THE JOINT COUNCIL *for* THE WELFARE OF IMMIGRANTS

Response to Independent Review of Administrative Law

Chai Patel, Nicola Burgess & Ellen Fotheringham

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Introduction

The Joint Council for the Welfare of Immigrants ("JCWI") was established in 1967. Our mission is to promote justice, fairness and equality in immigration and asylum law and policy. We do this through:

- Policy work and campaigning;
- Legal advice and strategic casework;
- Media work and information dissemination;
- Providing legal training to practitioners and others; and
- Publication of reference materials.

We have read the submissions to this review of the Public Law Project and the Administrative Law Bar Association and we full support and endorse the points made in those submissions. To avoid repetition, in our evidence we will focus on our experience of judicial review, which is grounded by the needs of our clients and the community we serve. The executive wields great power over those subject, or thought to be subject, to the immigration system. It makes decisions that alter the course of people's lives, separate parents from their children, and where things go wrong, could consign a person to face torture or even death abroad. Many of these decisions may be made with care and in accordance with relevant law. But the consequences where they are not may be catastrophic, and in many cases decisions do not attract a right of appeal. Judicial review is frequently the only remedy for an unlawful immigration decision. As a result our evidence focusses largely on our experience of judicial review, and its interaction with the immigration system and the Home Office.

The immigration system itself is vast and complex. Immigration Rules are written and laid by the Home Secretary, and she exercises that power frequently and with limited oversight. Home Office policies and guidance, both internal for caseworkers, and external for applicants is updated even more frequently. This has resulted in a system that has repeatedly been criticised for its complexity and many judges have expressed concern that they, let alone litigants in person, struggle to understand the Rules. Only this week Lord Justice Underhill remarked in a judgment that:[1]

> "*This Court has very frequently in recent years had to deal with appeals arising out of difficulties in understanding the Immigration Rules. This is partly a result of their labyrinthine structure and idiosyncratic drafting conventions but sometimes it is a simple matter of the confused language and/or structure of particular provisions. This case is a particularly egregious example. The difficulty of deciding what the effect of paragraph 276B (v) is intended to be is illustrated by the facts not only that this Court itself is not unanimous but that all three members have taken a different view from that reached by a different constitution in Masum Ahmed. Likewise, the Secretary of State initially sought to uphold Masum Ahmed – contrary, it would seem to her own Guidance – but, as we have*

[1] *Hoque & Ors v SSHD* [2020] EWCA Civ 1357 para 59

seen, shortly before the hearing executed a volte face. (This illustrates a different vice, also far from unique, that the Home Office seems to have no reliable mechanism for reaching a considered and consistent position on what its own Rules mean.) Of course mistakes will occasionally occur in any complex piece of legislation, or quasi-legislation; but I have to say that problems of this kind occur too often. The result of poor drafting is confusion and uncertainty both for those who are subject to the Rules and those who have to apply them, and consequently also a proliferation of appeals. The Secretary of State has already taken a valuable first step towards improving matters by asking the Law Commission to report on the simplification of the Immigration Rules, and I hope that action will be taken on those recommendations. But the problem goes further than matters of structure and presentation, and I would hope that thought is also being given to how to improve the general quality of the drafting of the Rules."

Since then, despite the Law Commission's recommendations to the contrary, over 500 further pages of Immigration Rules have been laid before Parliament, with no public sharing of the drafts and with only a month to go until they are in force. There is no sign that we will see any of the hoped for improvements any time soon.

In such circumstances judicial review plays an essential role in ensuring that where decisions are being made, crucial to people's lives and fundamental interests, they are made in accordance with law, and that subordinate legislation and policies do not contradict the will of Parliament or the common law requirements of legality. If the executive, which makes the Immigration Rules, writes the policies, and decides cases, were also to be given greater space in which to determine the legality of the same, that would undermine the principle that that people in this country are governed by law, rather than executive diktat. Judicial review in immigration thus operates in the following ways to prevent that eventuality.

However, the current system is far from satisfactory. Too frequently individuals and organisations are prevented from challenging unlawful acts or practices by structural barriers. Lack of access to legal aid, deserts in the UK where there are insufficient practitioners, language barriers, and late access to legal advice in prisons and detention all contribute to a system in which too many unlawful acts go unscrutinised and uncorrected. Organisations are sometimes prevented from bringing challenges with merit, by harsher rules on costs and funding.

Recommendations

1. Immigration appeal rights should be reinstated across the board to ensure decisions are checked by way of a robust appeals procedure, rather than a more limited judicial review;
2. No restrictions are made to the current scope of judicial review;
3. Codification of judicial review is unnecessary, and would likely create the very problems of uncertainty and confusion that it is being proposed to solve;
4. The Legal Aid means test should be reformed to ensure a greater proportion of people are eligible, and to ensure far greater availability of early legal help which would greatly reduce costs further down the line;
5. The changes made by LASPO, reducing the scope of legal aid should be reversed, as early legal help and representation in other matters would reduce the need to resort to judicial review at a later stage;

6. The 2015 Renumeration Regulations relating to civil legal aid should be modified to ensure payment is made to claimant solicitors even where permission is refused. The purpose of the permission stage is to give the court an opportunity to filter out unmeritorious claims, it is not right that those with arguable claims should be deprived the opportunity because many lawyers are not able to fund work at risk;
7. Parties should be permitted to agree extensions of the limitation period to encourage settlement of claims;
8. The duty of candour should be strengthened to ensure that relevant information is disclosed at pre-action stage in order to encourage early settlement;
9. Public bodies abusing the judicial review process by settling a claim and then repeating the error or illegality that led to the claim should be sanctioned by way of a claimant's automatic entitlement to costs on an indemnity basis;
10. The cost-capping regime for public interest claims should be reformed to be more generous to claimants and in particular the courts should be permitted to make a costs-capping order prior to any decision on permission
11. The Home Secretary should pro-actively advise applicants who have had claims refused with no right of appeal, that they may challenge the decision by way of judicial review and of the relevant time limits
12. Consideration should be given to expanding the use of the proportionality test in judicial review claims.

CASE: The Home Office Visa Streaming Tool

A very recent case in which JCWI was involved, which demonstrates the importance of judicial review both to individuals affected, but also the benefits to government that it may bring, concerns the Home Office Visa Streaming Tool, sometimes referred to as the Home Office visa algorithm. The Streaming Tool was designed to increase the efficiency of the processing of visa applications by using a computer programme to stream them into risk categories. Based on the risk score the application would be divided into a red, amber, or green stream. In part the risk was assessed by reference to the applicant's country of nationality.

Applications marked green were sent to certain caseworkers who were expected to process a large number each day, and whose work would be double-checked if they refused an application. Applications marked red were sent to another group of caseworkers who were expected to take more time on each application and whose work would be double checked. The intent was that caseworkers would make decisions in individual applications on the facts and would not be influenced by streaming score assigned or the different time pressures and review processes for each stream.

However, there was evidence that the streaming tool would in fact influence outcomes and that caseworkers were nudged or incentivised by the risk score into being more likely to refuse an application marked 'red' and to be more likely to refuse one marked 'green'. Moreover, because the tool used nationality as a risk factor, this meant that the visa system would be unlawfully discriminating against people because of their nationality. This is race discrimination and is prohibited by Parliament under the Equality Act 2010. In addition, the risk assigned to each nationality was based in part on previous decisions against people of that nationality. Thus any past bias created by the streaming tool, would be fed back into the system and form part of a self-

reinforcing feedback loop. There were also deep flaws with the historic data used to assign risk to particularly nationalities in the first place.

The system was developed in 2015. A 2017 report by the Independent Chief Inspector of Borders and Immigration raised concerns about the system, and in particular the risk that the streaming tool would become a de facto decision-making tool.[2] In 2019 the All Party Parliamentary Group for Africa, and the APPGs for Malawi and for Diaspora, Development, and Migration published a report on the high levels of discrimination experienced by people from African countries making visa applications, particularly visit visa applications, to the UK. It included consideration of the possible effects of the visa streaming tool. However, the Home Office, despite recommendations for transparency by the Independent Inspector, refused to reveal details of how the tool worked, even to Members of Parliament.[3]

JCWI, with expert advice from the technology accountability organisation Foxglove, began pre-action correspondence with the Home Office in early 2020. In response to our pre-action letter, and acting under the duty of candour, the Home Office disclosed information about the operation of the streaming tool. The information disclosed, revealed that nationality was taken into account as a risk factor, and that the tool operated in a way that gave rise to a substantial risk of race discrimination, and racially discriminatory feedback loops across the visa system. Based on this, JCWI issued a claim for judicial review of the streaming tool primarily on grounds that it perpetrated unlawful race discrimination under the Equality Act 2010.

Before any decision had been made by the court on permission, the Home Office responded to our claim and offered to suspend all use of the Streaming Tool, to replace it with a temporary system that took no account of nationality, and to create a new streaming tool, bearing in mind the issues we had raised in our claim. They agreed to pay our reasonable costs, and we withdrew the claim on that basis in August 2020.

In our view this example demonstrates the huge benefits that judicial review brings not just to those affected, the rule of law, and in enforcing the will of Parliament, but also assisting government to correct otherwise hugely costly and dangerous errors. In particular, it shows:

1. The importance of judicial review. In 2019 there were over 3 million visa applications. Over 2 million of them were for visit visas. Between 2015 and 2020 that system was operated using a racially discriminatory process. It was only by way of judicial review that the matter was resolved.
2. The essential role played by the duty of candour. The government had not responded to requests for information about the operation of the Streaming Tool from Members of Parliament or journalists. Nor had it followed recommendations by the Independent Chief

[2] An Inspection of entry clearance processing operations in Croydon and Istanbul, July 2017, Independent Chief Inspector of Borders and Immigration (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631520/An-inspection-of-entry-clearance-processing-operations-in-Croydon-and-Istanbul1.pdf)

[3] Debate on Visa Processing Algorithms, HC 19 June 2019, Vol 662 Col 316 (https://hansard.parliament.uk/Commons/2019-06-19/debates/7B667153-E403-430C-8784-489D90717085/VisaProcessingAlgorithms)

Inspector for greater transparency around the operation of the Tool.[4] The evidence that the Streaming Tool used nationality as a risk factor, and operated in a way that gave rise to race discrimination and discriminatory feedback loops was only revealed under the duty of candour. Complying with the duty was not onerous or costly for the Government, a relatively small number of documents were disclosed, with redactions being made. Moreover, as the disclosure was made during pre-action correspondence the Government was not obliged to make a public disclosure as it might have been if information were sought under the Freedom of Information Act.

3. The benefits to good governance and to the public purse. Every year there are several million visit visa applications to the UK. Tourism, people arriving for business trips, academic conferences, or to attend weddings and family functions. This brings in many billions of pounds to the economy every year. Since 2015 that system had been operating in a racially discrimination contrary to the will of Parliament. The discrimination had been noted publicly, and was damaging the UK's reputation, though the Streaming Tool itself remained opaque. We have referenced the APPG on Africa report above, but we were also aware of growing concerns amongst universities and businesses. The chair of UNESCO announced that they would no longer hold meetings in the UK because of the discrimination in the UK visa system that meant many guests were unable to attend.[5] We heard similar complaints from others including the LSE. The cost of entrenched discrimination within the visa system in terms of lost business, loss of reputation, lost tourism, and other lost spending is incalculable. It also risked undermining the Global Britain agenda of the current government, which is anxious for new trade opportunities around the world. But on any calculation it dwarfs the modest cost of the judicial review claim brought by JCWI, which has brought the error to light, and allowed the government to fix the system without even requiring a court hearing.
4. The obstacles that organisations face in bringing such cases. JCWI is a sophisticated client in such cases. We have extensive legal experience, conduct our own legal aid casework, and have a long history of acting both as a claimant and an intervener in judicial review. Nevertheless, in this case, as in every other such case in which we have been involved, it was a very hard decision to proceed. We were only able to do so because many other experts and groups judged that the case had merit, and justified the risk. This included our advisers at Foxglove, those who donated to fund the work, and our legal team and counsel who operated on a Conditional Fee Agreement. In our experience it is very rare for organisations or what is sometimes termed as 'pressure groups' to bring judicial reviews, and certainly the costs rules and the difficulty of funding representation act as a serious disincentive to any group doing so frivolously. We see far more examples of arguably unlawful policies and practices going unscrutinised because of these difficulties than we do of ill-judged and over-eager claims interfering with the business of government. This is reflected in the relatively miniscule numbers of judicial review brought each year.
5. The importance of the current law on standing, which allow organisations to bring claims on behalf of large groups of people who individually may be unable or unlikely to bring a claim,

[4] https://www.ein.org.uk/news/independent-chief-inspector-borders-and-immigration-calls-greater-transparency-over-way-visa

[5] https://www.theguardian.com/uk-news/2019/jun/24/unesco-chair-blasts-discriminatory-uk-visitor-visa-system

where it is in the public interest to do so. The racial discrimination caused by the streaming tool operated on a systemic level. No individual applicant, denied a tourist visa say, could be expected to be aware of the discrimination, could possibly prove that the discrimination was the determining factor in her individual case, or could justify the time and costs risk of bringing a judicial review in a foreign country as opposed to making other arrangements or making a fresh application for a visa. In the event that any individual had brought such a claim, the Government would likely have sought to settle the claim by granting the visa, at which point it would have become academic, and also pose a significant costs risk to the claimant. That is why mass discrimination, affecting millions of applications, went unchallenged from 2015 to 2020. JCWI's ability to fund investigation, and to pursue the claim in the wider interest, and to absorb the significant costs risk of action was crucial.

Q1: 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?

The overall scope of questioning is directed toward the relatively rare situation in which government departments face judicial reviews affecting matters of policy. Answers to it will not give an adequate picture of the use of judicial review where decisions are made in individual cases, as in social security or immigration. Nor will it shed any light on the wider system of administrative law and justice, of which judicial review is a small but important part.

We are concerned that the questions posed will fail to elicit certain essential information. The effect is of a questionnaire that encourages evidence critical of the use of judicial review, while evidence of its benefits is unlikely to be provided. In particular:

- In suggesting there is a tension between judicial review and the 'ability' of government departments to make decisions, it risks asking government officials whether their lives would be made easier if they were not required in all circumstances to act lawfully. Ultimately within the UK's constitution there is no safeguard to ensure lawful action and to ensure that the will of Parliament is enforced in practice other than scrutiny of decisions and policies by the courts. If with that scrutiny, comes some inconvenience, then that is the price we pay for living in a society ruled by laws, not executive whim.
- It does not ask how departments judge whether or not a decision is or would be correct or effective. If a department is not monitoring or adequately investigating the effects and quality of its decisions or policies it is not in a position to judge whether they would have been or are effective. For example the Home Office has expended considerable legal resource in defending its 'Hostile Environment' policy, but remains entirely unable to provide any evidence that it is effective in achieving its goals.[6] It is pointless to ask departments whether they are hampered in taking effective action, where they have no means of knowing whether the desired action is or has been effective, and they will not put systems in place to judge the same.

[6] Public Accounts Committee, Seventeenth Report of Session 2019 – 21, https://committees.parliament.uk/publications/2633/documents/26242/default/

- It asks only where judicial review has improved the government's 'ability' to make a decision. Judicial review may well make a decision process lengthier, or more difficult, but it has the benefit of ensuring that the ultimate decision is of a better quality and is lawful. Departments should focus on the quality of decision making; the phrasing of the question risks answers that focus on the freedom to make flawed and unlawful decisions quickly and without check.

Many government lawyers would recognise the role judicial review plays in improving the quality of decisions, we are not sure they would necessarily view that is being the same as improving the 'ability' to make decisions. In our experience, far from impeding the functions of government, judicial review is more often the method by which the government is able to recognise and correct errors, and unforeseen consequences of policies early on. It is also a crucial corrective where decision makers have closed their minds to the requirements of law.

Home Office monitoring and learning re. quality of decisions

One example of evidence that we consider ought to have been elicited from government departments, but which is unlikely to be obtained by this questionnaire, is of the quality of decision making within the Home Office and of its ability to learn from the outcomes of judicial reviews and implement that learning in future decisions. Our experience of casework is that judicial reviews are driven by the extremely poor quality of decision making we frequently see from the Home Office, and by the refusal or inability of the department to correct errors unless and until a judicial review is brought.

Case: Victoria – repeated failings & 'cut and paste' refusals

This was the case for our client Victoria, who is a political asylum seeker from Zimbabwe. Her father holds a very senior position in the ZANU-PF government and threatened her life should she ever return to Zimbabwe, owing to her support for the opposition party.

Victoria was largely unrepresented at her initial asylum appeal, and her claim failed in the first instance. After her appeal was dismissed, she received more emails from her father warning never to return to Zimbabwe.

Victoria instructed JCWI to help her make further submissions. By way of new evidence, she submitted the threatening emails from her father, proof of her father's political position in Zimbabwe and an expert report by an academic expert on Zimbabwean society, opining that she faces a real risk of persecution on return.

Notwithstanding the new evidence, her case was rejected twice, on the basis her submissions did not surmount the modest test to be accepted as fresh claim. The Home Office's initial refusal letter was clearly a 'cut and paste' templated for Zimbabwean opposition claims: it failed to make any reference to evidence Victoria had submitted and stated that she had provided 'generic country evidence' and 'no evidence that she had personally come to the adverse attentions of the Zimbabwean authorities.' JCWI issued judicial review proceedings challenging the rejection, which settled at the permission stage after the Secretary of State agreed to reconsider Victoria's claim. The Home Office then issued a second, near identical decision, and a second set of judicial review proceedings took an identical course to the first. In the third refusal letter, the Home Office, now making some reference to the evidence Victoria submitted, accepted her submissions amounted to a fresh claim, allowing her a right

of appeal against the decision to refusal her case on all grounds. The appeal is now ongoing in the First-tier Tribunal: JCWI have advised Victoria that she has a very strong case to be recognised as a refugee.

JCWI's judicial review challenges to fresh claim rejections are consistently resolved in our client's favour, largely by way of consent order.[7] A senior member of our legal team has acted in 31 fresh claim judicial review claims over the last 4 years, 28 of which have settled following a grant of permission and 1 was found in favour of her client following a substantive hearing.

In Victoria's case, and many other cases of this nature we act in, litigation could have easily been avoided had the case been given proper consideration by a decision maker in the first instance: cut and paste decisions, failing to engage with the specific facts of a case or to make any reference to a client's individual evidence are very common occurrences in fresh claim decision making.

JCWI advise several clients every week with through our free advice surgeries and telephone advice lines with strong grounds to make a fresh asylum claim, provided they are given the right support to gather and submit the evidence they need. Owing to our small legal team's limited capacity, we are unable represent the majority of people we advise.

Case: Jason – repeated failings & last minute settlement

Jason arrived in the UK in 1992 as an asylum seeker, fleeing serious torture in the DRC. Jason held Indefinite Leave to Remain in the UK and studied and worked here for several years before his life fell off track as a result of serious mental health problems and addiction issues, which resulted in criminal offending.

While detained under immigration powers at HMP Pentonville, Jason was informed by the Home Office that they planned to take deportation action against him. Unable to find a legal aid lawyer to assist him from prison, Jason initially represented himself: he wrote to the Home Office explaining that he had faced torture in the DRC and feared for his life there and that he suffered from serious mental health issues.

Jason was still detained in HMP Pentonville and weeks away from deportation from the UK when he wrote to JCWI seeking legal support. It was immediately clear when JCWI met Jason that he had a strong case to be granted humanitarian protection in the UK.

JCWI served pre-action correspondence on the Home Office asking that Jason urgently be released from detention and that his deportation be halted in order for his humanitarian protection claim to be considered. We highlighted the risk that Jason faced on return to the DRC and that, as a victim of torture suffering from mental health issues, his detention was unlawful. .

The Home Office refused to release Jason from detention or halt his deportation, and, with deportation now imminent, we went on to issue urgent judicial review proceedings. Their response made no reference to the medical evidence of torture provided, nor the previous judicial finding that he was a victim of torture. In line with Home Office policy, the judicial review proceedings halted

[7] Over the last 2 years, of 12 fresh claim judicial review challenges to fresh claim rejections, 2 have settled at PAP stage, 6 have settled pre-permission, 4 have settled following a grant of permission, and 1 went to a final hearing, at which the Upper Tribunal found in our client's favour.

Jason's deportation. The Home Office quickly agreed to re-consider Jason's humanitarian protection claim on receipt of our grounds of claim, although refused to release him from detention.

Jason's mental health continued to deteriorate badly in detention, and he reported having intense flashbacks to the torture that he had experienced. He became unable to cope and attempted suicide by smashing a glass door and swallowing shards of the broken glass. The Home Office still did not release Jason from detention after this incident.

The Home Office finally agreed to reconsider Jason's detention the day before an urgent oral permission hearing. He was released in the weeks that followed and has now been awarded substantial damages in compensation for the months of unlawful detention he experienced. Jason has also been granted humanitarian protection in the United Kingdom by an Immigration Judge, who found that Jason's life is at risk from government forces in the DRC and that he poses a high risk of suicide in the event of his removal there.

While in detention, Jason developed psychotic symptoms that eventually developed into schizophrenia. Although Jason now has the safety of humanitarian protection, his brothers, Kidani and Kevin, who care for him, feel that detention and the trauma of coming so close to being deported to the DRC have had such a terrible impact on him that he may never recover. When giving a witness statement in support of Jason's case, Kidani broke down as he told of his fear that he has lost Jason forever.

Jason's appeal was allowed in March 2020, since when the Home Office have failed to issue him with any paperwork or a BRP confirming his status in the UK. Without this, he is still unable to lawfully access any benefits, a bank account or medical treatment in the UK. JCWI have written the Home Office regularly over the last 6 months to chase Jason's documents and have received no response. We will now be forced to issue further pre-action correspondence challenging the delay.

Case: Micha - delay

Micha was brought to the U.K. by her mum from the DRC when she was just 4 years old. Now 21, she has never left since. She went to school and college in London and didn't realise she was any different from her friends or her British siblings until she was told she couldn't get a job because of her immigration status when she was 16 years old.

Micha experienced violent and emotional abuse from her mother as a child and witnessed serious domestic violence from her stepfather. Social services had regular involvement with her family, but no one ever assisted Micha to regularise her immigration status.

JCWI successfully assisted Micha to apply for leave to remain in 2017 when she was 18 years old. She was granted a 30-month visa, with a 'no recourse to public funds' (NRPF) condition, meaning she was unable to access any benefits. Because of this, Micha was forced to continue to live with her abusive mother and her 4 siblings in crowded conditions.

Micha contacted JCWI in June 2020, very scared and distressed: she told us that she had recently found out that she was pregnant and that her mother had become abusive and thrown her out when she found out and her partner had abandoned her. Micha was on limited hours and furlough pay from her job as a waitress as a result of the Covid-19 pandemic and could not afford to rent a

flat and support herself with the limited income she had. Micha faced immediate street homelessness.

JCWI contacted over 15 housing charities seeking support for Micha to no avail, owing largely to her NRPF status. In order to avoid our pregnant young client sleeping on the streets, JCWI exceptionally agreed to pay for 4 nights of accommodation for Micha while we worked to have the NRPF condition lifted from her leave to remain. JCWI made an urgent change of conditions application and explicitly asked for the application to be considered within 4 days owing to the extreme and exceptional circumstances. We presented detailed evidence of Micha's finances, pregnancy and her other vulnerabilities. At the same time as submitting the application, we served correspondence on the Home Office alerting them to the fact that we would be forced to issue pre-action correspondence if we had not received a response to our application within 4 days.

The change of conditions application was submitted on Friday and, over the weekend, Micha developed very serious pregnancy related sickness causing her to be hospitalised overnight. Although she was discharged, she was still very sick and was told that she would be likely to be experience this condition for several months.

On Monday morning JCWI had received no acknowledgement or response from the Home Office to our application. We served pre-action correspondence, including evidence of Micha's medical condition, and sought a response confirming the NRPF condition would be lifted by 11am on Tuesday, at which stage Micha would be street homeless again.

The Home Office responded to our pre-action correspondence on Tuesday morning stating they would make a decision 'as soon as possible' but refused to commit to a timeframe. We immediately issued judicial review proceedings, seeking urgent interim relief requiring the Home Office to lift the NRPF by 6pm that day. Interim relief was granted by the Upper Tribunal within hours of issue and Lambeth Council immediately agreed to provide emergency housing for Micha.

Absent an objective evaluation of the quality of decisions and policies made by a department, it will be very hard for this review to distinguish between a department being frequently prevented from acting effectively by judicial review, and a department which frequently acts unlawfully or with undue delay unless faced with judicial review. The questionnaire primarily measures the degree to which a department and those within it feel impeded by the use of judicial review by those outside the department. However it does not need to do so. To the extent that departments hold relevant data in relation to litigation success rates, complaints, settlements, and policy changes prompted by judicial review, they should be required to provide them. An independent analysis of those data could provide a more objective standard against which those responses could be compared.

It is dangerous to assume that good governance and effective decision making, are things that exist independently of judicial review. It assumes that judicial reviews acts upon a system that already has these things in place, and may impede them. In our experience, the availability of judicial review, the knowledge that the legality of an action may be subject to independent and effective scrutiny, that remedies will be available, is integral to ensuring good governance and effective decision making as it was in the Visa Streaming Tool case we describe above.

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The role of judicial review in immigration matters without a right of appeal

Nothing in this section is intended to diminish the importance of judicial review in relation to cases where there is a right of appeal to the Immigration Tribunal: as many of the case studies we have put forward demonstrate it plays an essential role there as well.

By 2015 the government had removed rights of appeal to an independent tribunal in almost all immigration matters, barring human rights and asylum claims. Decisions on immigration cases, even those which fall short of the most serious cases involving asylum and substantial breaches of human rights, are still of colossal importance to the individuals involved. They may involve a future course of study, or work, the chance to attend a family wedding or the last chance to pay respects to a loved relative at a funeral, or opportunities to attend business meetings, conferences and to grow networks and knowledge. People living in the UK face great disruption to their lives, businesses and employment if a visa renewal is denied them. For some claims a system of 'administrative review' was instituted, but as this is simply a request for the Home Office to remake its own decision, it is not a substitute for independent scrutiny, and has been heavily criticised, including by the Independent Chief Inspector of Borders and Immigration.[8]

The only independently adjudicated remedy that remains in such cases is that of judicial review. It is by no means easy to obtain – fears raised in Parliament when appeal rights were removed that the numbers of judicial review applications would rise dramatically proved to be unfounded. Nevertheless, in our experience judicial review can prove the only route to a lawful outcome for those who have been wrongly refused, and have no alternative means of redress.

Case: Sandra – Visit visa refusal

Sandra applied to visit her son in the UK. He was about to be deployed to Afghanistan in his role in the British Army. His mother wanted to spend time with him before and to then support her daughter-in-law with childcare while he was away serving the country.

The application for a visitor visa was refused. In 2013 the right of appeal against these types of immigration decisions was abolished. The only option available to Sandra was to challenge this decision by way of judicial review. A pre-action protocol letter was served and the decision to refuse the visit visa was over-turned. Nevertheless, given the time taken to resolve this matter Sandra's son had already been deployed to Afghanistan before she was able to visit.

Sandra had previously been refused visit visas for very similar reasons but as she was then unrepresented she was unable to challenge them. She therefore missed several opportunities to spend time with her British family, in particular her grandchildren.

Case: Louise – Visit visa refusal

Louise wanted to visit the UK to attend her son's graduation. She had a well-paid job working for the government in her own country, her husband worked as an architect, they held considerable savings and owned property. Nevertheless, her application for a visa was refused. It wasn't accepted that she was a genuine visitor as she didn't have sufficient funds

[8] https://www.gov.uk/government/publications/an-inspection-of-administrative-reviews-may-december-2019

for her visit. This was the third such refusal preventing her from visiting her son in the UK. This particular visit was of more importance due to the special occasion.

As there was no right of appeal the only option for Louise was to challenge this decision by way of judicial review. Again, at the pre-action stage the decision was overturned and Louise was issued a visitor's visa, unfortunately this was too late for her to attend her son's graduation but did allow family life to be enjoyed.

Most people denied visit visas, are unable to pursue a judicial review. The costs risk of such an application, the cost of legal advice, means that it is often only in extreme cases that challenges arise. Both Louise and Sandra had been refused visas multiple times in the past, and only sought judicial review when trying to travel for an event of great importance to their family. While it is impossible to say for sure, in our view it is quite possible, even likely, that the previous refusals they received might also have been overturned had they been able to challenge them.

This reinforces the point that we made in relation to the Visa Streaming Tool case above, which is that where decisions are not subject to effective and independent review, there is a greater risk that unlawful practices or poor decision making goes uncorrected. In immigration cases judicial review is often the only remedy, and yet it is often inaccessible to those who need it, until circumstances grow truly dire. In both Sandra and Louise's cases they obtained a remedy, but too late. Had they or others been more empowered to challenge visit visa refusals in the past, decision making in the Home Office may well have been more robust. In many of these cases a route to appeal may be preferable, but in its absence, judicial review is the only means by which decision makers can be held to their obligations under the law.

Q2: 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)?

If the overall aim of such improvements is to reduce the use of judicial review, and to reduce the time and costs associated with judicial review claims, then we consider the solutions lie outside the law on judicial review. Judicial review claims arise in our work for the following reasons:

1. Poor decision-making, that does engage with the facts or the law pertaining to the case before the decision-maker;
2. Policies and guidance written in haste, and without sufficient consultation or genuine engagement with expert groups, which as a result do not conform to the law;
3. Individuals being unable to remedy injustice in their cases because they are unable to obtain timely legal advice, or unable to pursue an appeal to an independent tribunal, and because the decision-maker fails to engage in a proper consideration of relevant evidence or law until a claim is issued.

The solution lies with creating additional mechanisms of accountability and fairness that would catch these problems before a judicial review becomes necessary, not in restricting the application of judicial review. This means ensuring that individuals get early access to quality legal advice, and guaranteed representation from the beginning of their claim, ensuring a robust appeals system, and in policy-makers eliciting evidence and opinions from those affected by policies, monitoring the

effects of policies and changing course where the policy gives rise to illegality or human rights violations.

We also consider that it is necessary for the principle of proportionality to be applied to a greater range of cases, in order to ensure that human rights are respected. In a recent challenge to the introduction of a guidance note in the Upper Tribunal (Immigration and Asylum Chamber) implementing a new procedure in response to the Covid-19 pandemic, there were clear arguments on proportionality grounds as to why the guidance note was unlawful (as it introduced a default presumption in favour of paper hearings reversing a decades long practice of holding oral hearings in an area of law where the claims are of the utmost importance to the appellants requiring the highest standards of fairness and where it was possible to hold a remote hearing). The Defendants resisted the case being argued in this way and so the guidance note could only be scrutinised on Wednesbury grounds. In our view it is wrong that decisions can be made that touch on fundamental rights to a fair hearing, without being scrutinised to a higher standard than simple irrationality.

In the context of the Home Office there is a substantial body of evidence demonstrating that its internal systems of checks and balances and self-correction have failed over decades, and continue to do so. This has resulted in a department which in exercising immigration functions consistently makes poor decisions and policy, has closed its mind to evidence, and frequently acts in contravention of its legal duties. Many reasons have been put forward for this record of failure including poor governance, poor staff training and retention, a 'culture of disbelief', institutional ignorance, the complexity of the law and its own policies, political pressures, and lack of funding.

For the purposes of this inquiry, we suggest it is enough to consider how frequently the Home Office gets it wrong, what the consequences are for those failures, and the extent to which judicial review remains the only effective mechanism by which policies or individual decisions may be challenged. It is also important to note that in each of these reports, the question is almost never of a new or novel failing, but rather the accumulation of years of uncorrected failings, with many previous warnings being made in the past.

1. Lessons not Learned, Freedom from Torture – this report analyses and consolidates 50 reports published over a period of 15 years by 17 different organisations and focusses on Home Office decision making in asylum claims;[9]
2. Windrush Lessons Learned Review, Wendy Williams – this is in an independent report commissioned by the Government into institutional failings within the Home Office that led to the detention and deportation of many individuals with a legal right to remain in the UK;[10]
3. Report on Immigration Enforcement, Public Accounts Committee – a recent report in which the Public Accounts Committee finds that the Home Office "does not make decisions based on evidence, it instead risks making them on anecdote, assumption and prejudice";[11]
4. 12 House of Commons Home Affairs Committee, The Windrush generation (HC 990 2017-19)

[9] https://www.freedomfromtorture.org/sites/default/files/2019-09/FFT_LessonsNotLearned_Report_A4_FINAL_LOWRES_0.pdf

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf

[11] Public Accounts Committee, Seventeenth Report of Session 2019 – 21, https://committees.parliament.uk/publications/2633/documents/26242/default/

In addition it is not, as the Home Secretary has recently suggested, the fact that individuals get too much legal advice, or too ready an access to the courts that has created problems for governance, but rather that they do not.

The evidence shows that there is very little that impedes the government in making new rules, or policies or decisions in the field of immigration. They do so frequently, and making large and sweeping changes with little notice. Between 2010 and 2018 the Immigration Rules doubled in length with over 5,700 changes being made. Immigration legislation is frequently put before Parliament and generally passes without significant impediment or amendment. What the reports referenced above show is instead that problems of governance arise because of the easy and unchecked access to such powers, rather than because of any restrictions placed upon the government by judicial review.

Indeed much of the evidence suggests that there needs to be more ready access to judicial review, or an even stronger judicial mechanism like an appeal, in order in order ensure that individual cases are dealt with in accordance to law. The All-Party Parliamentary Group on Africa's report into the discrimination faced by those from African countries in obtaining visit visas makes this point in describing why visit visa decision making was so inadequate:

> *"Firstly, internal mechanisms seem weak and superficial. Secondly, there is no external quality control; and thirdly there is no right of appeal for refusal of a visit visa application. The only formal way to overturn a refusal is an expensive and lengthy judicial review, for which most applicants have neither the time nor the resources. Without a mechanism to challenge decisions, the lack of oversight and accountability is aggravated.*
>
> *Such is the seeming randomness of decision-making that many organisations that sponsor or support large numbers of applications have learnt through experience that it is often more fruitful to simply apply again, paying the fees for a second time, than to try and challenge a decision."*

Where judicial review has come in to play, and in our experience too infrequently, is to act as an essential check on those wide powers exercised by the Secretary of State and her agents. Whether as in the Visa Streaming Tool case, against an unlawfully operating policy that was causing widespread harm, or as in Micha's case where an individual was repeatedly subject to unlawful decision making. We find judicial review to be the last resort against what would otherwise be unaccountable power.

Q3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

No. It is not clear what problem statutory intervention is proposed to address. If the question is one of certainty and clarity as to the law, we would strongly advise any attempt at codification. The law of judicial review, in stark contrast to the codified Immigration Rules for example, is well-established and clear in its principles. It has developed gradually, over centuries, and has adapted to radical changes we have seen over that period to the role of the state, and the greatly increased role that public bodies play in our day to day lives. However, that process of slow adaption does not mean the

law lacks certainty or clarity. As practitioners we find public and administrative law to be an area of relative clarity and simplicity. We deplore the fact that cuts to legal aid, and the creation of legal advice deserts through large parts of the country have resulted in so many being forced to appear unrepresented before the courts, but they require early legal help and legal representation, not a replication of the law in statute.

In fact we consider it inevitable that codification would likely result in a huge increase in complexity and uncertainty as to the law. A stark example of this is the attempt by the government to codify the application of Article 8 of the European Convention on Human Rights in the Immigration Rules themselves. In the introduction to this submission we described the bewildering complexity of the Immigration Rules, which have grown ever more complex over time. In 1994 the Rules were 80 pages long, now they number over 1000 pages, and only this week a further Statement of Changes to the Immigration Rules was laid numbering over 500 pages.

The Law Commission was recently asked to assess the complexity of the Immigration Rules and make recommendations for simplification. In its report one of the major factors identified as creating complexity was the policy decision taken by the Home Secretary to incorporate article 8 within the Immigration Rules.[12] We consider that similar, though perhaps far greater problems would arise from an attempt to codify judicial review principles, and to little benefit. Both human rights issues and judicial review require the courts to apply well-established general principles to highly fact-specific cases. The courts would be forced to interpret new statutory provisions, and there would inevitably be considerable satellite litigation calling into question issues of law, which currently may be quite settled. Given that there is no issue with the clarity and certainty of the law as it stands, it would be quite counterproductive to confused matters through an attempt at codification.

It may be that the purpose of codification is not to clarify the law, but instead to curtail it or to crystallise it in its current form and prevent further development. We strongly disagree with such an approach. It would undermine the rule of law and is contrary to the UK's constitutional settlement. The courts are ultimately responsible for ensuring that the state acts within its legal powers and in accordance with fundamental principles of legality and justice. Any attempt to restrict their ability to do so would fatally undermine the rights of the most vulnerable and least powerful members of our society to enforce their right to be given the protection of the law, and to be treated in accordance with it.

Q4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

Yes. In our view there is no confusion amongst practitioners or the courts as to the principles to be applied in determining whether a decision is subject to judicial review, nor whether it is justiciable.

[12] Simplification of the Immigration Rules: Report, 13 January 2020, HC14 Law Commission, pg 2 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf

Decisions taken under statutory and prerogative powers, and those in exercises of a public function are in principle subject to judicial review. The courts show considerable deference in considering the issue of justiciability when it comes to decisions made under prerogative powers and are punctilious in not straying into questions that are not amenable to the judicial process, but it is always their role to determine whether the claimed power exists and the limits of that power.[13]

As practitioners we have no difficulty in understanding the principles applied by the courts in determining whether a particular question in regard to the exercise of a power or the making of a decision is amenable to judicial review or not. In rare circumstances the question may be complicated in its facts: the increased privatisation of public functions by the government and the role that private companies play in the justice and prison system ,for example, may be hard to trace. But it is a basic function of the courts and legal system to deal with such matters of fact, and there is no issue as to the clarity of the law in this area.

There is no case for excluding certain decisions currently subject to judicial review from such scrutiny. Judicial review is a remedy of last resort. This is well-established. The courts will normally reject any claim for judicial review if an alternative remedy is available. This means that where a judicial review claim is brought, there is no generally fall-back within the domestic legal system to ensure . It would be unprecedented, and unacceptable to insulate certain decisions from scrutiny. It would give the executive unchecked powers and the proposal is anathema to the rule of law and the UK's founding constitutional principles. Allowing the executive, or any actor, free reign to exercise a power outwith the scrutiny of the courts is alien to the democratic principles under which we are governed. All people subject to the powers of the British state have a right to ask a court to determine whether or not those powers were lawfully exercised in accordance with the will of Parliament and the demands of justice.

Q5: 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?

The procedures are adequately clear for practitioners, however litigants in person frequently face difficulties in this area. As we have stated elsewhere, we do not thing that this can be remedied by alterations to the rules or procedures of judicial review. Effective access to justice can only be ensured by providing people with competent legal advice, and through a greater commitment to expanding the scope of legal aid and early legal advice.

We would ask the review to note the significant additional hurdles that claimants, represented and unrepresented face in immigration cases:

- Frequently there are language barriers;
- Clients are often highly vulnerable and have experienced great trauma which can make the court setting, and process of engaging with litigation extremely difficult;
- Almost all cases raise issues of fundamental importance to those involved and there is a grave cost attached to any error that weighs against the claimant;

[13] *Council of Civil Service Unions & ors* v *Minister for the Civil Service* [1984] UKHL 9

- For litigants in person the second appeals test for appeals from the Upper Tribunal to the Court of Appeal can be particularly difficult to understand (s. 13(6) Tribunals Courts and Enforcement Act 2007).
  As a result it is imperative that as far as possible issues are resolved through better decision making before the judicial review stage is reached, and that claims for judicial review are adequately resourced.

Case: Camilla – litigants in person

Camilla is a Thai national married to Charles, a British Citizen who suffers from serious health conditions. They are prevented from living together as man and wife in Thailand due to Charles's health and the lack of suitable and affordable care in Thailand. The UK is the only country in which they can enjoy their family life together. Camilla made an application to remain in the UK on this basis. This was refused, without a right of appeal as the Home Office took the view that the claim was so without substance that it was bound to fail (despite accepting that the relationship was genuine, the matter in dispute was whether there were insurmountable obstacles to the relationship continuing in Thailand). Charles and Camilla provided the Home Office with some evidence of the relationship and the extent of his healthcare needs. Nevertheless, the application was refused and Camilla was unable to appeal. She continued to remain in contact with the Home Office and one day when she was reporting, she was detained and removal directions set to remove her to Thailand. This was a time of considerable stress for the family. Although a solicitor had assisted with the application they had not adequately advised Camilla of her right to challenge this decision by way of judicial review (in the absence of an appeal right). By the time she was detained, she was considerably out of time.

While held at Yarl's Wood IRC Camilla managed to make contact with JCWI. After gathering the relevant papers, it very quickly became obvious that there were grounds on which to challenge the original refusal, to seek an extension of time and to make further human rights submissions explaining how the decision to remove Camilla was a clear breach of her right (and indeed Charles's right) to a family life.

The Home Office maintained the decision in response and so Camilla had no option but to commence judicial review proceedings, otherwise her family life with Charles would have been permanently fractured and there were real concerns as to how Charles would be able to cope without Camilla due to his health needs. Removal directions were cancelled as a result of the proceedings and Camilla was released from detention to the family home. Permission to apply for judicial review with an extension of time granted. The reasons put forward for the delay were accepted. The claim settled in Camilla's favour after the grant of permission and she was granted the right to remain in the UK with Charles.

There were clear grounds for Camilla to challenge the decision, she simply did not understand that she had the right to or know the process. When decisions of this nature are made by the Home Office there is no explanation that the decision may be amenable to judicial review. They simply record that there is no right of appeal. For an unrepresented or poorly represented applicant, where English is not the first language and where there may be other barriers due to vulnerabilities it is easy to see why no action might be taken on such a decision. So although the process is very clear for practitioners who are able to navigate the relevant protocol, CPR or procedure rules for

unrepresented litigants improvements could be made – e.g. SSHD indicating on the decision that although there is no right of appeal, it can be challenged by way of judicial review, and any claim must be brought promptly and in any event within 3 months.

Q6: 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?

As we have stated above the current time limits, and their inflexibility tend to discourage settlement. Furthermore the relatively short time limit for judicial review in immigration claims can cause great hardship to claimants who are frequently in extremely chaotic living situations, have limited access to paperwork, and will often struggle to find a lawyer able and willing to take on the claim. Often migrants are placed in areas where there are very few or even no lawyers able to carry out immigration judicial reviews, or with a legal aid contract to do so.

Case: DM – Difficulty meeting time limit

DM is an Eritrean national, he has lived in the UK for around 15 years. After his initial asylum claim failed, JCWI assisted DW to make further submissions to the Home Office with new evidence. We advised him that he has a strong case to be recognised as a refugee. DM's claim was rejected and JCWI advised DW that there were grounds to challenge this decision by way of judicial review. DM instructed JCWI to send pre-action correspondence, following which the Secretary of State maintained her original decision. Around 6 weeks had expired from the date of decision when the pre-action response was received. In the subsequent 6 weeks, JCWI lost contact with DM.

DM is homeless and destitute owing to his irregular immigration status. His life is chaotic and unpredictable owing to his circumstances, and he does not always have a place to stay or charge his phone. JCWI called DM most days in the weeks before the limitation period expired and, fortunately, eventually made contact with him exactly 3 months from the date of the refusal. We were able to work urgently to issue judicial review proceedings, which were successful following a substantive hearing in the Upper Tribunal.

It is important for us to note that the clients we see, however much they may struggle to meet time limits are in a more fortunate position than those whose cases we cannot put before you because we are unaware of them. We are a well-resourced charity, able to take on last minute cases at risk, and with great expertise in bringing these sorts of claims. For litigants in persons, or those with less well-resourced or less experienced representation these difficulties could prove insurmountable.

Q7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

The rules are too harsh on claimants and too lenient on the government and public authorities who defend such claims. Changes to judicial review costs rules that prevent a costs-capping order being made before the permission stage force small organisations to take on the significant costs risk of a contested permission renewal hearing. The balance of risk and the inequality of arms between the

parties to judicial review claims, which frequently involve impecunious and highly vulnerable individuals or small groups attempting to obtain justice from the state itself, tends to discourage valid claims and encourage the government to maintain unlawful policies, relying on the harsh costs rule to force settlements. Meanwhile adverse decisions against the government can often have little effect in terms of learning and decision making, because decision makers are not affected by the costs incurred.

Q8: 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?

The costs involved in bringing a claim for judicial review are often high. This can be a deterrent for many who are unable to secure legal aid[14] and in public interest cases. In the immigration context, where claims may involve a risk to life and limb, the costs will always be proportionate to the issues at stake[15]. Judicial Review claims which encompass a claim for damages, arise in cases concerning the deprivation of liberty[16] or a flagrant breach of Article 8 ECHR. In these cases, the level of costs may exceed the amount of damages, nevertheless such costs would still be proportionate owing to the underlying issues at stake.

Case: MK

MK's fresh claim was rejected when she was heavily pregnant and experiencing serious domestic abuse. She was receiving a university scholarship at the time which very narrowly excluded her from Legal Aid. In the circumstances, JCWI were required to represent her under a CFA. MK was living on around £800.00 a month at the time. She was required to redirect some very small savings she had made, a desperately needed for her baby to cover the £154.00 judicial review court fee. This put huge financial strain on her, and she subsequently had to rely on donations of clothes and nappies for her baby son.

Standing

This is addressed in response to 13 below and in the Visa Streaming Tool case study at the beginning of our response.

[14] Judicial Review is in scope for legal aid purposes under LASPO 2012, nevertheless in certain areas of the country there are a dearth of providers due to years of cuts and in other areas although providers are present they lack capacity.

[15] By way of example, JCWI recently assisted Amos, a Sudanese national, challenge his removal, in circumstances, where as a non-Arab Darfuri, applying the Secretary of State's own policy and country guidance case law, he had a strong claim to be recognised as a refugee. There was also significant evidence that he was a victim of trafficking and medical evidence to show that he was unfit to fly.

[16] By way of example, JCWI assisted Heather in an application for judicial review seeking her release from detention and damages for the period of detention found to be unlawful under the *Hardial Singh* principles. The costs exceeded the level of damages awarded, nevertheless the damages were secondary to gaining Heather's liberty. Heather had lawfully resided in the United Kingdom since she was 6 months old and had a serious and enduring mental health condition with suicidal ideation.

Unmeritorious claims

The courts have the power to certify a claim as totally without merit ("TWOM"), meaning that there is no right of renewal to an oral hearing and instead the appeal lies to the Court of Appeal. The use of TWOM certificates came about as a result of the 2013 reforms. Following the reforms, in immigration cases there developed a practice of the Secretary of State for the Home Department ("SSHD") routinely requesting that claims be certified as TWOM in the Acknowledgement of Service ("AoS"). This was addressed by Helen Mountfield QC sitting as a Deputy High Court Judge in the case of *R (oao) K, a child, by her litigation friend MT v SSHD* [2018] EWHC 1834 (Admin):

> *The 'totally without merit' provisions were introduced to save court time in respect of cases which were obviously hopeless or abusive. They were intended, in such cases, to remove the right, after permission to apply for judicial review has been refused on the papers, to make a renewed oral application for permission (without first seeking the court's permission to renew). Far too often, however, Acknowledgements of Service are received on behalf of this Defendant which invite the judge considering permission to dismiss the claim as being 'totally without merit' when that is clearly not the case*. [104]
>
> *In a case where the Secretary of State does not consider an argument obviously hopeless or abusive - even if she does not consider that it crosses the arguability threshold - what should be pleaded is that the Defendant does not accept the Claimant's case is arguable. Where a case is obviously arguable, albeit the Defendant thinks it is wrong, what should be pleaded is that the Defendant accepts that the point is arguable, though the Defendant does not think it is right.* [105]

As long as TWOM certificates are reserved for obviously hopeless or abusive claims then this is a sufficient safeguard against unmeritorious claims. The courts also have the power to oversee the conduct of lawyers and refer to the relevant regulatory body for disciplinary action where required[4].

Q9: Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

JCWI are of the view that the remedies available are generally sufficient. They are discretionary and can be tailored to the facts of a particular case. There is no situation in which a court is obliged to enforce a remedy against its better judgment. In the vast majority of cases, the remedy results in the impugned decision being remade by the public body. In JCWI's experience, where that public body is the Home Office, following a grant of relief or even where the decision has been withdrawn by consent, it is a too frequent practice for the decision to be remade in near identical terms to the first impugned decision, requiring further recourse to the courts. See for example the case of Victoria in the response to Question 1.

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Q10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Time Limits

The strict time limits imposed in judicial review claims can make it harder to settle a claim prior to issue. In particular it is impossible for the claimant and defendant in a case to agree an extension of time in order to explore alternatives to litigation.

Poor Decision Making

Most of the judicial reviews we undertake arise from a lack of flexibility and delays in the decision-making process and from consistently poor decision-making, in particular by the Home Office. Frequently the Home Office fails to apply the law or even its own policies to the facts of the case in front of it.

You will find examples of this in many of the case studies we have presented in this report and in particular to our answer to Question 1. Here are some further examples of the issue. While these examples have been chosen to illustrate particular issues, we should emphasise that they are by no means exceptional. They are exemplars of the typical failings that we see in our day to day casework.

Case: EW - Failure to engage with initial application

EW was an Eritrean national. He suffered from leukaemia and was refused treatment of Northwick Park Hospital owing to his immigration status. JCWI assisted him to make a human rights application under Article 3 ECHR on the basis of his medical condition. We stressed the extreme urgency of the application in our submissions to the Home Office, yet no decision was taken for several months. JCWI challenged the delay by way of pre-action correspondence, following which, the Secretary of State agreed to make a decision quickly. EW was granted leave to remain and was able to access full treatment of his condition, including a bone-marrow transplant. He was also able to access housing and welfare support. Unfortunately, EW died shortly after he was granted leave to remain. Had JCWI not challenged the delay, it is very likely he would have died homeless and destitute, without any immigration status. JCWI made it clear that this was a very exceptional case, which required an urgent decision: all the information and arguments put forward in the pre-action letter were contained in the original submissions. Had the original submissions been considered properly there would have been no reason to pursue a judicial review.

Case: Gary – Failure to engage with Pre-Action correspondence

Gary had held Indefinite Leave to Remain ("ILR") since he was a child. As a result of a tragic life event his mental health deteriorated and his pre-disposure to bi-polar disorder was triggered. He had several manic episode and experienced severe lows. He was also experiencing physical health problems. When manic he lost his passport which confirmed his ILR. On the spur of the moment he decided to return to South Africa, the country of his birth to recuperate. He did not tell his British family who all remained in the UK. After a few weeks he purchased his return ticket to the UK and tried to board a plane. He was from prevented from doing so due to his inability to prove his ILR. He was told to make enquiries with the Home Office before travelling. Gary, and his very worried family in the UK went to great length and expense trying to obtain the correct advice as to how he should get his papers in order and obtain the proof that he has ILR. He was given conflicting and incorrect information by representatives of the SSHD. This led to him making the incorrect application as a

returning resident (applicable when a person with ILR has been absent for in excess of 2 years, not a matter of weeks like Gary). This application was considered and refused. Again, at no point did anyone advise Gary that he had made the wrong application. He appealed against the refusal, this was allowed and Gary was permitted to travel to the UK.

Rather than being given confirmation of his ILR when he arrived in the UK he was granted limited leave to remain for 30 months with no recourse to public funds. This was despite having lived lawfully in the UK for decades, he had worked and paid and taxes. Considerable correspondence was entered in to with the Home Office to try and obtain confirmation that Gary still held ILR, indeed the Home Office had never made any decision to revoke this so as a matter of law he still held ILR.

Gary threatened judicial review proceedings but was advised that he had an alternative remedy to submit an application under the Windrush scheme. Gary followed this advice. Despite having all the relevant evidence in their possession and previously accepting that Gary held ILR at the relevant time, the Home Office considerably delayed in making a decision on this application. During this time Gary who had no recourse to public funds experienced a fall and required surgery which prevented him from working. He began to financially suffer, this was compounded by the impact of Covid-19 on his work in the hospitality trade. Gary sent a pre-action protocol letter advising the Home Office of the detriment the delay in determining his application was having on him and seeking a realistic timeframe as to when a decision would be made. In response the Home Office apologised for the delay and indicated that they hoped to make a decision shortly. Two months later as there was still no decision and no indication as to when one would be made a further pre-action protocol letter was sent. The Home Office responded in the same terms, again failing to acknowledge the detriment caused to Gary and crucially failing to provide a likely timeframe as to when a decision would be made.

Gary had no option but to proceed to issue judicial review proceedings. At the SGD stage, and for the first time, the Home Office committed to a timeframe in which a decision would be made. There was no explanation for why this could not have been provided in response to the pre-action letters designed to avoid the need for litigation. The Home Office have subsequently granted Gary ILR, although ironically stating that he did not qualify under the Windrush scheme, despite having been advised to apply under this concession years earlier.

Case Study: Gloria – Poor Decision Making

Gloria is a child victim of trafficking. She sought asylum on this basis, this was refused by the Home Office and her appeal against this decision dismissed. The judge found that she had voluntarily come to the UK to work for a family. Permission to appeal was sought against this decision for a child cannot consent and so the implications of this finding clearly engaged the relevant trafficking conventions. Although permission was initially refused by the Upper Tribunal, this decision was quashed following a successful cart judicial review and the matter was remitted to the Upper Tribunal. At this hearing the parties agreed that the judge had found that Gloria had been trafficked because he found that she had come to work for the family here. The matter was remitted to the Home Office to re-determine Gloria's asylum and human rights claims. There then followed considerable delay by the Home Office in making a new decision. This delay was challenged by two pre-action protocol letters, the latter resulting in a new decision.

Unfortunately, the Home Office's position in the decision was at odds with that advanced at the hearing before the Upper Tribunal. It was no longer accepted that she is a victim of trafficking and so the asylum and human rights claim was refused on this basis. The hearing before the First-tier Tribunal (IAC) was listed, Gloria thoroughly prepared for this and the day before the hearing a representative for the Home Office wrote to the FtT stating that they were withdrawing the asylum decision. The letter detailed:

> *"The reason for the SSHD's withdrawal is that in light of the concession made in the Upper Tribunal by the Respondent, the decision will need to be reconsidered and in light of this information a new decision might be made."*

This was the concession that Gloria was a victim of trafficking. Gloria recovered her reasonable costs from the Home Office for the appeal, in the decision on costs by the FtT the following findings were made:

> *"In remitting the appellant's case to the respondent, the Upper Tribunal therefore accepted that the appellant had been trafficked to the United Kingdom as she had entered the country as a minor (aged 15 years) and therefore could not have consented to coming to the UK to work."* [5]
>
> *"It is at least arguable that this acceptance by the Upper Tribunal that the appellant had been and therefore is a victim of trafficking should have been the respondent's starting point for reconsideration."* [6]
>
> *"I am satisfied that it is important to note that the decision made by the respondent on 17 November 2017 was only served after the appellant had sought to challenge the delay in the respondent's reconsideration of the asylum and human rights claim. The appellant had by that time sent two pre-action protocol letters dated 10 April and 25 October 2017. After the first letter the respondent agreed to make a decision within six months. She failed to do so. The second pre-action protocol letter became necessary. Both letters detailed the appellant's immigration history and specifically requested that the respondent make a new decision taking in to account the finding that the appellant is a victim of trafficking. Ultimately, the respondent's decision failed to do so."* [13]

It proved necessary to serve a further pre-action protocol letter challenging the further delay in finally determining Gloria's trafficking, asylum and human rights claims, which had now been outstanding for in excess of 4 years.

The Home Office replied indicating that the request for reconsideration of Gloria's trafficking claim had been declined as it had not been made in accordance with the Home Office's policy.

A further pre-action protocol letter was served highlighting that a judicial finding had been made that Gloria is a victim of trafficking and so it was irrational for the Home Office to require a first responder to request reconsideration (in line with her policy). The Home Office replied asserting that they were not bound by the findings of the Tribunal.

An application for judicial review was filed arguing that as there had been a judicial finding by the Tribunal and a concession made on behalf of the Home Office that Gloria is a victim of trafficking, it

was Wednesbury unreasonable for the Home Office to maintain the negative conclusive grounds decision.

The judicial review proceedings were settled by consent pre-permission, with the Home Office agreeing to reconsider the negative conclusive grounds decision within two months (specifically taking in to account the judicial findings and the Home Office's own concession) and to reconsider Gloria's asylum and human rights claim within one month of the new conclusive grounds decision.

The Home Office failed to honour the promise as to timeframes recorded in the consent order and so a further pre-action protocol letter was served challenging this and the further delay.

As a result, the Home Office made a positive conclusive grounds decision, finally accepting that Gloria is a victim of trafficking. She was subsequently recognised as a refugee 5 years after she first claimed asylum.

Case Study: Megan – Failure to apply relevant law

Megan is an Australian national with a right of abode. She has resided lawfully in the UK since she was a few months old. She experienced some personal problems, became estranged from her family and when in a position of vulnerability committed a crime for which she was sentenced to over 12 months bringing her within the automatic deportation provisions. However, as she had a right of abode then she could not be deported. Nevertheless, the Home Office wrote to her asking for reasons why she should not be deported. Detailed legal representations were submitted in reply and an application made for confirmation that she held a right of abode. As Megan held a right of abode and could not be deported, there was no lawful basis to detain her under immigration powers at the end of her criminal sentence. Contact was made with Home Office officials who accepted that she held a right of abode, but still took the view that she must be detained until her application had been granted. Megan held a right of abode by operation of statute and it was not an application that the Home Office could grant. The pending application was for a certificate of entitlement which does not *confer* a right of abode, it simply acknowledges a right of abode that the relevant individual already possesses.

As Megan was detained under immigration powers, her detention was unlawful. A pre-action protocol letter was served, with a truncated timeframe for response as Megan had been arbitrarily denied her liberty. There was no response and so Megan had no option but to commence judicial review proceedings. She asked for an urgent interim relief hearing in order to be able to secure her release. This was listed and the day before, after Megan had fully prepared for the hearing, the Home Office agreed to release her. The claim was subsequently settled by consent in Megan's favour and the Home Office agreed to pay her a significant sum of damages.

Ultimately, the only correct starting point if one desires to reduce the number of judicial review claims brought each year, is to increase the quality of decision making by public bodies, and to provide more support for early resolution of cases. Any approach that tries to do so by reducing access to judicial review, will reduce access to justice and create a system of impunity for illegal acts against the most vulnerable in society. Judicial review is already a remedy of last resort. Of the relatively few judicial review cases brought, most are already dealt with either by early settlement or filtered out at permission stage. It is essential that those cases which are arguable, and which the

defendant will not concede, continue to be heard and indeed that more people are supported to bring such claims, and not prevented from doing so by lack of funds or of legal advice.

Q11: Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

JCWI frequently experiences settlement prior to trial and last minute settlements. We have highlighted at the beginning of this submission our experience of when this occurs at an early stage in the Visa Streaming Tool case. In that case, by issuing the claim JCWI was able to force the Home Office to reconsider its position and no doubt to take advice from the GLD and external counsel on the racial discrimination caused by the streaming tool. Our belief is that upon such scrutiny, the Government became aware of the gravity of the situation and took immediate steps to rectify it. In our view this only happened because we were able to issue the claim, and put the Home Office in a position where they would have to justify use of the Streaming Tool to the High Court.

Pre-trial settlement is extremely common in immigration judicial reviews. In our experience the Secretary of State does not engage in any meaningful sense at a pre-action stage. We find that the Home Office only engages properly with the issues and facts put forward after permission has been granted. This results in frequent settlement just before trial, because it is only then that the merits of the case have been properly considered by the defendant.

Case: Nigella – last minute settlement

Nigella was recognised as a refugee, after she experienced torture and rape in her own country. She was granted Indefinite Leave to Remain and then applied to naturalise as a British Citizen. This was refused as the Home Office asserted that she was not of good character as an allegation of illegal working was made. Nigella refuted this and requested that the decision was reviewed. Home Office decision making is frequently subject to delay. The refusal was maintained on review (12 months after the original decision). An application for judicial review was issued within 3 months of the decision on review and an extension of time to challenge the first decision was sought. The Home Office provided summary grounds of defence resisting both the claim in its entirety and the extension of time request. Permission to apply for judicial review was granted (on some but not all grounds). Although the judge failed to formally make a decision on the extension of time, this was impliedly granted. The Home Office then settled the claim and agreed to reconsider whether to naturalise Nigella as a British Citizen.

Following reconsideration, the Home Office again refused to naturalise Nigella as a British Citizen. In light of the Home Office's previous position in the earlier claim, that it was out of time, an application for judicial review was filed within three months of this decision (in tandem to a further request for a review of the decision). Nigella sought the Home Office's consent to a stay of the judicial review claim pending the decision on the review, in order to keep costs to a minimum. The solicitors for the Home Office failed to respond and so an application to the court for a stay proved necessary. The refusal was again maintained on review, Nigella amended her grounds of claim, the SGD were filed defending the claim in its entirety and permission to apply for judicial review was

again granted. The original decision and the decision on review were largely similar to the two decisions at the heart of the first claim for judicial review.

The Home Office sought an extension of time to file her DGD. This was resisted as it would unduly cause the court timetable to slip and as the SGD had been very brief Nigella did not really know the Home Office's position in respect of the claim. Nigella had also sought disclosure of relevant documents from the Home Office which had not been forthcoming. Just two weeks prior to the hearing date the Home Office proffered settlement of the claim and agreed to naturalise Nigella as a British Citizen.

Q12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Parties are already encouraged to use ADR. The main difficulty in reaching settlement prior to issuing the claim, as we have explained in our response to questions 1 and 11 and as is demonstrated in many of the case studies we have put forward, is the refusal of public bodies, and particularly the Home Office to engage properly with pre-action correspondence and pre-permission submissions. In addition the Home Office, and other public bodies, often do not properly engage with their duty of candour until a late stage. Finally the time limits for judicial review can prevent ADR being pursued where a claim needs to be issued rapidly.

Ultimately this review must recognise the huge power imbalance inherent in judicial review. Our clients are often highly vulnerable and facing life-ruining decisions. Meanwhile the Home Office, and other bodies, have no real incentive to engage with a claim until it looks likely to succeed. There are often no incentives outside of a court order for the Home Office to do better. We see this in particular in the examples we have given where claims for judicial review are settled by the Home Office, and then the decision is remade with the same flaw, often after lengthy further delay. For the claimant this is a life altering injustice. For the body in question it is a minor inconvenience. Only the courts have any power to enforce decisions against a recalcitrant public body. That is their role.

Q13: 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?

Public interest litigation is crucial, it allows for consideration of wider issues of importance, unconstrained by the facts of a particular case. It also allows for the submission of evidence which would be unavailable to individual claimants. It serves a significant purpose in upholding the rule of law. In our view, the rules of standing are appropriate as the Claimant must have a sufficient interest in the matter to which the application relates. We have discussed above the great benefit brought by the current rules on public interest standing in the Visa Streaming Tool case brought by JCWI. Another example raising similar issues, is the litigation JCWI is currently pursuing around the use of remote hearings in the Upper Tribunal.

Case: Upper Tribunal - Error of law hearings

JCWI are currently involved in litigation against the President of the Upper Tribunal (Immigration and Asylum Chamber), in which the Lord Chancellor is an interested party[6]. The challenge concerns the introduction of a guidance note which sets out how error of law hearings should be determined in this chamber (usually on the papers) in response to the Covid-19 pandemic. This reverses a decades long practice of holding an oral hearing in cases where the issues at stake are of fundamental importance to the individuals and which due to the subject nature require the highest standards of fairness. Only after litigation commenced did it become apparent that the Defendant was not monitoring the new process and so the only reliable statistical analysis available to the court was that compiled on behalf of JCWI. In this case JCWI were also able to advocate on behalf of litigants in person who were unduly affected by the change in practice but lacked the means to litigate in their own right.

The Scope and Timing of this Review

We share the concerns raised by the Administrative Law Bar Association and by the United Kingdom Administrative Justice Institute about the scope, timing and terms of this review:

- The timetable for evidence gathering falls far short of what would be necessary to gain a proper understanding of the role of judicial review in administrative law and governance;
- The focus on judicial review to the exclusion of all other means of administrative redress, which are far more common, may lead to a distorted understanding of the role of judicial review, which is in reality rarely used and a last resort;
- Both the time frame, and the choice of evidence solicited weighs too heavily in favour of government departments who will have a very partial view of the role of judicial review, and against those who most require it. Claimant lawyers, charities and NGOs supporting individual claimants, and the claimants themselves have far fewer resources, less awareness of such exercises, and may be unable to provide evidence. Far more effort and time needs to be spent soliciting and gathering evidence from those who have used judicial review mechanisms;
- This review ought to be reframed and reconstituted to provide a wider and more accurate picture of the current state of administrative law, and ought to be given sufficient time in which to do so;
- It is essential that all responses and evidence that this review takes into account in reaching conclusions are published, so that independent scrutiny can be brought to bear upon it. Otherwise, given the rushed time frame we consider there is a substantial risk that the outcome of the review is skewed by partial evidence.

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For more information please contact:

Chai Patel
Legal Policy Director, JCWI
[redacted]

Nicola Burgess
Legal Director, JCWI
legal@jcwi.org.uk

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JCWI is an independent charity campaigning for justice and fairness in immigration, nationality and asylum policy since 1967.