guidance on the operation of the Exceptional Case Funding (ECF) Scheme. Further details of each of these cases can be found under Question 13.

[1] Public Law Project (Oct 2020) Submission to the Independent Review of Administrative Law

Our position is that early access to good quality legal advice and better decision-making by the public authority with which we principally deal (UK Visas and Immigration/UKVI) would lead to an earlier and fairer resolution of many cases without the need to get to the stage where we seek recourse through the last resort remedy of Judicial Review (JR).

1. **Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?**

We support the Public Law Project's submission in response to this Question, to which we add the following:

Our experience is that Judicial Review claims can help to clarify the law and support public authorities – in our area of law, predominantly the Home Office but also the Ministry of Justice – to carry out their duties effectively and lawfully. The JR process is there to ensure that the rule of law is upheld and to support the transparent and accountable decision-making that is integral to good government. There are already checks and balances in place that precede any application for JR, and any further restrictions would amount to an unacceptable diminution of our clients' right of access to justice.

In addition, our position is that that the process and practice of JR cannot, in our view, be looked at in isolation. Therefore, it is necessary to consider the nature and quality of advice and decision-making processes that precede the stage where it may be necessary to exercise the last resort remedy of JR. We would urge the Panel to consider this important preliminary issue as part of its review. We believe it important to note that the focus of the questions in the call for evidence do not take sufficient account of what we regard as critical reforms which could lead to far fewer claims for JR being brought in our area of law.

In its response, the Public Law Project has highlighted that the overall number of Judicial Review applications is small and steadily decreasing. In the area of asylum and immigration law, these could be further reduced in the following ways: by enabling clients to access good quality legal advice from an early stage, combined with improvements in the UKVI asylum and immigration application and decision-making processes. We provide further detail on these two issues under Question 10.

In addition, the Public Law Project refer to the fact that many claims are resolved at the pre-action stage through the service of a properly drafted letter in accordance with the Pre-Action Protocol. Our casework experience supports this in that, in many cases where we have not made progress in resolving issues through the Home Office internal process or via a client's MP, the threat of issuing a Judicial Review claim results in engagement with the issues by the Home Office, obviating the need to issue a claim.

Also, the Public Law Project's submission that a significant number of Judicial Reviews are resolved at pre-permission stage is again supported by our casework experience. The vast majority of our cases are settled pre-permission and post permission being granted.

2. **In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?**

We support the Public Law Project's submission in response to this Question, to which we add the following:

- Our experience is that responses to Pre-Action Protocol letters in the area of immigration and asylum law are generally poor

- Despite requests for disclosure in compliance with the duty of candour, responses to Pre-Action Protocol letters rarely provide any disclosure
- Providing early disclosure in compliance with the duty of candour would enable prospective claimants to consider material which in turn may lead to a claim for JR not being issued
- As proposed by the Public Law Project, we agree there is a case for reinforcing the importance of the duty of candour, including consideration of putting it on a statutory footing

In addition, we urge the Panel to ensure that the review is informed by the experiences, situations, needs and insights of the clients whose cases have been through a Judicial Review, and include opportunities for people with this lived experience, including children and young people, to help shape the reforms. In relation to asylum and immigration cases, we can assist with this.

4. **Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?**

Judicial Review is the ultimate and last recourse to hold the executive to account. To remove decisions from the scope of JR offends against the rule of law. As the Public Law Project submission points out, the courts are already alive to sensitive issues where the executive has a strong role and defer to the government depending on the issue before them. It would be disproportionate to render certain decisions or powers non-justiciable and to deny protection of the law to individuals.

5. **Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?**

As lawyers, we believe the process is clear. However, it may not be clear to members of the public and we endorse the proposal relating to public legal education set out in the Public Law Project's submission.

6. **Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?**

Yes. The time limit for making an application for JR is short in that it must be brought 'promptly', and in any case no more than 3 months after the initial decision is made. We are not aware of any evidence to support reducing this time limit. The courts already consider whether a claim has been brought promptly and have the discretion to refuse to grant relief if there has been undue delay in bringing a claim. To reduce the time limit is likely to lead to injustice.

In our experience, reducing the time limit would significantly prejudice our clients. We need time to consider a decision and take instructions. Further time is needed in order to comply with the Pre-Action Protocol for Judicial Review. Following this, for the majority of our clients, we need to make applications for legal aid. The standard response time for consideration of a 'non urgent' application for legal aid is 4 weeks and it can take longer. A case example of this follows.

Case study 1

We were acting for a client who has significant physical and mental health problems following a serious stroke. She is wheelchair bound and is shielding. She is unable to come to our office. She does not have a smart phone nor computer facilities. We had to liaise with the local stroke survivor's support service who provide a weekly food drop off service for them to obtain bank statements,

other evidence and signed forms from our client. Correspondence was sent to the Home Office in relation to a decision we considered unlawful. Following a response which continued to be unlawful, we sent a pre-action letter, had to wait for the response, then liaise with our client and third parties to obtain the necessary documents to apply for legal aid, which was granted a day before the 3 month deadline, and after considerable chasing. In our view, reducing the deadline would result in a serious barrier for access to justice.

8. **Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?**

We support the Public Law Project's submission in response to this Question, to which we add the following:

We agree that costs reduction will seriously undermine the public law supplier base which, in immigration advice and representation, has already seen a significant reduction through the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)[2] which removed the majority of non-asylum cases from the scope of legal aid. In a review of the impact of LASPO on immigration cases, the Paul Hamlyn Foundation reported that the number of providers in England and Wales taking on immigration (non-asylum) cases fell from 249 in 2013 (when the legal aid changes came into force) to 178 in 2019. Moreover, many areas of Wales and several regions of England (for example, the South West and East, as well as parts in the North East and North West) are immigration advice deserts.[3]

The possibility of being paid at inter partes /market rates is what enables many legal aid suppliers to remain financially viable. That reduction in costs would seriously affect Law Centres (already reduced in number from 94 in 2013 to 47 in 2019) as well as not-for-profits, given that payment of inter partes costs is one area where we get paid at commercial rates. As a consequence, costs reductions would have a knock-on effect on access to justice.

10. **What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?**

Under Question 1, we referred to the serious consequences that can result from clients accessing poor quality legal advice, as well as the poor quality of decision-making in UKVI – both of which, having gone through all prior stages, can lead to us having to make an application for JR.

In relation to poor quality legal advice:

A recent report by Jo Wilding[4] on the immigration legal aid market demonstrates a market failure in asylum and immigration legal aid. In the report, the author points out that, not only are there legal aid advice deserts, but even in areas where there is a supply of providers they have limited or no capacity to take on new cases. She notes that demand is exacerbated by poor quality Home Office decision-making and by the poor quality of the advice offered by some providers. Poor quality legal advice leads to other lawyers having to take on the case, and/or fresh claims having to be made – both of which add to legal aid costs.

[2] Ministry of Justice (Feb 2019) Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)
[3] Grant, Saira (March 2020) An overview of immigration advice services in England and Wales
[4] Wilding, J (2020) Droughts and deserts: a report on the immigration legal aid market

Statistics for the Legal Aid Agency's (LAA) quality assurance Peer Review process[5] support our view that a significant proportion of legal aid immigration providers are providing advice and representation that is not competent. In 2017/18, 36% of legal aid immigration and asylum providers reviewed did not reach the threshold for competent advice – more than double the proportion of providers in any other area of civil legal aid work who were judged to be providing non-competent advice. In 2018/19 (the most recent period for which information is available), 22% of providers reviewed were found to be providing advice and representation that did not meet the threshold for competent advice.

Our agency is peer reviewed by the LAA at level 1 ('Excellent'). Where we are involved in advising and assisting a client from the beginning of the process of making an application in an immigration or asylum case, we have a high rate of success in achieving the outcome our client is seeking either without the need to appeal, or at the appeal stage without the need to resort to JR. Where we issue JR claims, it is in cases where there is no other remedy such as refusal of fresh claims where the client was poorly represented or in the cases involving separated children seeking to reunite with family members where Judicial Review is the only remedy available.

In relation to poor quality decision-making in the immigration system:

In his annual report, the Independent Chief Inspector for Borders and Immigration (ICIBI) provides a list of 'expectations' of asylum, immigration, nationality and customs functions,[6] which stipulate that:

- Decisions and actions are 'right first time'
    - They are demonstrably evidence-based or, where appropriate, intelligence-led
    - They are made in accordance with relevant legislation and guidance
    - They are reasonable (in light of the available evidence) and consistent
    - They are recorded and communicated accurately, in the required format and detail, and can be readily retrieved (with due regard to data protection requirements)

ICIBI, academics,[7] parliamentarians and NGOs[8] have commented at length on the poor quality of Home Office decision-making. In a review of 50 reports published over the past 15 years by UN agencies, parliamentary committees, universities and NGOs, Freedom from Torture found that they shared the view that poor Home Office decision-making was caused by: flawed credibility assessments; the unrealistic and unlawful evidential burden placed on applicants; a starting point of disbelief and a broader 'refusal culture' in the ethos of the Home Office; an inadequate learning culture and a lack of independent oversight.[9]

In our experience, the quality of Home Office decision-making is often poor. In a wide range of cases involving our clients, we regularly see cases where Home Office officials have, for example:

- Made errors of law;
- Set unrealistic evidentiary demands;
- Failed to properly explain or say at all how they have considered the evidence put before them;

[5] Available from the Legal Aid Agency
[6] ICIBI (Sept 2020) Annual report for the period 1 April 2019 to 31 March 2020.
[7] Wilding, J (2020) Droughts and deserts: a report on the immigration legal aid market
[8] JUSTICE Working Party (July 2018) Immigration and asylum appeals: a fresh look.
[9] Freedom from Torture and others (Sept 2019) Lessons not learned: the failures of asylum decision-making in the UK.

- Failed to make further inquiries which could have clarified or dealt with any concerns before refusing a claim;
- Refused to consider additional evidence, including expert medical evidence, when this has been provided; and
- Failed to properly set out on how the best interests of the child have been considered as required under s.55 of the Borders Citizenship and Immigration Act 2009 and recommended by the ICIBI

Another ICIBI 'expectation' is that:

- Errors are identified, acknowledged and promptly 'put right'
    - Safeguards, management oversight, and quality assurance measures are in place, are tested and are seen to be effective
    - Complaints are handled efficiently, effectively and consistently
    - Lessons are learned and shared, including from administrative reviews and litigation
    - There is a commitment to continuous improvement, including by the prompt implementation of recommendations from reviews, inspections and audits

Case study 2

A very recent example of poor quality decision-making is the failure of a decision-maker to apply a policy when specific reference was made to it by us. Following representations, the decision-maker made reference to the policy but the decision was an unlawful application of the policy, forcing us to send a Pre-Action Protocol letter. The response to this was poor. We issued a Judicial Review claim. On advice from the Government Legal Department (GLD), the UKVI agreed to reconsider its decision within a certain time frame. Following the withdrawal of the Judicial Review, the decision-maker has issued a refusal letter virtually identical to the which necessitated the issuing of the claim in the first place.

We apply for Judicial Reviews when other paths of action have been unsuccessful. We are acutely aware that JR is the remedy of last resort and therefore try other ways of resolution first through the government department's complaints procedure, via MPs, or through pre-action letters. We cannot successfully apply for legal aid for our clients unless we can provide the Legal Aid Agency (LAA) with evidence that we have tried all other methods of resolution. The only exception to this is when a case involves an urgent matter like an impending removal – however, it is important to note that, even in these cases, we are first required to make urgent representations/submit a letter before claim with a truncated timescale. In each of these cases, we have only proceeded to JR because of Home Office failures to respond to the detail of the complaint or issue presented to it through those other channels.

We provide two case examples – the first, seeking to correct an omission in the Immigration Rules that could have wider application to other cases; the second to expedite a decision in order to protect a highly vulnerable young person – where a JR has enabled us to progress matters where other paths of action were unsuccessful.

Case study 3

There is a lacuna in the Immigration Rules in relation to child victims of domestic violence in that, whereas an adult has access to a specific route to Indefinite Leave to Remain (ILR) and access to

public funds where their relationship breaks down as a result of domestic violence, there is no such route for children. We had raised this with the Home Office at a policy level but had not made progress.

A child entered the UK as the dependent of his mother, who was given leave to enter as the spouse of a British citizen (the child's father) with a condition preventing access to public funds for her and her dependents. The child was subjected to domestic violence by his father. The local authority became involved and accommodated the child away from the family home. Due to his age, the child would not have accrued 13 weeks in care before his 18th birthday, so was facing homelessness and destitution as he would be unable to access local authority housing or any benefits.

We assisted the child in making an application for ILR via the process that is used for adults. The Home Office rejected the application on the basis that it was not open to a child. We judicially reviewed on the basis that the Immigration Rules were unlawful as they did not provide an appropriate route for a child victim of domestic violence, and requested interim relief in the form of an order that the boy – now over 18 – could have recourse to public funds. The order was granted, and the judge indicated that permission should be granted. The Home Office then agreed to settle and grant ILR.

Case study 4

The asylum claim of a girl who had been trafficked by her family for the purpose of forced marriage was refused by the Home Office on the basis that she could internally relocate in her country of origin, and that – despite medical evidence – her mental health problems were not serious enough to prevent her from being able to do so. She then attempted suicide. We lodged a fresh claim asking that it be expedited given the severe and ongoing risk to her life and submitted medical evidence to support the claim. The fresh claim was not decided and expedition requests were ignored. The Home Office did not engage properly during the Pre-Action Protocol stage. We therefore had to proceed to JR to protect the client's safety as far as we were able to. The Home Office settled and granted refugee status before a decision was made on permission.

As Right to Remain notes in its online guide to the UK asylum and immigration system for claimants, 'legal aid lawyers taking on a Judicial Review are taking a risk, and are only likely to do this if they feel you have a strong case'.[10] Our experience is that the Home Office does not look at cases properly until they are threatened with litigation.

Moreover, we have not seen consistent evidence that the Home Office has a comprehensive and responsive learning culture in place, which would include learning from Judicial Reviews. The Windrush review supports that view, and recommends the development and application of a cross-departmental learning culture which would include learning from adverse case decisions.[11] We note that in its recent Comprehensive Improvement Plan,[12] in relation to the Windrush generation at least, the Department recognises the need to learn from the past.

[10] https://righttoremain.org.uk/toolkit/jr/

[11] Williams, Wendy (March 2020) Windrush: lessons learned review, rec.16

[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922973/CCS001_CCS0820050750-001_Resp_to_Windrush_Lessons_CP_293_Accessible.pdf

13. **Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?**

We agree with the Public Law Project's comments that it is vital that an individual is able to challenge the decisions and actions of public bodies. The rules on standing already operate to ensure that the most appropriate body to challenge a decision will be granted standing to do so.

Based on our experience, bringing claims in the public interest can be much more cost effective than multiple individual claims with different sets of legal representatives involved, and it also promotes the rule of law.

Case study 5

The Migrant and Refugee Children's Legal Unit (MiCLU) and ILC, with Brick Court Chambers and Doughty Street Chambers, successfully represented the Children's Society in their legal challenge to the government's removal of legal aid for children's immigration cases, with the government announcing its reinstatement for unaccompanied and separated migrant children in July 2018. The challenge was settled pre-hearing.

On 18 July,[13] the Under Secretary of State for Justice announced the government's intention to lay an amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to bring immigration matters for unaccompanied and separated children into scope of legal aid. At the MoJ's invitation, ILC and the Children's Society were party to negotiations on the detail of the changes which came into force on 25 Oct 2019 through The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children)(Miscellaneous Amendments) Order 2019.[14]

We regard this collaboration as a particularly useful exercise which enabled us to offer our case experience, and legal and policy expertise on these matters to support the government officials tasked with devising and shaping the detail of the new Regulations.

Case study 6

The litigation relating to the Detained Fast Track (DFT) brought by Detention Action is in our view an example of why it was only possible to bring the claim in the public interest. Its two claims led to the government accepting that the system was not operating lawfully and, on 2 July 2015, announcing its suspension on the basis that: *'Risks surrounding the safeguards within the system for particularly vulnerable applicants have also been identified to the extent that we cannot be certain of the level of risk of unfairness to certain vulnerable applicants who may enter DFT. In light of these issues, I have decided to temporarily suspend the operation of the detained fast track policy.'* [15]

Bringing the claims in the public interest was cost efficient as the multiple difficulties within the process could be demonstrated through the evidence adduced by Detention Action, avoiding the need for a series of individual claimants with different legal teams bringing claims with the benefit

[13] https://questions-statements.parliament.uk/written-statements/detail/2018-07-12/HCWS853
[14] https://www.legislation.gov.uk/ukdsi/2019/9780111188903
[15] https://questions-statements.parliament.uk/written-statements/detail/2015-07-02/HLWS75

of public funding certificates. The litigation enabled the government to recognise that the process was not operating lawfully and to suspend it thereby maintaining the rule of law.

Case study 7

A solicitor from our Immigration Unit represented a client in the joint case of *Gudanaviciene, IS (by his litigation friend, the Official Solicitor), Reis, B, Edgehill, LS (Claimants/Respondents); The British Red Cross Society (Intervener) – v- The Director of Legal Aid Casework and the Lord Chancellor (Appellants) [2014] EWCA Civ 1622, 15 December 2014*.[16] This was a test challenge in six immigration cases which had been joined together as they raised common issues about the operation of the Exceptional Case Funding (ECF) scheme introduced under s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Mr Justice Collins in *Gudanaviciene & Ors v Director of the Legal Aid Casework & the Lord Chancellor [2014] EWHC 1840 (Admin)* quashed the decisions of the Director in each of the cases on the basis that the refusal to grant ECF would breach be a breach of ECHR or EU rights; and found significant parts of the Lord Chancellor's Guidance ('the Guidance') was unlawful.

The Court of Appeal significantly upheld that judgment, ruling that the Lord Chancellor's guidance on ECF was unlawful, leading to the publication of new guidance in June 2015.

To assess the impact this change has had: in 2013/14, only 4 out of 234 applications for ECF for immigration cases were granted; in 2019/20, 2,035 out of 2,525 applications for ECF for immigration cases were granted.[17]

26 Oct 2020

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[redacted]

[16] https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/1622.html&query=gudanaviciene&method=boolean
[17] Legal Aid Agency (Sept 2020) Legal aid statistics quarterly, April to June 2020. Exceptional case funding, Table 8.2