Amnesty International UK

Submission to Independent Review of Administrative Law (IRAL)

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THE PARAMETERS AND PURPOSE OF THIS REVIEW

1. Amnesty International UK welcomes that consultation by the Independent Review of Administrative Law (IRAL) has been opened to a broad range of interested parties. Such breadth is appropriate given the importance and complexity of the issues in question – including to the protection of human rights. However, we believe there are legitimate questions about the need for (and framing of) this Review, its Terms of Reference ('ToR') and the Call for Evidence ('CfE').

2. In particular, the ToR, and CfE seem to be premised upon a deeply problematic assumption that the ability to challenge government action through judicial review has a disproportionate and negative impact on effective governance. That assumption comes through not only in the focus of the Review on a supposed "*balance"* between the ability to challenge the lawfulness of executive action and effective governance, but also strongly in the framing of the questions to government departments and the nature of the evidence there requested. Indeed, the entirety of the first (and most comprehensive) question is directed to seeking as much evidence as possible as to whether various "*aspects*" of judicial review (including the important elements of lawfulness of any government decision, and surprisingly, the "*time taken*" to "*mount defences*") "*seriously impede the proper or effective discharge of central or local governmental functions?*". These are not open, neutral questions. Rather, they appear in large part designed to elicit evidence to substantiate the assumption underpinning the stated focus.

3. It is troubling that there is no similar direction to the Panel to consider any burden, harm or obstruction experienced by individual members of the public or those acting in the public interest who may need to use judicial review. Despite one question asking whether there are any "*improvements*" that could be made to the law on judicial review, this is specifically framed as asking about any areas "*not covered*" by the first question - that on impediments to effective governance - and in light of the ToR. The latter do not in any discernible way invite comment and evidence on the way the system works well. There simply does not appear to be any ambition (demonstrated through any similarly specific questions) to secure or improve the capacity of such individuals and public interest actors to protect themselves or others from unlawful executive action and ensure that it government is held to account for any failure to respect the limits of what is permitted to it by the law.

4. We are also concerned that this starting point for the IRAL's terms of reference and call for evidence seeks to delimit the legitimacy of those pursuing judicial review action to 'citizens'. Citizenship is not and cannot be the basis on which a right to seek judicial review is predicated.[1] Judicial review is the process by which the lawfulness of executive conduct is determined by the courts, by which public wrongs are righted on application of an appropriate claimant - not an entitlement attached to an individual's citizenship.

5. Beyond these primary concerns, we cannot but note the large disparity between the proposed ambit of the IRAL's review and the resources and timescale made available to it. The topics the IRAL has been given in its terms of reference are all complex and fundamental to the way

[1] Not solely, but perhaps most acutely given that the executive now has powers to strip individuals of their citizenship. See s.66 Immigration Act 2014; and S.40 British Nationality Act 1981

administrative law is conducted in the UK. At the very minimum, attempting to constrain the way it is conducted is highly contentious. Whatever decisions are made on these topics will have the potential to lead to very wide-ranging consequences across government and society as a whole. Done with appropriate thoroughness, any one of these questions would make (far) more than sufficient work for an independent review panel such as the IRAL, with the resources available to it and operating in the time scales that have been announced by the Lord Chancellor.[2] Without in any sense wishing to denigrate the expertise and experience of the chosen panel, it simply does not seem feasible for reforms of the scale and gravity contemplated by the terms of reference to be properly considered in the present framework.[3]

6. Moreover, we note the absence of any proper or clear justification for initiating this Review. The ToR do not explain what problem it seeks to address, nor what solution the government has in mind. There are myriad inferences that can be drawn from the ToR, CfE and statements made by Ministers as to what motivated this Review to be initiated, but little clarity or transparency. There are even perhaps more profound questions to be asked about the legitimacy of a review of this nature being commissioned by the executive in the first place. The constitutional settlement is that Parliament makes law, the courts are the final arbiters of what is the law, and the executive is to perform its functions and responsibilities according to the law. In this, the executive is accountable to both Parliament and the courts. It is deeply troubling for the executive to seek to undertake or commission an inquiry into the means by which it is to be held to account by the courts for compliance with the law as ultimately made by Parliament (or as regards the common law, as governed by Parliament given its authority to amend that law).

7. This is not the first review of administrative law of recent years, nor the first to appear informed by a misplaced belief that judicial review is somehow an impediment to good governance, and/or widely abused. We all recall the 'Proposals for Reform' and subsequent 'Proposals for further reform'[4] of 2013, for example, and the then Secretary of State for Justice Chris Grayling's statements there claiming, *inter alia,* that "*judicial reviews are brought by groups who seek nothing more than cheap headlines*" and "*the Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate or discourage legitimate executive action*" – a characterisation we continue to believe is wholly unevidenced, and which nevertheless resulted in the removal of legal aid pre-permission, something which has had a significant negative impact on access to justice.

8. Criticism or complaint by the executive about judicial constraint upon its exercise of functions and powers relating to nationality, immigration and asylum for example, is not new. For many years it has consistently taken the form of wishing to remove or reduce the capacity of the

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[2] https://hansard.parliament.uk/Commons/2020-09-01/debates/20090123000007/AdministrativeLawIndependentReview?highlight=%22independent%20review%20of%20administrative%20law%22#contribution-A9D6069C-2358-48F9-B644-3C00F643A58C

[3] We note, for example, that Lord Woolf's, admittedly wider ranging, consultation on improving access to justice and reform of what would become the Civil Procedure Rules took two years to be published, had a staff of sixteen and a range of high level expert working-groups. See *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the civil justice system in England and Wales*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf

judiciary to hold the executive to account before the law. Over the last two decades, the most extreme of several policies proposed and pursued were, firstly, the introduction by the Blair administration (David Blunkett's Home Office) in the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003-04 of a measure to oust the higher courts from all appellate or review authority in respect of any immigration or asylum decision or function; and, secondly, the making of a draft order by the Cameron administration (May's Home Office; Grayling's Ministry of Justice) under delegated powers created by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to exclude all non-British citizens from legal aid for any matter (that is any matter of law, not merely one concerning nationality, immigration or asylum) save for their having completed 12 months lawful residence in the UK and/or to assist with a claim for asylum. The former was ultimately withdrawn from the Bill and the latter was unanimously declared unlawful by the Supreme Court, sitting as a panel of seven in *R (PLP) v Lord Chancellor* [2016] UKSC 39.

9. This review also takes place against a backdrop of an apparent increase in government attempts to transfer power to itself from Parliament and set itself and its agents above the law. By increasingly legislating for Henry VIII powers amongst growing concern about the capacity of Parliament to effectively scrutinise the making of secondary legislation, the government is increasing its powers at the expense of the legislature. By way of example, in connection with the Immigration and Social Security Coordination (EU Withdrawal) Bill, now near the end of its parliamentary passage, Lord Pannick (after setting out the trenchant criticisms of the Constitution Committee and of the Delegated Powers and Regulatory Reform Committee) said: *"This Bill is far from unique in seeking to confer excessively broad powers on Ministers. The Constitution Committee has repeatedly drawn attention to the need for effective limits on delegated legislation, to ensure ministerial accountability to Parliament. I am pleased that Members of the House of Commons, in the last few days, have begun to recognise the dangers of such legislation, not least because, when regulations are brought forward, they are unamendable. The unacceptable breadth of provisions such as Clause 4 in this Bill is, I regret to say, typical of a Government who, too often, see Parliament as an inconvenience rather than the constitutional authority to which the Government are accountable*." (Hansard HL, 30 September 2020 : Col 206). Moreover, from the obvious disregard for international law in the Internal Markets Bill, to the effective statute of limitations for torture, war crimes and other abuses committed by the military overseas contained in the Overseas Operations Bill, to the provisions of the Covert Human Intelligence Sources Bill which (in contrast to the existing policy) would render criminal actions by government agents 'lawful for all purposes' and the ongoing threats to 'opt-out' from the HRA or extraterritorial provisions of the ECHR, we are concerned at what looks – alongside this review – like attempts to increase the power of the executive at the expense of the normal constitutional settlement.

10. Regrettably, we are left to conclude that whatever the intention, skill, experience and independence of the Panel members, this is not a properly neutral process established to work out the best way to address any failure or dysfunction of the present system, but one underpinned by a desire further to reduce the ability of the Courts and those applying to them to check executive power.

11. Beyond these overarching concerns, in this submission Amnesty International UK will focus primarily on topic 4 of the ToR - the question of whether procedural reforms to judicial review

are necessary to "*streamline the process*", as this is the issue on which we are best placed to comment in detail.

12. Before we address those specifics, however, we wish to be clear that in our view, judicial review remains critical to the proper functioning of a stable, fair and rights-respecting democratic society. It is fundamental to the rule of law and separation of powers that the public are able to hold the executive to account for the lawfulness (or otherwise) of its actions, through the independent judicial system.

13. Judicial review acts to resolve ongoing unlawfulness affecting an individual, or a system, and more broadly to protect rights and ensure checks and balances and accountability in the operation of government. That a government may on occasion find this inconvenient or that it may sometimes prevent the pursuit of particular policy goals is the inevitable outcome of effective oversight. Judicial review also operates to ensure better decision making (the awareness of the possibility of judicial review constituting an incentive to act properly and carefully, and its operation helping to set the boundaries), clarity in the law and parliamentary sovereignty. The courts act to uphold the will of parliament, ensuring that the actions of the executive are in accordance with the laws it makes. That is what a functioning democracy requires. As Lord Neuberger explained recently, in considering cases this particular executive appears to have been particularly troubled by:

    > "*in both Miller 1 and Miller 2 the courts were standing up for parliament; standing up for democracy; standing up for the people against an over-mighty executive. And far from being the enemies of the people, in each case the courts were the friends of the people, standing up for democracy*."

14. Indeed it is Amnesty International UK's experience, as detailed further below, that in numerous important areas of human rights law, policy and practice, judicial review has improved government decision making, righted obvious wrongs and proved fundamental to the protection of ordinary people at home and abroad. If the result of this Review should be proposals that limit the Courts' powers to fulfil that vital role, and protect the government from judicial oversight, that would seriously damage the constitutional fabric of the UK, and the protection of human rights.

15. It is with great regret that we are compelled to make the preceding observations in connection with the IRAL. Our organisation is founded on a commitment to human rights, which necessitates a respect for the rule of law and the proper constraint of government within the boundaries of the law. All too frequently, Amnesty International UK must respond to governments and other actors who show a flagrant disregard for law and the proper constraint upon their power. It is, therefore, deeply concerning to be faced with the present review, initiated by the executive and with these ToR and CfE.

16. Our organisation has chosen to engage with the IRAL notwithstanding our significant concerns, set out above, because the questions the IRAL is discussing will ultimately affect the defence and promotion of human rights in the UK. Rights must be able to be vindicated and enforced or they risk becoming illusory.

PROCEDURAL REFORMS

17. First, on disclosure and the duty of candour - we note that questions of proportionality of disclosure in a given case are already happily accommodated within the current system, making it hard to see how an argument that it is in general overly burdensome could be made out.[5] Moreover, experience has shown that, regrettably, Government departments cannot always be relied upon to abide by their full duties regarding candour and disclosure even under the present regime.[6] It does not seem that there is a case for loosening those duties.

18. Second - given our organisation's experience and function, our primary concerns on process and procedure relate to the possibility of further restrictive changes to the rules on standing, and on costs and intervention. Amnesty International UK only very rarely acts as a claimant in the UK courts, more often applying to assist the court as a third party intervenor, particularly on matters of international human rights law and where we have specific research of importance to the issues in play. Neither is something we undertake lightly. Like many other civil society organisations, we have a lengthy process for deciding whether or not to bring or intervene in a judicial review claim, which is focussed upon the strength and importance of the case and the arguments Amnesty would bring to the Court's attention.

19. Of course, it is only recently that the Criminal Justice and Courts Act 2015[7] was brought in, shifting the costs risks for intervenors in judicial review. Concerns around the passage of that Act included that imposing greater costs risks on civil society organisations (CSO) claimants or interveners would effectively be to use a financial obstacle to impede the resolution of questions of justice. We can confirm that it is our experience that the risk of significant costs for seeking to assist the Court in reaching the correct understanding of the law cannot but be of serious concern and play a role in deciding whether to bring entirely meritorious and appropriate interventions. There does not appear to be any basis for revisiting these issues here and exacerbating them so soon after the last set of already restrictive changes were introduced.

20. Despite the limited number of times Amnesty has itself acted as a public interest claimant, we are conscious of the importance of the role that CSO can play in this respect, particularly regarding issues of potential violations of human rights and other executive unlawfulness affecting groups who face major hurdles, or are effectively entirely excluded from, accessing justice themselves. Whether or not a given civil society organisation is equipped and appropriate to act as a claimant in a given case is a matter for the trial judge, using the framework currently in place.[8] Rather than the defendant public authority focusing on standing as a technical issue on which to seek to 'knock out' a claim, as frequently happens, and indeed is currently the case in a claim of significant public importance where Amnesty

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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf

[6] See e.g. *Santos, R (on the application of) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin) (23 March 2016); and *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 (27 April 2010)

[7] See S. 87 Criminal Justice and Courts Act 2015

[8] S.31(3) Senior Courts Act 1981; See also *R v HM Inspectorate of Pollution, ex parte Greenpeace (No 2*)[1994] 4 All ER 329; *and R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386

International UK is poised to apply to intervene, the government would be better placed spending its time considering properly whether the policy or decision under challenge is in fact within the law and responding to the merits of the case in hand. As Sedley LJ explained in (*R v Somerset CC ex p Dixon* [1998] Env LR 111):

> "*Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power*"

21. In our work with other civil society organisations we have similarly seen the deterrence effect of cost caps and costs risks for those seeking to bring judicial review challenges. That should also be seen in the context of – particularly for organisations working on women's rights issues such as gender-based violence, and even more so those supporting women with additional protected characteristics – organisations already being overstretched and under resourced.

22. On the question of time limits for bringing claims and on rights of appeal, including on permission, we note that these are already subject to relatively strict controls and in our view there is no reason for these to be further increased. While we can see, in an ordinary case, the need for a general time limit on bringing a claim in the interests of certainty, the time limit is already very (too) short, and the ability for judges to extend the time allowed if the circumstances require it is fundamental to the interests of justice and of ensuring that rights are respected. Appeals against negative permission decisions, meanwhile, have proved to be crucial in a number of important rights-affecting cases, particularly those that go on to progress the development of the law.[9]

JUDICIAL REVIEW AND HUMAN RIGHTS

23. Of significant concern to Amnesty international UK is the spectre of this review leading to a narrowing of access to or operation of judicial review. We believe it is important to bring to the Panel's attention some key examples of how judicial review has protected and promoted human rights and ensured better - lawful - government decision making.

<u>Arms and strategic export controls.</u>

24. In the field of arms export controls and related regulations on a range of strategic goods, Judicial Review challenges (both those which have progressed to hearing stage and those that have not) have provided a vital check on government decision making, and ensured clarity and proper understanding of international and domestic law in the field. Decisions on export licensing have the potential to affect the lives of millions of people overseas, whose rights are directly threated by any misuse of weapons, policing and security equipment and related technology. They also can threaten regional and even global peace and security. Of course, decisions under the licensing regime in these areas is often complex. However, the ability of individuals and organisations to challenge such decisions, where appropriate, plays an important role in ensuring that they are taken on the proper basis, meeting our international

[9] See eg *ZH (Tanzania) v SSHD* [2011] UKSC 4

legal obligations. The availability of judicial review therefore plays an important role in the arms export controls system. Indeed, a core lesson from the Scott Inquiry into the role the UK played in arming Iran and Iraq (to the detriment of not just regional, but also global peace and security, with consequences still problematic today) was the need to ensure sufficient checks and balances over government decisions making in the arms and security trade field, to ensure our non-proliferation policy were not only in line with our international obligations but also to issues of wider peace and security. Judicial Review is one of those. Just recently, in a case where Amnesty International UK intervened to assist the Court on a number of key issues of interpretation[10], the Court of Appeal concluded that the government's procedure for granting licences to export arms to Saudi Arabia was unlawful. It had erred in its decision making process around continued supply of arms to Saudi Arabia and its decision to continue supply needed to be looked at again and re-taken on the proper lawful basis. That led not only to a review and re-taken decision in 2020, but also first to a separate urgent investigation of government licensing processes with the Minister acknowledging serious errors in the previous approach to "*sharing internal information within government*" after it came to light that several licenses had been issued in contravention of the court's Order in the judicial review claim[11].

25. In another case relating to export controls[12], the government reversed its position during a judicial review, in an outcome that not only protected human rights, but undoubtedly contributed to its global objectives in opposing the death penalty and eradicating torture. In defending a claim brought by a death row inmate concerning drugs being sourced from the UK that were being used for executions by lethal injection in the USA, the government originally said that it couldn't stop such exports because the drug had legitimate uses – however the Business Secretary then accepted, on seeing evidence in the case that the drug was only being exported for use on death row, that an Order needed to be made controlling exports of the drug. The case therefore helped improve government decision making, ensuring consistency between the export control system and wider government policy. The UK government is now considered a leading advocate of export controls in this area on the world stage.

26. Initiating Judicial Review procedures can also encourage transparency and help the government resolve controversial issues well before a hearing is reached, bringing much needed transparency to areas of policy that may have been absent. The letter before claim and disclosure stages provide a route for critical public interest issues to be examined in a way that protects the integrity of the wider system for the government. For example, the way government arms export licensing data is managed often makes it impossible from the outside to determine whether or not it is applying the correct risk assessment process during the licensing stage. In responding to a letter before claim, the government has an opportunity better to explain its rationale behind any specific decisions that publication of data itself cannot fully determine. It provides a vehicle for the government to provide reassurance in cases of high public interest that it is following the correct rules. One such an example is

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[10] *R (CAAT) v SSIT* [2019] EWCA Civ 1020

[11] See Ministerial Statement of Elizabeth Truss and related parliamentary questions 26 September 2019 Hansard Vol 664 https://hansard.parliament.uk/commons/2019-09-26/debates/DDE3B0F3-BAD6-4C34-85E6-B01934962D76/ArmsExportLicences(SaudiArabia)

[12] *R(Zagorski) v SSBS* [2010] EWHC 3110 (Admin)

where data published raised clear concerns that the UK was providing significant military equipment to Israel for use by the Israeli government in Gaza and the occupied Palestinian territories in contravention of its own licensing criteria relating to human rights and international law. Through disclosure, documents which were subsequently published by the claimant - the government clarified that the scale was significantly smaller than more generic reporting indicated, adding greater transparency and understanding of government decision making in complex cases.

Business and Human Rights

27. Judicial review has also been of enormous value in combating unlawfulness and improving decision making in the realm of business and human rights. For example, in a key case in 1995, the decision of the foreign secretary, Douglas Hurd, to give £316 million in aid to Malaysia for a hydroelectric project (the Pergau Dam) was challenged in the High Court by the World Development Movement[13] ('WDM'). This was a ground-breaking case that has positively influenced the direction of the UK's development aid policy ever since.

28. WDM claimed that the aid was disbursed in order to secure the UK's political and commercial relations with Malaysia and that the decision to do so was unlawful. In its landmark judgment, the court accepted that the decision was ultra vires the Overseas Development and Co-operation Act 1980, which at that time governed development aid.

29. According to the judgment, if the money had been spent for sound development purposes, it would have been appropriate for the Foreign Secretary to have other considerations in mind, such as political and economic considerations. However, in the view of the court the project was *"so economically unsound that there is no economic argument in favour of the case*"(Rose LJ). The willingness of the court to extend judicial review to development assistance may have once been seen as a big step, but in truth, by simply confirming the government had overstepped its powers conferred by Parliament, the Court was performing its usual task of ensuring Parliament's supremacy.

30. This led to important changes in the legal framework governing development assistance, improving government action. Before Pergau Dam, development aid was the responsibility of the Overseas Development Administration ('ODA'). The ODA formed part of the Foreign Office and the minister responsible for development was the Secretary of State for Foreign Affairs. After the criticisms levelled at the ODA in the Pergau case, it was felt that the creation of a new ministry responsible for development would shelter aid from political interference and so end 'tied aid' to contracts for British firms. The aim was to provide development work with greater capacity to defend itself against political pressure in the way the ODA had not been able to do when it had come under pressure to use the aid budget to make possible an arms deal. This case therefore led directly to the creation of DfID as a separate Government Department, a major and important step forward in better decision making heralded as enabling the UK to become a world leader in development assistance, and a structure that lasted until the (very) recent merger with the Foreign and Commonwealth Office.

[13] *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*, [1995], 1 W.L.R, 386

31. More recently, in July 2014, a case for judicial review brought against the Secretary of State for International Development by an Ethiopian national known as Mr O passed the permission stage[14]. The claimant alleged that the Department for International Development (DfID) had failed adequately to assess evidence of human rights violations in Ethiopia to which it was said funds provided by DfID under the Promotion of Basic Services ('PBS') Programme had contributed. Warby J ruled that the claim was properly arguable and merited a full hearing. Shortly afterwards, on 26 February 2015, DfID announced that it was terminating its support for the PBS programme. DfID's statement emphasised that its decision to withdraw from support was unconnected to permission being granted for a full hearing of Mr O's claim. However, by ending their support for the project before the full hearing, it is our belief that this was in truth an acknowledgment that the project was unsound which would not have happened had the case not been brought.

32. The judicial review challenge against the Secretary of State for International Development, Justine Greening claimed that despite being aware of allegations of abuse and being asked to investigate them, DfID had unlawfully failed properly to assess whether UK aid had been used to carry out forced villagisation. It was alleged that DfID had failed adequately to monitor how its funds were being used. Seeking permission for full judicial review, Mr O claimed that DfID *'had failed adequately to assess Ethiopia's compliance with its human rights obligations which was a pre-condition for receiving British aid money'*. Thereafter, Leigh Day Solicitors, representing Mr O, sought specific disclosure of the documentation relating to assessments carried out by DfID.

33. In the meantime, DfID's partner in the relevant Ethiopia programme, the World Bank, had agreed to consider allegations of human rights abuses associated with the PBS in response to a request by representatives of the Anuak people[15]. In early 2015, the findings of the World Bank Inspection Panel charged with investigating the claims was leaked to the media. The panel had found '*an operational link*' between the PBS programme and the Commune Development Programme. It also found that the World Bank had neither carried out sufficient investigation into this nor taken action to mitigate the risk of human rights abuses. A month later, DfID announced that it would be ending all funding to the PBS programme, in which it had by now invested £745 million. Leigh Day responded by ending the judicial review action. The O case is widely viewed as a significant development in the accountability of the UK for its aid. It signalled the apparent willingness of the court to grant judicial review of an aid decision. Although O did not proceed to a full hearing, the judgment of Warby J granting permission for judicial review is thorough and detailed. As such, it presents an important opportunity to consider, for the first time since Pergau Dam, the approach of the courts to accountability for the Department's aid decisions.

34. In another claim, which straddles arms and business and human rights, the bringing of a landmark judicial review claim against the serious fraud office for dropping its investigation into alleged bribery by BAE systems in Saudi Arabia[16] is widely acknowledged as having led to greater scrutiny and to the UK Bribery Act being brought into law. Although the (deeply

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[14] *R (O) v Secretary of State for International Development* (14 July, 2014)

[15] https://www.inspectionpanel.org/panel-cases/protection-basic-services-program-phase-ii-additional-financing-and-promoting-basic

[16] *R(Corner House) v SFO* [2002] UKHL 60

disturbing) case lost in the (then) House of Lords, it significantly improved UK decision making. It lost, importantly, not because the Court disagreed that the SFO Director has dropped the case under "*extreme pressure*" from Saudi Arabia, but because his decision to do so was ultimately decided to be lawful, though not felt to be a simple conclusion. As Baroness Hale explained, while pointing out that BAE were the target not Saudi, and had also attempted to dissuade the SFO themselves:

> *52. I confess that I would have liked to be able to uphold the decision (if not every aspect of the reasoning) of the Divisional Court. It is extremely distasteful that an independent public official should feel himself obliged to give way to threats of any sort. The Director clearly felt the same for he resisted the extreme pressure under which he was put for as long as he could. The great British public may still believe that it was the risk to British commercial interests which caused him to give way, but the evidence is quite clear that this was not so. He only gave way when he was convinced that the threat of withdrawal of Saudi security co-operation was real and that the consequences would be an equally real risk to "British lives on British streets". The only question is whether it was lawful for him to take this into account. [57]…although I would wish that the world were a better place where honest and conscientious public servants were not put in impossible situations such as this, I agree that his decision was lawful and this appeal must be allowed."*

35. The case greatly increased public and government awareness and understanding of bribery and corruption in this area, and of the UK's international obligations. It is widely believed to have been a major spur to the UK finally legislating in this area, after (among others) OECD criticism of the case, with the government introducing a draft Bribery Bill in 2008 that became law in 2010 (reference to the BAE /Saudi allegations can be seen, for example, in evidence given to the Joint Committee scrutinising the Bill[17]). As such, it is widely regarded as having exposed many problems in the UK's previous enforcement of anti-bribery law, and the need for new legislation.

<u>Nationality, immigration and asylum policy</u>

36. Over the years, judicial review has been of particular importance in these policy areas. It is often complained that the volume of judicial review claims brought in these areas has been especially high. However, this reflects several critical facts:
    i. The executive has long been especially active in these areas.
    ii. Its actions in these areas tend to be to the obvious and profound detriment of the people affected – e.g. excluding people from work, from housing, from healthcare, from financial support, from permission to enter or stay in the country, from remaining or being with their family (including their children and their partners), from remaining at liberty and from remaining in the country (including where they have lived here for many years, sometimes all or near all their lives and where they have homes, families and strong connections; or where they face persecution or other serious harms elsewhere).
    iii. The executive's actions in these areas may be unhelpfully informed by the wide license that has been granted to it to excuse itself (and self-regulate that excusal) from

[17] For example, see references in evidence 2009 https://publications.parliament.uk/pa/jt/jtbribe.htm

various public and other duties, particularly equalities and data protection duties (the executive has been granted various exemptions from these statutory duties[18]), which may provide greater encouragement to Ministers and officials to disregard or fail to acknowledge the full and true impact of policy and its implementation in these areas.

iv. The people affected by these actions are in large part people who are not enfranchised in the UK (they are also people who are in principle enfranchised but whom are wrongly treated as not, including British people wrongly treated as without British citizenship or wrongly deprived of their right to register with that citizenship) and thus the executive may be more encouraged towards excess in its actions precisely because it is not directly accountable to these people in the same way as individuals who can vote.

v. As has been expressly admitted by Ministers in response to the Windrush scandal (*Hansard* HC, 16 April 2018 : Col 28 *per* Amber Rudd; 21 July 2020 : Col 2020 *per* Priti Patel), the executive in these policy areas has tended towards indifference to the people affected by its actions.

vi. The executive, perhaps for reasons related to the foregoing, has been especially prone to refusing to change or remedy its actions without those affected needing to bring a judicial review claim (and it has long and frequently required litigation to be pursued up to the point immediately prior to the court making a decision on permission for the claim to be brought or to the point of the grant of that permission; at which point it has often then agreed to review or remedy its action thereby avoiding a ruling on the legality of its action)[19].

vii. The executive has long shown an incapacity or unwillingness to change its behaviour in response to rulings of the courts that its actions are unlawful (or its own concessions as to this), thus necessitating one judicial review to be brought after another by individuals subject to the same wrongs[20].

37. All of the above must be considered in the context of the significant increase in power given to or taken by the executive in this area coupled with the significant reduction and constraint upon remedies available to individuals wronged in the exercise of that power. Some of this has been specifically licensed by Parliament. Nonetheless, the impact of removing or curtailing

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[18] Paragraph 4 of Schedule 2 to the Data Protection Act 2018; and Part 4 of Schedule 3 and paragraph 2 of Schedule 18 to the Equality Act 2010

[19] This was e.g. the cause for the court's considerations of costs in *R (Bahta & Ors) v SSHD* [2011] EWCA Civ 895; is consistent with information received from practitioners; and is consistent with what is said by the Public Law Project in their submission of October 2020 to this review.

[20] The matters addressed in *R (ZO) & Ors v SSHD* [2010] UKSC 36 concerning permission to work for people awaiting decisions on fresh claims for asylums provide one example for, while the Secretary of State pursued appeals against rulings that her refusal to provide for such permission after delays in determining fresh claims was unlawful, nothing was done to address the continuing unlawfulness of the Secretary of State's position necessitating individual claims from many other individuals deprived of their rights. Another example is provided by *R (Lumba & Ors) v SSHD* [2011] UKSC 12; as particular identified in the factual findings in the High Court judgment in *R (Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin) showing that the Secretary of State had maintained over a substantial period an unpublished policy under which she exercised her powers to detain, which policy had only been revealed by judicial review litigation in a number of cases including *R (Lumba) v SSHD* [2008] EWHC 2090 (Admin), in which the judge recorded that, "*At the hearing I was faced with the extraordinary situation that I was told by* [the Secretary of State's counsel] *that he was unable to inform me precisely what the policy was that was applied*" (paragraph 69).

rights of appeal[21] and access to legal aid[22] is to increase the need for individuals (and public interest litigants) to turn to judicial review. Similarly, increased power and/or use of power to detain or disburse people, or to attempt or carrying out removals or deportation with little or no notice[23] and, more generally, the introduction of complexity by changes to immigration rules and their frequency (which have made it extremely difficult for people, lawyers, courts, or even the executive, to understand what the rules mean[24]) all adds to the need for judicial review litigation.

38. The number of judicial review claims brought in this policy area that have had profound positive human rights consequences for the people affected are too many and varied to do justice in this submission. What follows, therefore, is a short list of some especially significant matters (by which no claim is made that these are of more importance than others not listed, still less that these constitute an exhaustive list of even the most significant matters):
    i. Judicial review has been necessary to bring back to this country people unlawfully removed from it to places where they have suffered or been put at risk of suffering persecution and torture[25].
    ii. Judicial review has been necessary to prevent people being removed to such places[26].
    iii. It has been necessary to end policy and practice by which people seeking asylum in this country have been made destitute and homeless[27].
    iv. It has been necessary to end the unlawful detention of people,[28] including in circumstances where their detention has been in breach of this country's obligations not to inflict inhuman or degrading treatment upon a person.[29]
    v. It has been necessary to require the Home Office to make public its own policies by which it determines whether people are to be permitted to stay in the country[30] or whether to detain people.[31]

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[21] The Immigration Act 2014 removed the right of appeal against all non-asylum immigration decisions (save for those made on a human rights claim); and the impact assessment (IA No. HO0096, July 2013) on the specific measure expressly identified the likelihood that this would lead to an increase in judicial review claims.
[22] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 largely removed non-asylum immigration matters from legal aid scope.
[23] e.g. *R (Medical Justice) v SSHD* [2011] EWCA Civ 1710; and *R (FB & Ors) v SSHD* [2020] EWCA Civ 1338
[24] e.g. The first paragraph of the Law Commission's introduction to its *Simplifying the immigration rules* report, HC 14, 13 January 2020, reads, "*The Immigration Rules regulate the entry into and stay in the UK of people who are subject to immigration control. They impact on millions of people each year. Yet it is widely acknowledged that the Rules have become overly complex and unworkable. They have quadrupled in length in the last ten years. They have been comprehensively criticised for being poorly drafted, including by senior judges. Their structure is confusing and numbering inconsistent. Provisions overlap with identical or near identical wording. The drafting style, often including multiple cross-references, can be impenetrable. The frequency of change fuels complexity.*"
[25] e.g. *R (BN) v SSHD* [2011] EWHC 2367 (Admin); *R (N) v SSHD* [2009] EWHC 873 (Admin)
[26] e.g. *R (Brown) v SSHD* [2015] UKSC 8, which matter concerned the Secretary of State's policy to exclude a right of appeal against a refusal of asylum on account of the country of origin of the claimant.
[27] e.g. *R (Limbuela & Ors) v SSHD* [2005] UKHL 66
[28] e.g. *R (Agyeikum) v SSHD* [2013] EWHC 1828 (Admin)
[29] Appendix 4 to the *Review into the welfare in detention of vulnerable persons*, Cm 9186, January 2016, a review commissioned by the Home Office, identified six cases where the courts had held the detention of claimants under immigration powers had violated the prohibition of inhuman and degrading treatment under Article 3, Human Rights Act 1998.
[30] e.g. *R (Rashid) v SSHD* [2005] EWCA Civ 744
[31] e.g. *R (Lumba & Ors) v SSHD* [2011] UKSC 12 concerning unpublished policy that contradicted published policy; and *R (Humnyntskyi) v SSHD* [2020] EWHC 1912 (Admin) where the court found that published policy was not being followed on account of unpublished policy.

vi. It has been necessary to compel the Home Office to make its own policies for determining whether people are to be permitted to stay known to and applied by its own decision-makers;[32] and to make known to people decisions it has made which create the conditions, if not addressed by an individual, by which an application by them for further permission to stay must be refused causing them to become in breach of immigration laws.[33]
vii. Judicial review has been necessary to ensure the department's consistent application of its own policies to determine whether people are to be permitted to stay, including in relation to people seeking asylum,[34] victims of domestic abuse[35] and of people and families long resident in the UK.[36]
viii. Judicial review has been necessary to require the department to give effect to the decisions of the immigration tribunals.[37]
ix. Judicial review has been necessary to remove exclusions from rights to British citizenship and prevent the deportation of British people entitled to that citizenship to places they do not know and have never been.[38]
x. Judicial review has been necessary to compel the Home Office or Passport Office to confirm facts known to it and act on those facts which in turn confirm a person to be a British citizen.[39]
xi. It has repeatedly been necessary to ensure any regard, let alone a primary regard, is given to the rights and circumstances of children affected by Home Office rules, policy and practice.[40]

39. As such, it is abundantly clear how important judicial review is for this area of policy and decision making, and how without it, there would have been no proper remedy for numerous breaches of human rights, and significant unlawfulness. If there are ongoing concerns as to the number of judicial review claims in this area then the remedy is not to restrict access to the courts, but for the executive to seek to improve its decision making, dramatically improve the structure and functioning of the nationality, immigration and asylum systems, and ensure it prioritises lawfulness over political and other expediency.

Rights or women and girls

40. Gender inequality is pervasive in society, and while the UK has many laws in place designed to protect against such discrimination, the reality is that systematic discrimination persists

[32] e.g. *R (Rashid) v SSHD* [2005] EWCA Civ 744 where the court held, "*The failures in the Home Office in this case were startling and profound.*" Those failures were not to apply the Secretary of State's policy, which if applied would have required the claimant (and many others in his position) to be granted asylum; and to make representations before tribunals and courts in contradiction of that policy.
[33] e.g. *R (Pathan) v SSHD* [2020] UKSC 41
[34] e.g. *R (Rashid) v SSHD* [2005] EWCA Civ 744
[35] e.g. *A v SSHD* [2016] CSIH 38; *R (OGA) v SSHD* (CO/1734/2017)
[36] e.g. *Hoque & Ors v SSHD* [2020] EWCA Civ 1357
[37] e.g. *R (S & Ors) v SSHD* [2006] EWCA Civ 1157
[38] e.g. see the summary of the Human Rights Committee, *Proposal for a draft British Nationality Act 1981 (Remedial Order) 2018*, Session 2017-2019, May 2018
[39] e.g. *R (RM) v SSHD* (CO/5234/2016)
[40] e.g. *R (Suppiah & Ors) v SSHD* [2011] EWHC 2 (Admin) concerning the unlawful detention of children; and *R (PRCBC & Ors) v SSHD* [2019] EWHC 3536 (Admin) concerning the effective deprivation of children's rights to British citizenship by a prohibitive and unaffordable fee (including where one of the claimants would and should have been born a British citizen but for a human rights incompatibility of the British Nationality Act, both declared by the court and thereafter conceded by the Secretary of State).

and continues to result in adverse outcomes for women in many areas of life. Regrettably, the very nature of gender inequality can mean that women affected by such outcomes – by discrimination, as well as by gender-based violence, find that their situations are considered of lesser importance and value. Unfettered access to justice is therefore critical to ensuring their rights are protected, with challenges helping also to further legal and societal understanding of what it takes to achieve substantive equality, as defined in the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW'). Regrettably, the changes made to legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have already significantly damaged access to justice, in a way which Amnesty International found in its research for the report 'Cuts that Hurt'[41], disproportionately affected vulnerable groups, including women (as the equality impact assessment had predicted).

41. There are numerous judicial review challenges that have protected the rights of women and girls, all routes of last resort when other routes have failed. For example, it is widely understood that violence against women is still under investigated in this country, and rape attrition rates are abysmal. This July, a small women's charity was granted permission by the Court of Appeal to challenge the Crown Prosecution Service (CPS) rape charging policy and practice, arguing systemic illegality. That challenge[42] seeks to bring to light an alleged covert policy change, which they say meant that in 2016-17 prosecutors were encouraged not to charge so called "*weaker cases*" with the aim of improving their conviction rate, and which led to a disastrous fall in rape prosecutions. This case, like so many similar challenges, has the potential not only to shed light on what may be shown to have been an unlawful approach, remedying that wrong, but also to improve the protection of the rights in the future.

42. Similarly, after a judicial review of the decision of the parole board to direct the release of the convicted serial rapist John Warboys, and such decisions in general, significant improvements were made to the parole system as a whole. The High Court had concluded that in the case before them, there was further inquiry which the Parole Board ought to have carried out or instigates, as they could not be confident that material would make no difference to the outcome. As such the case as remitted to a re-hearing and encouraged to include someone with judicial experience. Further, the court ruled that Rule 25(1) of the Parole Board Rules 2016 (prohibiting the making public of information about proceedings before the Parole Board or the names of persons concerned in proceedings) was ultra vires the relevant parent legislation, with it being for the Secretary of State then to decide how it should be reformulated (if so minded). This led not only to immediate improvements such as removing the ban on disclosing information about decision making (with hundreds of decision summaries following) and new Guidance being issued making clear that relevant past offending should be included in the dossiers submitted to the Parole Board and considered as part of the hearing, but later – and directly - to *"sweeping"*[43] changes to the parole system itself. Without that Challenge exposing "*a lack of transparency and deficiencies in that case*", as characterised by the government announcing the changes, it is difficult to see how this

[41] https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF
[42] https://www.endviolenceagainstwomen.org.uk/court-of-appeal-grants-permission-for-judicial-review-of-cps-rape-policy-womens-groups-delighted/
[43] https://www.gov.uk/government/news/new-improvements-to-parole-board-transparency-and-victim-support

would have happened[44]. This case therefore not only protected the rights of Warboys' apparent victims, but also led to significant positive changes to the system overall.

43. Judicial review has also played a crucial role in bringing women's rights in Northern Ireland in line with the rest of the UK through the decriminalisation of abortion. In 2018 the Supreme Court ruled that the near total ban in that country was a violation of Article 8 of the European Convention on Human Rights. Five out of seven judges at the UK Supreme Court ruled that Northern Ireland's abortion law breached Article 8 of the European Convention on Human Rights by not allowing abortions in cases of rape, incest or fatal foetal abnormalities. Lord Mance stated the law is 'untenable' and in need of 'radical reconsideration' due to the 'ongoing suffering' it causes[45]. The Court did not issue a declaration of incompatibility because a majority of judges did not agree that the Northern Irish Human Rights Commission had standing to bring these proceedings before the Court, as it was not itself 'victim' of an unlawful act. However, the Court made clear the unlawfulness of the Northern Irish law vis-à-vis international human rights standards. Following the Supreme Court judgement, the High Court in Belfast ruled on the case of Sarah Ewart, who, following a diagnosis of fatal foetal abnormality, had to travel to England after being denied an abortion finding that abortion law in Northern Ireland was incompatible with Article 8 of the European Convention on Human Rights ("ECHR") in relation to fatal foetal abnormality[46]. This highlighted the unlawfulness and helped to demonstrate how untenable the existing position was, influencing the change in the abortion laws in Northern Ireland which followed.

Protecting rights

44. There are a large number of other areas of policy making where judicial review has proved an important safeguard on human rights. In respect of privacy rights, for example, in just one such area, there have been a number of judicial reviews that have ensured rights were protected. In a case called *T v. Chief Constable of Manchester* [2013] 1 WLR 2515, the Courts upheld a claim by a young aspiring teacher that it was unlawful for him still to have to disclose and explain his conviction as an 11 year old child for bike theft (he had no other convictions) to his employer. This led to critical changes to the criminal records check system designed to avoid such irrelevant offences following individuals for the rest of their lives[47]. It was followed by *P v. Secretary of State for the Home Department* [2018] 1 WLR 3281 where a woman successfully challenged the replacement (also problematic) law requiring disclosure of multiple offences (said to amount to a 'pattern') on any applications she also wished to make as a teacher, after being convicted for shoplifting a book, and separately of not turning up to Court, despite her undiagnosed schizophrenia and unwellness at the time. These created important positive changes for those in similar positions, and yet were defended by the government in Court (in the case of *T*, despite having conceded the law needed to change).

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[44] The Minister directly linked the two, saying "*Taken together, these reforms will help ensure that the mistakes made in the John Worboys parole case would not happen again. We owe that to victims, and I am determined to rebuild society's trust in this system*." Ibid.

[45] https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

[46] https://www.lawsoc-ni.org/summary-of-judgment-in-re-sarah-jane-ewart-abortion-ffa-031019

[47] It was followed by P *v. Secretary of State for the Home Department* [2018] 1 WLR 3281 where a woman successfully challenged the replacement (also problematic) law

45. Further, in a recent judgment of the Court of Appeal[48], the Courts considered a challenge to the lawfulness of the use of live automated facial recognition technology by the South Wales Police Force in an ongoing trial, where an individual claimed he had been caught on camera - once while in a busy shopping area, and then at a protest. The Court found that the police's trial of this novel technology, in circumstances where the vast majority of those whose images were captured and digital information was processed were of no interest to the police, was not in accordance with the law – there was insufficient legal framework (including too much discretion being left to individual police officers). As such, the police trial had interfered with the article 8 rights of the claimant. The police had also, *inter alia*, failed to fulfil the public sector equality duty, in that they had not done everything reasonable to ensure the software used did not have a "*racial or gender bias*" [201]. The Court granted a declaration as to the unlawfulness. This challenge should have an important positive impact on the way any such future trials are conducted, and indeed on how the technology is (if at all) rolled out elsewhere.

46. Privacy is not the only area where judicial review has been critical to protecting the rights of ordinary people in the UK. And there are many, many cases that have transformed the lives of individuals, where judicial review has proved the only way to ensure government (including local government) meets its obligations under the law. Many of these will never enter the public arena, as they are insufficiently high profile to generate much coverage, yet are of profound importance to individuals. For example, in 2011, Jan Sutton, a 46 year old woman with multiple sclerosis, challenged a social care decision by Norfolk County Council that had left her effectively trapped in bed, bringing a judicial review claim after being left in a situation she called "*utterly degrading and dehumanising*"[49]. After securing the level of care she was properly entitled to in an out of court settlement[50], Jan's life "*improved immeasurably*". She believed that was the result of the threatened Court action (for which permission had been given) and became a dedicated and passionate campaigner for human rights law and justice for the rest of her life.

47. These are just three examples. There is no shortage of others. From transforming the law on inquests to ensure that families like those of the Hillsborough victims are given proper answers, to challenges to police failures properly to investigate rape claims, to challenges to unlawful detention without proper trial of non-nationals, judicial review works every day to protect the rights of ordinary people and ensure government works itself to do that, improving its decision making. Access to the law, and to this critical protective mechanism, has already been significantly curtailed. Amnesty International UK hopes that the only changes to judicial review that this Review will result in are those which will ensure that it is more accessible and efficient itself. If there are concerns about the number of judicial reviews that the government decides to devote resources to defend, then the appropriate remedy for that is to improve the quality of decision making, including the decision of which challenges do indeed require defence rather than acknowledgment of a need for change.

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[48] *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058

[49] https://www.eveningnews24.co.uk/news/tributes-paid-to-norwich-disability-campaigner-jan-sutton-1-5128239

[50] http://jansutton.blogspot.com/2012/08/sutton-v-norfolk-county-council.html