# ILPA's Response to the New Plan for Immigration

## Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

## Introduction

As insufficient time has been provided for organisations to respond to this consultation, please note that the length or lack of response to any specific question should not be taken as support by ILPA for any of the proposed changes.

# Chapter 1: Overview of the Current System

## Question 3. The UK Government is committed to building an asylum system that is firm and fair, based on three major objectives:

• To increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum.
• To deter illegal entry into the UK, thereby breaking the business model of criminal trafficking networks and protecting the lives of those they endanger; and
• To remove more easily from the UK those with no right to be here.

1. It is useful to start our response with a reminder, that refugee status is something that a person has, regardless of when and how it is recognised by the state in which sanctuary is

sought.[1] The Policy Statement is explicit in its intention to punish refugees who seek safety in the UK, and we condemn those proposals, which are anything but firm and fair, and instead seek to actively cause harm to people.

2. We do not accept the underlying premise of the Policy Statement, which is that the asylum system in the UK is viewed as attractive to people, such that they will choose to come here on that basis, as opposed to other reasons, such as their having family here, or wishing to seek safety in a country whose language they speak. The government's response to this false premise is to make the system unattractive and punitive. In fact, this is already the case, as is detailed in a vast number of reports, including Freedom from Torture's report "*Lessons not Learned: The failures of asylum decision-making in the UK*", published in 2019, which summarised the system as follows:

> *The United Kingdom asylum determination system is both inhumane and inefficient. People who have suffered horrific events, often face further suffering once they come to the UK. Poor Home Office decision-making on asylum claims is endemic, with almost two in five asylum refusals corrected on appeal*.[2]

3. Asylum accommodation in the UK has been in an unacceptable state for several years, as set out in the British Red Cross' report "Far from Home" published in April 2021:

> *There have been many detailed reports over several years raising concerns about poor quality, unsanitary and, in some cases, unsafe accommodation provided to people seeking asylum. Among other serious issues, these reports have described vermin-infested accommodation, ceilings falling in, pregnant women struggling to access healthcare and survivors of torture and human trafficking being forced to share a bedroom with strangers.*[3]

4. Due to delays in decision making, people, including families with children, are left in these conditions for years. These delays are the biggest issue within the asylum system, yet are not

[1] Most recently reiterated by the Supreme Court in G v G [2021] UKSC 9 [81] https://www.bailii.org/uk/cases/UKSC/2021/9.html

[2] https://www.freedomfromtorture.org/sites/default/files/2019-09/FFT_LessonsNotLearned_Report_A4_FINAL_LOWRES_1.pdf page 3

[3] Page 12 https://www.redcross.org.uk/far-from-a-home

mentioned in the Policy Statement, which instead sets out a series of proposals that would create a significant amount of additional work for the Home Office, as well as HMCTS. A properly functioning system whereby the Home Office makes quality decisions quickly would achieve the objectives set out in Question 3, the proposals in the Policy Statement will not.

## Chapter 2: Protecting those Fleeing Persecution, Oppression and Tyranny

### Question 7 Please use the space below to give further feedback on the proposals in chapter 2.

#### *Proposal: Grant resettled refugees immediate indefinite leave to remain on arrival in the UK so that they benefit from full rights and entitlements when they arrive*

5. For reasons explained in depth in our response to Chapter 4, we do not agree with the implementation of a two tier system of leave for those refugees whom the UK has recognised as being in need of protection. We believe that all refugees should be granted indefinite leave to remain, regardless of their mode of arrival.

#### *Proposal: Review the refugee family reunion routes available to refugees who have arrived through safe and legal routes*

6. As above, for reasons explained in depth elsewhere in our response, we do not agree with the implementation of a two tier system of leave for those refugees whom the UK has recognised as being in need of protection. We believe that all refugees should be able to reunite with their families, regardless of their mode of arrival.

#### *Proposal: Introduce a new means for the Home Secretary to help people in extreme need of safety whilst still in their country of origin in life-threatening circumstances*

7. This proposal appears to suggest that in a situation where people are facing a life-threatening situation in their country of origin, that they should remain there while the Home Office, operating a system beset with delays and poor decision making, considers whether they should be granted entry to the UK. No explanation is given as to why a person would risk their life to do this, and this seems completely unworkable.

### *Proposal: Enhance support provided to refugees to help them integrate into UK society and become self-sufficient more quickly*

8. Allowing people in the asylum system to work while they wait for the decision on their application has been described as "common-sense Conservatism".[4] In July 2020 a report was published by the Lift The Ban coalition, calling for people seeking asylum and their adult dependants to be given the right to work, unconstrained by the Shortage Occupation List, after they have waited six months for a decision. The report shows that the policy change would strengthen people's ability to integrate, allow people to live in dignity and support themselves and their families, improve their mental health, help to challenge exploitation and that this change could benefit the UK economy through net gains of £97.8 million per year.[5] This is the policy that should be enacted to enable refugees to integrate and become self-sufficient more quickly.

## Safe and legal routes including Family reunion for unaccompanied asylum seeking children

### Question 14: Are there any further observations or views you would like to share about safe and legal routes to the UK for family reunion or other purposes for protection claimants and/or refugees and/or their families that you have not expressed?

9. The Immigration Rules should be amended to permit children, whether waiting for a decision on their application or already recognised as a refugee, to sponsor their siblings and parents to come and join them, and the Home Office should consider applications flexibly and humanely. All family reunion applications should be fee free, with no income and accommodation requirement. The 'serious and compelling' considerations requirement in 319X(ii), that a child applying to join a relative must meet in order to be granted leave, should be removed.

10. We also endorse all of the recommendations in the British Red Cross' report 'The Long Road to Reunion':[6]

[4] https://www.conservativehome.com/thinktankcentral/2020/07/daniel-pryor-letting-asylum-seekers-work-is-common-sense-conservatism.html

[5] https://www.refugee-action.org.uk/wp-content/uploads/2020/07/Lift-The-Ban-Common-Sense.pdf page 3

[6] https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/improving-the-lives-of-refugees/refugee-family-reunion page 31

- *Only require family members overseas to travel to a Visa Application Centre to submit their biometrics after a provisional positive decision has been made. Refusals should be sent by email and not require a journey to the Visa Application Centre.*
- *Be flexible in when and how biometrics are required to be submitted if a family is unable to reach a Visa Application Centre safely.*
- *Allow TB tests to be undertaken once an applicant has travelled to the UK, rather than being required in advance of arrival.*
- *Allow flexibility of ID requirements for entering a Visa Application Centre and obtaining a TB certificate.*

## Chapter 3: Ending Anomalies and Delivering Fairness in British Nationality Law

### Question 15: How effective, if at all, do you feel the following changes will be in contributing to the objective of correcting historic anomalies in current British Nationality law?

*Proposal: Introducing new registration provisions for children of a British Overseas Territories Citizen (BOTC) to acquire citizenship more easily*

11. Very effective.

*Proposal: Fixing the injustice which prevents a child from acquiring their father's citizenship if their mother was married to someone else.*

12. Not very effective.

*Proposal: Introducing a new discretionary adult registration route to give the Home Secretary an ability to grant citizenship in compelling and exceptional circumstances where there has been historical unfairness beyond a person's control.*

13. Fairly effective.

*Proposal: Creating further flexibility to waive residence requirements for naturalisation in exceptional cases. This will mean those impacted by Windrush are not prevented from qualifying for British Citizenship because they were not able to return to the UK to meet the residency requirements through no fault of their own.*

14. Very effective.

Question 16

The Government wants to change the registration route for stateless children, who were born in the UK and have lived here for five years.

The Government wants to ensure that those who are genuinely stateless can benefit. People should not be able to acquire these benefits if they purposely fail to acquire their own nationality for their child.

To what extent, if at all, do you agree that this is the right approach?

15. Strongly disagree.

Question 17: The law currently allows some discretion around naturalisation, to account for exceptional circumstances. However, it is currently an un-waivable requirement that a person must have been in the UK on the first day of their 5 (or 3) year residential qualifying period.

The Government is seeking to change the law so that discretion can be exercised when a person was not in the UK on that day in appropriate cases, whilst maintaining the principle that people should have completed a period of continuous residence.

This might be used, for example, where a person was a long-term resident of the UK but had been prevented from returning to the UK after a trip overseas five years ago by mistake, as was the case for a number of the Windrush generation, or due to unforeseen compelling circumstances.

To what extent, if at all, do you agree that this approach provides sufficient flexibility to allow people with a strong connection to the UK to qualify for naturalisation?

16. Strongly agree.

## Question 18: Please use the space below to give further feedback on the proposals in chapter 3.

17. ILPA members attended two round tables as part of this consultation process, and provided detailed submissions on the proposals, including elaboration on the answers given above. Once received, we will publish the minutes from that meeting alongside this response.

18. We also wish to raise the issue of transnational marriage abandonment in respect of the proposal to create "*further flexibility to waive residence requirements for naturalisation in exceptional cases*". Transnational marriage abandonment is the deliberate abandonment of a spouse abroad, with the specific intention to prevent the return of the spouse to the UK, often referred to those spouses as "stranded spouses". Many stranded spouses never manage to return to the UK, including because they struggle to find legal assistance to secure Entry Clearance. For those stranded spouses who do manage to secure a return to the UK, this is often after having spent years abroad. The reasons they may be abroad for many years include (1) hoping that their spouse would facilitate their return to the UK; (2) difficulties finding legal assistance to return; and (3) lengthy legal battles once assistance is secured. Some stranded spouses might have indefinite leave to remain on return to the UK (e.g. stranded spouses who had indefinite leave to remain before they were abandoned abroad, and who return with returning resident visas); or might manage to secure indefinite leave to remain shortly after their return, on the basis that they were victim of domestic abuse at the hand of their settled spouses.

19. For those stranded spouses, the only reason they are not eligible for naturalisation soon after their return is the residence requirement. Stranded spouses are often eager to naturalise as British citizens. This is, among others, because of their experience of abandonment abroad. British citizenship is the only status which would prevent abusive spouses to abandon them abroad with no means of return. ILR is not sufficient, as it lapses after two years. For the reasons set out above, it is not uncommon for women to be stranded for more than two years. On the other hand, stranded spouses often do not have the financial means to "risk" the application fee – when advised that their application could be refused, my experience is that they decide to wait until they meet the requirements in a straightforward way. This is often a delay of many years. For those reasons, we would support a softening of the residence requirements, and we would ask that caseworkers dealing with nationality applications are

told about the example of stranded spouses as one of the examples of when exercising discretion would be appropriate.

20. Another issue is that too many people, often children, have their rights to British citizenship denied because their rights are dependent on a third party from whom they are estranged or who will not or cannot assist them. A common scenario is of a child under the sole care of their mother who has separated from an abusive father from whom the child derives citizenship rights. Without proof of that father's British citizenship or settled status, the child is unable to assert their own rights to citizenship. In many of these cases, the Secretary of State has access to information that could prove the child's entitlement, but routinely refuses to assist.

21. An amendment to the British Nationality Act 1981 is required to create obligations on the Secretary of State for the Home Department to assist individuals to establish their automatic right to British citizenship or right to register as a British citizen. Such obligations should include a duty to make reasonable enquiries on behalf of an individual where the individual is unable to provide information or documents to prove their claim but the Secretary of State has access to information or documents which could. Such enquiries should include searches of own Home Office records as well as other government department records the Secretary of State has powers to access.

## Chapter 4: Disrupting Criminal Networks and Reforming the Asylum System

### Question 21. The UK Government intends to create a differentiated approach to asylum claims. For the first time how somebody arrives in the UK will matter for the purposes of their asylum claim.

### As the Government seeks to implement this change, what, if any, practical considerations should be taken into account?

22. We have addressed these proposals in question 22 and explained why they should not be implemented.

## Question 22. The UK Government intends on introducing a more rigorous standard for testing the "well-founded fear of persecution" in the Refugee Convention.

## As the Government considers this change, what, if any, practical considerations should be taken into account?

23. The Foreword to the Policy Statement sets out how "Global Britain" takes "pride in fulfilling our moral responsibility to support refugees fleeing peril around the world." In light of the Policy Statement it is not understood why the UK Government is intent on introducing a "more rigorous standard" for testing whether someone has a well-founded fear of persecution.

24. There are three obvious and immediate practical considerations to be taken into account as the Government considers this change:

    i. The proposals fail on the Government's own terms.
    ii. The proposals for a split test are unworkable.
    iii. The proposals unlawfully diverge from the Refugee Convention

***Proposals Fail on Government's Own Terms***

25. The proposals to introduce a more rigorous standard for testing a well-founded fear of persecution are not justified on the Government's own terms. They fail in three ways.

26. First, the Policy Statement does not set out any evidence as to why a "more rigorous" standard is required. The fact that it is said there are 109,000 asylum claims in the asylum system is not a basis for introducing a more rigorous standard, or for that matter a less rigorous standard.

27. Secondly, the proposal for a more rigorous standard has no basis in any of the three objectives of the Policy Statement. It is irrelevant to deterring illegal entry. It is irrelevant to removing those with no right to be in the UK. The closest objective engaged is that of increasing the fairness and efficacy of the system. But it is precisely the importance of ensuring the fairness of the system which militates against any suggestion there is a need to introduce a more rigorous standard. "Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case." (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451,

§3. The number of claims of a well-founded fear of persecution is extraneous to the test to be applied for assessing this. Any approach to the contrary only epitomises unfairness.

28. Thirdly, the Policy Statement describes a "proud history" of being "open to the world" and a commitment to "continue that tradition." It is demonstrably contrary to tradition and the well-established international law standards for the UK to seek to apply a more rigorous test than that set out in the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"). This is set out further below.

29. Against this background then, it is therefore clear that the proposal fails on the Government's own terms.

***Proposals for a Split Test are Unlawful and Unworkable***

30. The proposal is to introduce a "more rigorous test" by introducing a test with two elements.

31. The first element is to be judged on the balance of probabilities. Under this first element it needs to be shown that "the person is who they say they are and that they are experiencing genuine fear of persecution." In assessing this first element regard will be had to whether someone has already had opportunities to claim asylum. This first element will include a credibility assessment. The implication would therefore appear to be that an applicant could fail the first element if they have not claimed asylum in for example an EU state because it will be suggested they do not have a genuine fear of persecution.

32. The second element will then be judged on the lower standard of reasonable likelihood. Under this second element the applicant will need to show that they are likely to face persecution if returned. The Policy Statement describes how the applicant will need to establish either that (a) they are part of a group suffering from "systemic and widespread persecution" or (b) that they have a risk which is "personal and individual to them."

33. The practical considerations and difficulties of applying this split test are manifold.

34. First it is unlawful and contrary to authority. The assessment whether an applicant had a well-founded fear of persecution is to be made on a unitary basis (*R v SSHD ex p Direk* [1992] Imm

A. R. 330, *R v SSHD ex p Kaja* [1995] Imm A. R. 1). There is one standard of proof: the lower standard. As was made clear in *R v SSHD ex p Sivakumaran* [1988] AC 958, at 994F-G there is one overarching question to be judged by one standard: “the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason.” This is the requisite test for establishing whether someone meets the Refugee Convention. As was affirmed in *Kaja* there is a one−stage process. The task of the decision−maker was to assess, to a reasonable degree of likelihood, whether the applicant's fear of persecution for a Convention reason was well−founded.

35. Secondly, it is impractical. The so called first element of whether someone is experiencing a genuine fear cannot be separated from the second element and whether they are likely to face persecution. It is impractical for one standard of proof to be applied to one credibility assessment (whether there is a genuine fear) and another standard to another credibility assessment (whether they are likely to face persecution). As was observed in *Kaja* applying a split test means that uncertainties which are excluded at the first stage are not carried over to the second stage. This leads to a higher threshold being applied at the second stage by stealth. This cannot be right. In *Ravichandran v SSHD* [1996] Imm AR 97 Simon Brown LJ observed at p 109 that the question whether someone was at risk of persecution for a Convention reason "should be looked at in the round, and all the relevant circumstances taken into account". All the relevant circumstances cannot be taken into account if they are hived off into two separate parts with two separate standards of proof.

36. Thirdly, it is contrary to the Secretary of State’s previously stated position. The Policy Statement sets out that consideration of opportunities the person had to claim asylum in other countries will be a factor weighing against the first element on the balance of probabilities. But neither primary nor secondary legislation can subvert the UK’s obligations under the Refugee Convention. Even the Secretary of State acknowledged that similar provisions in s8 Asylum and Immigration (Treatment of Claimants, etc) Act 2004, about when one claimed asylum did not “affect[ ] the normal standard of proof in an asylum/human rights appeal.” (Y v SSHD [2006] EWCA Civ 1223, §36; *JT (Cameroon) v SSHD* [2008] EWCA Civ 878, §15. The normal standard, ie the lower standard, applies throughout.

***Proposals Unlawfully Diverge from Refugee Convention***

37. The UK is a signatory to the Refugee Convention. It has been incorporated into UK law such that is has "primacy" (s2 Asylum and Immigration Appeals Act 1993, *R v (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1, §7, 42, although cf *R v Asfaw* [2008] 1 AC 1061, §29). The Vienna Convention on the Law of Treaties confirms the principle of general international law that a treaty, "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art 31(1)). It should be given a "generous and purposive interpretation, bearing in mind its humanitarian objects and purpose" (*Roma Rights*, §18). The "more rigorous standard for testing the well-founded fear of persecution" advocated by the Government is self-evidently contrary to the generous and purposive interpretation of the Refugee Convention demanded by the Vienna Convention.

38. Having asserted the primacy of the Convention by s2 of the 1993 Act it is well established that any subsequent primary or secondary legislation "should be given a meaning that conforms to that of the convention" (see *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, 141 and Bennion on *Statutory Interpretation*, 5th ed (2008), section 221.6; affirmed in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 [2012] 1 AC 48, §14 per Lord Phillips). There is an equally strong presumption that Parliament does not intend or authorise conduct that would place the UK in breach of its international obligations: *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 per Lord Hoffmann at, §27. The proposed "more rigorous standard" is inimical to the purposive intention and humanitarian objectives of the Refugee Convention.

39. There is only one Refugee Convention. There is an inherent risk of a domino effect leading to the unworkability of the Convention if signatory states choose to apply "more rigorous standards" than those mandated. The position advanced in the Policy Statement is untenable. It is directly contrary to the stated "pride in fulfilling our moral responsibility to support refugees fleeing peril around the world." It should not be adopted.

## 25. Please use the space below to give further feedback on the proposals in chapter 4. In particular, the Government is keen to understand:

## (a) If there are any ways in which these proposals could be improved to make sure the objective of overhauling our domestic asylum framework is achieved; and

## (b) Whether there are any potential challenges that you can foresee in the approach being taken around asylum reform.

### *Proposal: Ensure those who arrive in the UK, having passed through safe countries, or who have a connection to a safe country where they could have claimed asylum, will be considered inadmissible to the UK's asylum system*

40. The inadmissibility process, combined with a lack of any return agreements, simply adds a further six months' delay into an already lengthy process, with the known harm that causes to people, and the additional resource then required in respect of asylum support. This is another proposal that just seems to create more work for the Home Office in a situation where they are already unable to process cases in an accurate and timely manner. Further, as was the case with the Dublin Regulations, it will still be appropriate for some cases to be considered in the UK, regardless of any returns agreements that may eventually be agreed.

### *Proposal: Seek rapid removal of inadmissible cases to the safe country from which they embarked or to another safe third country*

41. The Policy Statement makes clear that the UK does not want to accept refugees who arrive via any method than resettlement. Despite this, the UK is proposing to remove people to other 'safe third countries'. Whether this is for the offshoring of processing asylum claims, or to countries of transit, what is not explained is why those countries should take accept those who arrive outside of resettlement when the UK is unwilling to do the same.

### *Proposal: Introduce a new temporary protection status with less generous entitlements and limited family reunion rights for people who are inadmissible but cannot be returned to their country of origin (as it would breach international obligations) or to another safe country*

42. The policy statement states "*Anyone who arrives into the UK illegally - where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system, consistent with the Refugee Convention*."

43. This statement appears to be misleading as, at the Asylum Reform roundtable on 21 April 2021, slides were shown indicating that the intention is to extend this to all refugees other than those who arrive via resettlement. It appears that the five year grant of refugee leave

will cease to exist, given the proposal that those arriving via resettlement will be granted immediate indefinite leave to remain.

44. One of the slides shown at that round table stated "Expected impact: Reduce illegal migration and unmeritorious asylum claims." To state the obvious, a person who is a refugee does not have an unmeritorious claim. Yet refugees are the group who are being targeted by this proposal, which is that refugees who make their own journey to the UK instead of waiting years in dangerous conditions in resettlement camps in the hope that they may eventually be one of the less than one per cent of refugees who are resettled each year.[7] These proposals will have no impact on unmeritorious claims, they will simply make life even more insecure and uncertain, for over a decade, for those who have sought and been recognised as needing protection by the UK. This will cause harm to this group and will have a hugely detrimental impact on their ability to integrate".[8] The hostile environment will also cause difficulties for people during the period their extension applications are under consideration. The Equality and Human Rights Commission has already determined that the Home Office has failed to comply with its public sector equality duty under s.149 of the Equality Act 2010 when developing, implementing, and monitoring its hostile environment immigration policies.[9] The targeting of refugees by the current proposals risks only giving rise to a compounded further breach of this public sector equality duty.

45. The proposals also fail to acknowledge that resettlement programmes are not available to everyone, and that refugees may have entered the UK via other routes, for example student visas, and only discovered that they are actually refugees once they have been in the UK for years, this is something seen often with LGBTQI+ asylum claims. Women are trafficked to the UK for the purpose of exploitation, and are refugees due to the risk of re-trafficking if they were returned.[10] There are no resettlement options for these groups, and they will be excluded from refugee leave despite having no alternative than to claim asylum within the UK.

[7] https://www.unhcr.org/uk/resettlement.html

[8] https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy Section 4: Temporary Protection, pages 72-73

[9] https://www.equalityhumanrights.com/en/inquiries-and-investigations/assessment-hostile-environment-policies

[10] See e.g. *HD (Trafficked women) Nigeria* (CG) [2016] UKUT 454 (IAC) https://www.bailii.org/uk/cases/UKUT/IAC/2016/454.html

46. Australia already uses a temporary protection visa system similar to that proposed, in 2019 the Australian Human Right Commission published a report "Lives on hold: Refugee and asylum seekers in the 'Legacy caseload'".[11] The report raises concerns about the compliance of this regime with both the Refugee Convention and international human rights obligations. The report also notes the disconnect between the stated strategy to combat people smuggling, and reality, which is the "*available evidence suggests that temporary visas do not act as an effective deterrent to people smuggling. When TPVs were first introduced in late 1999, the numbers of asylum seekers coming to Australia increased to then record highs during the following two years*".[12]

47. The report also details the harm caused to people's mental health through the use of temporary protection visas:

> *Numerous studies focusing on people who were granted TPVs between 1999 and 2008 have found that temporary protection arrangements had a detrimental impact on mental health.*
>
> *Uncertainty about their future, the inability to make long-term plans and the stress associated with having to reapply for protection (including the anticipatory distress of potentially being returned to the country from which they had fled) caused significant distress and anxiety amongst TPV holders, hampered their capacity to recover from past trauma and resulted in poorer settlement outcomes.*
>
> *Research comparing the mental health outcomes of TPV holders and other humanitarian entrants has also consistently found that temporary visa holders experience poorer mental health outcomes than permanent visa holders*.[13]

48. The detrimental impact on children is also noted in the report, which notes that an Inquiry in 2004 found that the use of these visas was more likely to compound mental health problems for children than to facilitate their integration into society, and that their use was in breach

[11] https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy Section 4: Temporary Protection, page 65
[12] https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy Section 4: Temporary Protection, page 69
[13] https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy Section 4: Temporary Protection, pages 70-71

"*of Australia's obligations to address the best interests of the child as a primary consideration*".[14] The UK also has such an obligation under section 55 of the Border Citizenship and Immigration Act 2009.

49. In relation to the proposal to prohibit refugees granted temporary protection visas from reuniting with their families, again, there is evidence of the harm that this proposal will cause. The Human Rights Law Centre in Australia published a report in April 2021, "Together in safety", with input from both medical experts and international law specialists.[15]

> *Some patients had never experienced a depressive episode before becoming separated from their loved ones under the Australian Government's policy. Others experienced a worsening of pre-existing depressive episodes, some to the extent that they developed psychotic symptoms, for example, hearing negative voices when no one was present. The depressive symptoms resulted in a decline in people's functioning with diminished ability to care for themselves, isolation from other people, suicidal thoughts and in some cases multiple suicide attempts*.[16]

50. The report also describes the long term implications for children of such a policy:

> *The sudden and enforced separation of a child from an attachment figure (such as a parent) constitutes a major trauma and stress to the child's sense of safety and security. Such separation can result in a child experiencing behavioural disturbances such as anger, aggression and disorders of social interaction. These children may have long-term problems as a result of the disruption to their neurobiological development. The trauma of separation also increases the risk of self-harm and suicidal ideation in children. These problems with stress tolerance or adaptation can persist into adult life with major implications for mental health, interpersonal functioning and adaptation*.[17]

51. In addition to the harm that will be caused, this proposal will also create a considerable amount of work for an already under-resourced Home Office. At the moment, a person whose

[14] https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy Section 4: Temporary Protection, pages 72
[15] https://www.hrlc.org.au/together-in-safety
[16] https://www.hrlc.org.au/together-in-safety page 18
[17] https://www.hrlc.org.au/together-in-safety page 23

refugee status is recognised by the UK is granted five years leave to remain. After that they can apply for indefinite leave to remain. The new proposals are for leave to be granted two and a half years at a time, until a person can apply for indefinite leave to remain once they have accrued ten years of leave. This means an additional three applications per person. In 2019 5,453 people were granted asylum and 3,352 were refused.[18] Under the new proposals this would mean the Home Office would need to process over 15,000 further applications each year. The December 2020 statistics show that at December 2020 there were 51,321 people waiting for an initial decision on their asylum claim, 36,679 of whom had been waiting for more than six months.[19] The proposals will exacerbate the delays in this system.

52. It is difficult to see how the proposal to grant temporary leave subject to No Recourse to Public Funds ('NRPF') will have any practical effect, as recourse must be given where there is an imminent risk of destitution[20], and anyone in receipt of asylum support has already been accepted as destitute.[21] If the NRPF condition is placed on a person's leave, they can apply for a change of conditions to remove this restriction.[22] This proposal is either entirely ineffective, or all that it will achieve is yet more work for the Home Office, and more harm to refugees who will be left in destitution for longer periods while the decision is overturned.

### *Proposal: Bring forward plans to expand the Government's asylum estate. These plans will include proposals for reception centres to provide basic accommodation while processing the claims of asylum seekers*

53. The Policy Statement refers to "The reception centre model, as used in many European countries including Denmark and Switzerland". Denmark's initial accommodation centre is

[18] Immigration Statistics, Asylum and Resettlement – Outcome analysis of asylum applications, Table Asy_D04 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962011/outcome-analysis-asylum-applications-datasets-dec-2020.xlsx

[19] Immigration Statistics year ending December 2020, table Asy_04 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961749/asylum-summary-dec-2020-tables.xlsx

[20] *R (W, A Child By His Litigation Friend J) v The Secretary of State for the Home Department & Anor* [2020] EWHC 1299 (Admin) https://www.bailii.org/ew/cases/EWHC/Admin/2020/1299.html. See also the findings in *ST (A Child By his Litigation Friend VW) v Secretary of State for the Home Department* [2021] EWHC 1085 (Admin) that the NRPF scheme does not comply with s55 Borders Citizenship and Immigration Act 2009, §179(iii) and 157-161.

[21] https://www.gov.uk/government/publications/assessing-destitution-instruction

[22] https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change

Sandholm, a former military barracks located approximately 1.5 hours from Copenhagen.[23] Switzerland's model has been described as follows: [24]

> *it falls short from providing adequate support to vulnerable applicants. The lack of efficient identification and referral mechanisms affects many asylum seekers, especially victims of sexual violence and single women, and unaccompanied minors are still being accommodated with adults. The Government itself published a report in October 2019 highlighting issues relating to the lack of training of reception staff as well as the lack of adequate support to asylum seekers*.

54. The use of former army barracks in remote locations and the lack of efficient identification and referral mechanisms are already issues that we have also seen in the UK with the use of Napier and Penally. The use of remote locations causes access to justice issues, as it makes it difficult for people to see their lawyer, or even to find one. On 8 March 2021 Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration published a high level overview of their findings following visits to Napier and Penally.[25] These included the following:

- *the Home Office had been slow to recognise the impact on residents of prolonged isolation in accommodation that was not designed or intended for long-term stays*
- *We had serious safeguarding concerns in relation to Napier. There was inadequate support for people who had self-harmed. People at high risk of self-harm were located in a decrepit 'isolation block' which we considered unfit for habitation. Residents who may have been children were also housed in the same block pending an age assessment; in one case we were told that this had been for up to two weeks.*
- *At both sites, residents described feeling trapped in poor conditions and feared that if they moved out they would jeopardise their only source of support and possibly their asylum cases.*
- *The environment at both sites, especially Napier, was impoverished, run-down and unsuitable for long-term accommodation.*

[23] https://www.statewatch.org/media/documents/news/2019/mar/uk-dk-se-reimagining-refugee-rights-asylum-harms-3-19.pdf page 15

[24] https://www.ecre.org/aida-2019-update-switzerland/

[25] https://www.gov.uk/government/news/an-inspection-of-the-use-of-contingency-asylum-accommodation-key-findings-from-site-visits-to-penally-camp-and-napier-barracks

- *Cleanliness at both sites was variable at best and cleaning was made difficult by the age of the buildings. Some areas were filthy.*
- *Most current residents had been in Penally or Napier for several months. They did not know how much longer they would be in the camp and this was a major cause of distress. They had been told initially that they would be there for a few weeks. Over the months, they had been told various things about their stay and about moving on and now did not trust anything they heard. Residents told inspectors they did not understand why they were still in the camp while others had been moved out, and some believed (mistakenly) that it was in some way connected to the Home Office's view of the strength of their asylum claim, and the fact they had been in Penally or Napier would count against them.*

55. ILPA has also provided a detailed submission to this inspection, highlighting serious concerns about the failure to screen properly and to identify people who are unsuitable for this type of accommodation.[26] Since the publication of the above findings by HMIP and the ICIBI, we are aware that people who are unsuitable to be accommodated in Napier have continued to be transferred there. Therefore, in respect of this proposal, we do not believe that Denmark and Switzerland provide models that should be followed by other countries. Further, the Home Office has already demonstrated systemic failures towards those in its care through the use of Penally and Napier, and we expect that the same issues would arise in respect of reception centres.

## *Proposal: Make it possible for asylum claims to be processed outside the UK and in another country by amending sections 77 and 78 of the Nationality Immigration and Asylum Act 2002*

56. The Policy Statement say that this change "will keep the option open, if required in the future, to develop the capacity for offshore asylum processing - in line with our international obligations." Obviously, in addition to being cruel and costly[27], these plans are currently entirely speculative, which means that it is not possible to comment substantively. However, we would comment that the UK cannot abdicate its responsibility towards refugees by

[26] https://ilpa.org.uk/ilpas-response-to-the-icibis-call-for-evidence-an-inspection-of-the-use-of-hotels-and-barracks-as-contingency-asylum-accommodation-19-february-2021/ page 5

[27] https://www.theguardian.com/commentisfree/2020/oct/02/australias-offshore-asylum-centres-have-been-a-cruel-disaster-they-must-not-be-replicated-by-the-uk

adopting an offshoring process[2829], and contrary to the assertion made, it seems highly unlikely that this proposal would be in line with international obligations. The International Criminal Court has said in respect of Australia's offshore processing system that: "*These conditions of detention appear to have constituted cruel, inhuman, or degrading treatment ("CIDT"), and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law*".[30] This proposal is both harmful and unworkable and should be abandoned.

*Proposal: Reduce the criminality threshold so that those who have been convicted and sentenced to at least 12 months' imprisonment, and constitute a danger to the community in the UK, can have their refugee status revoked and be considered for removal from the UK (in line with UK Borders Act 2007 provisions)*

57. This proposal is misleading, as there is a prohibition on refoulement of refugees, recognised in the UK Borders Act 2007 at s33(2), meaning that a person cannot be deported where to do so would breach their rights under either the Refugee Convention or the European Convention on Human Rights. So it is unclear where a person affected by this provision would be deported to. It seems more likely that what is being proposed here is the expansion of the group of people to whom the Restricted Leave policy[31] can be applied, by reducing the sentence threshold for deportation.

58. We note that it is not unusual for victims of trafficking to receive criminal convictions that are directly related to their being trafficked.[32] There is a risk that this group would be affected by such a proposal, we are particularly concerned about this given the Policy Statement conflates victims of this crime with other offenders, stating "*over recent years we have seen an alarming increase in the number of illegal migrants, including Foreign National Offenders (FNOs) and*

[28] https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia%E2%80%99s-responsibility-asylum-seekers-and-refugees-nauru-and

[29] https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/manus_island/Report/c07

[30] https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf

[31] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711142/restricted-leave-v3.0ext.pdf

[32] https://ccrc.gov.uk/commission-refers-the-human-trafficking-case-of-ms-a-to-the-crown-court/, https://ccrc.gov.uk/commission-refers-the-human-trafficking-related-case-of-gb-to-the-court-of-appeal/

*those who pose a national security risk to our country, seeking modern slavery referrals – enabling them to avoid immigration detention and frustrate removal from our country*."

59. We are also aware that people are being wrongly targeted for steering boats, when they are not the people smugglers purportedly being sought. "*Eight migrants who admitted steering boats have been jailed since August, with sentences ranging from 16 months to over two-and-a-half years. After serving their prison terms, they will be eligible for deportation*."[33] This is despite it being known that the people smugglers are not actually on the boats. This was referenced in the ICIBI's report "An Inspection of the Home Office's response to in-country clandestine arrivals ('lorry drops') and to irregular migrants arriving via 'small boats'" which stated that "*8.118 CFI officers told inspectors that small boats investigations were difficult because there were no organised crime group members onboard the boats, although one of the migrants might have agreed with the facilitators to act as a "chaperone" for a reduced fee. Much of the organised criminal activity took place in France. CFI looked for the UK links but without the evidence it was not possible to launch a joint investigation*."[34] There is already a concern that refugees are being unlawfully targeted and sentenced, and these proposals seem to exacerbate this risk.

60. We are also concerned that the existing racial bias within the criminal justice system[35] will be compounded by these proposals.

## *Proposal: Support improved decision-making by setting a clearer and higher standard for testing whether an individual has a well-founded fear of persecution, consistent with the Refugee Convention*

61. The proposals in Chapter 4 as they relate to introducing a more rigorous standard for testing the "well-founded fear of persecution" question are misconceived for the reasons already set out in the response to question 22. The objective of overhauling the domestic asylum

[33] https://www.independent.co.uk/news/uk/home-news/channel-crossings-migrant-boats-jailed-dinghies-smugglers-cps-b1722937.html

[34] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933953/An_inspection_of_the_Home_Office_s_response_to_in-country_clandestine_arrivals___lorry_drops___and_to_irregular_migrants_arriving_via__small_boats_.pdf

[35] See e.g. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf page 33 and https://www.theguardian.com/law/2020/dec/09/judges-told-they-should-consider-previous-racial-bias-before-sentencing

framework is best achieved through a properly resourced and trained department of decision makers who are able to make fair, humane and lawful decisions properly applying the Refugee Convention and the European Convention on Human Rights.

*Proposal: Create a robust approach to age assessment to ensure we act as swiftly as possible to safeguard against adults claiming to be children and can use new scientific methods to improve abilities to accurately assess age.*

62. As members of the Refugee and Migrant Children's Consortium, ILPA has already provided the Home Office with a response to the age assessment proposals. We have a few additional comments to add here.

63. We are concerned at the lack of detail in these proposals, which include the use of highly controversial medical age assessments on children, and that the intention appears to be that the majority of these important changes will be made via secondary legislation, which will mean far less scrutiny by Parliament. We understand from the roundtable meeting that we attended with the Home Office to discuss age assessment on 28 April 2021 that this is to be an ongoing discussion that will extend beyond the New Plan's consultation deadline. We believe that these proposals should not be put into primary legislation until the full details are available, so that Parliament knows what it is being asked to vote on.

64. It is appropriate to remember that both the Secretary of State and local authorities have a duty to safeguard children in the UK.[36] The risks of wrongly assessing children as adults are well documented in the guidance and case law around age assessments. Despite this, the principle that children and young people should be afforded the benefit of the doubt and treated as such is not being adhered to. The proposed changes will make this significantly worse, and we note that as with most of these proposals, no evidence of a problem has been provided.

65. On the proposed changes to age assessments, we note that the proposal to treat someone as an adult where their physical appearance and demeanour strongly suggests that they are significantly over 18 years of age seeks to pre-empt the Supreme Court's decision in *BF (Eritrea) v Secretary of State for the Home Department* UKSC 2019/0147, which the SSHD lost in the Court of Appeal on this point. Even individuals with significant "training" in age

[36] s.55 Borders, Citizenship and Immigration Act 2009

assessments assess ages incorrectly. The European Asylum Support Office (EASO) guidelines state that "the observation of physical appearances cannot be considered as a method of age assessment in and of itself, nor can it be used in isolation since it cannot provide any specific chronological age with certainty".[37]

66. In their report "A refugee and then…" published in June 2019[38], UNHCR detailed serious issues with age assessments on arrival. In particular, in relation to "*the conflict of interest that arises when those undertaking the age assessment (social care and immigration officials) also have a vested (including financial) interest in its outcome, and the possible incentive to use the age assessment process as a means for gatekeeping services such as provision of social care and accommodation under Section 20 of the Children Act 1989*". The second issue raised was "*the unreliability of methods of assessment founded in subjective judgements about a person's appearance or demeanour, given vast individual, cultural, ethnic and socio-economic variations in rates of maturing*".

67. The third issue raised in UNHCR's report was "*stakeholders expressed concerns that a "culture of disbelief" (which has also been identified in existing literature) may have developed within both the immigration service and social care, whereby vulnerable children are often assumed to be either ignorant of, or lying about, their age. Indeed, the fear that adults might be deceptively posing as minors, in order to receive improved social assistance and benefits, was often displayed by social workers and foster carers interviewed as part of this assessment*". We note that when we asked for evidence that this was an issue, we were told at the roundtable that the only evidence was "anecdotal" and that this was an issue that had been raised by Local Authorities.

68. We believe that rather than there being an issue with too many adults claiming to be children, instead the problem is that too many children are having their age disputed by the Home Office and Local Authorities. When an unaccompanied asylum seeking child arrives in the UK they may not have documentation to prove how old they are. As a result, an individual arriving in the UK and presenting as a child can have their age disputed by either the Home Office or

[37] https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf pg46
[38] https://www.unhcr.org/uk/publications/legal/5d271c6a4/a-refugee-and-then.html?query=A%20Refugee%20and%20Then

a local authority. Age assessments should not be carried out routinely but only where necessary as a result of there being reason to doubt a person's age.[39]

69. We refer to the following from RMCC's statement:

> *In 2020 and 2019, there were 2,291 and 3,775 asylum applications from unaccompanied children respectively. In that period, 1,530 individuals had their ages challenged and of those where an assessment was concluded, 50% were found to be children at the initial social work assessment. Statistics are not available to show how many of these decisions were later overturned, following advocacy, settlement, and/or finding of fact reviews by judges.*
>
> *Government statistics on age disputed cases do not include the category of those applicants who claim to be children but who are treated as adults, according to Home Office policy. This used to state that in the opinion of an Immigration Officer "their physical appearance and/or general demeanour very strongly indicates that they are significantly over 18 years and no other credible evidence exists to the contrary" but the wording has changed since May 2019 to "very strongly suggests that they are 25 years or over". Since no statistics exist to count the number of young people to whom this policy is applied, it is also not known how many of these initial decisions are overturned by social workers following assessments. With the increase of 'short form' assessments being undertaken, there has been a worrying trend of young people deemed adult on the basis that they are over 18, as the social workers are not bound by the 'over 25' policy, despite conducting abbreviated assessments which, according to case law, should also allow for a margin of error.*

70. We are concerned that the Home Office is providing a distorted view of age assessments. The Home Office should be able to provide the actual number of applicants whose age is not accepted and the actual number who are later accepted to be a child. This information should be the starting point for any discussion, rather than 'anecdotal' evidence. Only when this is

[39] Department for Education (2014) Care of Unaccompanied and Trafficked Children, Available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330787/Care_of_unaccompanied_and_trafficked_children.pdf pages 13-14 and https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf page 6

done will the Home Office be able to consult meaningfully on a solution which will safeguard children.

## Chapter 5: Streamlining Asylum Claim and Appeals

### Question 29. The Government propose an amended 'one-stop process' for all protection claimants. This means supporting individuals to present all protection-related issues at the start of the process. The objective of this process is to avoid sequential and last-minute claims being made, resulting in quicker and more effective decision making for claimants.

### Are there other measures not set out in the proposals for a 'one-stop process' that the Government could take to speed up the immigration and asylum appeals process, while upholding access to justice?

***A One-stop process for all protection claimants***

71. These proposals fail to take into account the variety of well-known reasons as to why it is not always possible for a person to comply with this process. This includes where poor legal advice has been given previously, but also includes where a person may have difficulty in disclosing their experiences, or may be unaware that they can even claim asylum. We have addressed elsewhere in this response the difficulties, acknowledged in Home Office guidance, that victims of trafficking experience with disclosure. Difficulty with disclosure is also acknowledged in the Home Office's Asylum Policy Instruction: Sexual orientation in asylum claims".[40] Many LGBTQI+ people are simply unaware that they are refugees, and that it is possible to obtain recognition of this and a grant of leave on that basis, until they have been in the country for years. Some have come here as students, as this was a way that they were able to safely leave their home country. These are just some examples of why it is not possible to expect people to be able to disclose all of their experiences on demand, victims of torture will have similar issues.

72. Further, the obligation to consider 'fresh claims' arises from the prohibition on *refoulement* drawn from the 1951 Convention Relating to the Status of Refugees ('the Refugee Convention'), summarised in *R. v Secretary of State for the Home Department, ex p. Onibiyo*

40 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf pages 34 - 35

[1996] EWCA Civ 1338 (28 March 1996), 'The obligation of the United Kingdom under the Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return.' The European Convention on Human Rights further requires that claims under article 3 ECHR receive anxious scrutiny, independent and rigorous examination and that the remedy must have automatic suspensive effect (*M.S.S. v. Belgium and Greece*, App. no. 30696/09).

73. However, in order to discharge these obligations without unduly burdening the state, the United Kingdom already operates a one-stop process for protection claims. Applicants are required to raise all the reasons why they wish to remain in the United Kingdom if the Home Office serves a 'section 120' notice on them (s.120 Nationality, Immigration and Asylum Act 2002). If they fail to mention something which they then raise after their appeal has been determined, the Home Office can prevent them from accessing the appeals process again (s.96 Nationality, Immigration, and Asylum Act 'NIAA' 2002). Meanwhile, in any asylum appeal, the government has to consent before the First Tier Tribunal considers any matter which it has not yet decided, so that it is never ambushed by new issues being raised late in an appeal (s.85 NIAA 2002). Applicants for asylum are also required to claim asylum as soon as possible after they enter the United Kingdom. If they fail to do so, judges are instructed to treat this as potentially damaging to the credibility of their claim (s.8 of the Asylum and Immigration (Treatment of Claimants) Act 2004). The Home Office also has the power to certify a claim which has no prospect of succeeding as 'clearly unfounded', under s94(1) NIAA 2002. The consequence will be that any appeal to the First Tier Tribunal must be brought from outside of the UK per s.92 NIAA 2002. A challenge to a certification decision can only be made by judicial review.

74. When repeat claims are made, the United Kingdom also already operates a truncated decision-making process which enables the Home Office to dismiss such claims without granting the applicant a second right of appeal (Immigration Rules HC 395, §353 and s.82 NIAA 2002). A second right of appeal is given to the applicant only if the Home Office is satisfied that there is a realistic prospect of the appeal succeeding. The burden is on the applicant to satisfy the Home Office that circumstances have changed sufficiently for that prospect to be real (*WM (DRC) v SSHD and SSHD v AR* [2006] EWCA Civ 1495). Desperate applicants who make

unmeritorious repeat claims are thereby weeded out and prevented from taking up judicial time.

75. These measures all work to minimise the repeat claims which the government says are "often" made, while striking a balance with the SSHD's obligations not to *refoule* people to a place where their life or freedom will be threatened. No evidence has been provided as to how many repeat claims are now being made under the present system, and no analysis is offered as to why they occur. We do know that the number of asylum appeals lodged in the First Tier Tribunal has been falling since 2014. The average time taken to determine appeals also fell from 50 to 40 weeks between 2017/18 and 2018/19.[41] The number of judicial review claims lodged in the Upper Tribunal has fallen steeply, from 15,727 in 2015/16 to 5,679 in 2019/20.[42] Data the Home Office provided to the ICIBI in 2020 suggests that appeals arising from further submissions (which may include family as well as asylum cases) made up 5.4% of appeals from 2017 to 2020.[43] There is no evidence to support the government's contention that unmeritorious, repeat claims are wasting judicial resources. The fact that litigation by asylum-seekers has been consistently falling is also important when interpreting the marked decline in enforced removals of non-EU nationals taking place from the United Kingdom. These fell from 14,900 in 2010, to around 3,500 in the year ending March 2020. It is not tenable to explain this trend by pointing to vexatious appeals or claims for judicial review.

76. In our experience, there are broadly two scenarios in which repeat claims do go on to be heard in the First Tier Tribunal. Both operate in the context of widespread trauma-related mental illness affecting genuine asylum seekers. Refugees' ability to secure advice, disclose their experiences and effectively investigate and evidence their own claims are sometimes seriously hampered by symptoms of depression, anxiety and post-traumatic stress disorder.[44] Victims of torture, domestic abuse, trafficking or sexual assault often need time and a sense of safety

[41] Civil Justice Quarterly statistics, https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2019 [accessed 14 April 2021]

[42] Civil Justice Quarterly statistics, https://www.gov.uk/government/collections/tribunals-statistics, Main tables, Q4 2019-20, Tables UIA 1 & 3 [accessed 11 January 2021]

[43] Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office Presenting Officer function, November 2019 – October 2020, p.66, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951120/An_inspection_of_the_Home_Office_Presenting_Officer_function__November_2019_to_October_2020.pdf [accessed 14 April 2021]

[44] See, for example, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, Immigration Appellate Authority (UK): Asylum Gender Guidelines, 1 November 2000, available at: https://www.refworld.org/docid/3ae6b3414.html [accessed 14 April 2021]

before they can begin to disclose their experiences.[45] Detention and isolation, in particular, greatly impede the full disclosure and evidencing of asylum claims.

77. First, we see repeat appeals where circumstances have changed since the first appeal was dismissed. A war may have become more serious in the country of origin, a family member might have been arrested, or new evidence might have become available which did not exist at the date of the first appeal. The legal principles under which asylum appeals are determined may have materially changed since the first appeal was heard – and the enthusiasm of successive governments to legislate in this area creates a constant state of flux in asylum and human rights law.

78. Where such changes give rise to an arguable appeal, it is right that the Tribunal hears it. Except in the last example, there is relatively little which the state can do to prevent circumstances changing. The chances can be somewhat reduced by eliminating long waiting times for asylum interviews and appeal hearings, and by removing failed asylum seekers who do not leave the country voluntarily. But the chances of new evidence coming to light after an appeal has been heard are also greater where applicants are not given adequate time to gather evidence before their appeal. Speeding up the process too much is counter-productive. Thus, meritorious fresh claims following appeals that proceeded within the old 'Detained Fast Track' are seen with some regularity.

79. The second most common reason we see repeat appeals in the First Tier Tribunal is where the applicant had no or poor legal advice in their first appeal. This leads to issues and evidence not being aired in the first appeal, through no fault of the applicant. Unrepresented appellants struggle particularly. They do not know what kind of evidence they need to produce, or what arguments they should be making. The absence of professional lawyers representing the Home Office in the First Trier Tribunal and Upper Tribunal means that judges are not directed to the correct legal principles and mistakes are made. The Independent Chief Inspector of Borders and Immigration highlighted last year the need to develop a Code of Conduct and a training plan for presenting officers.[46]

[45] See, for example, D. Bögner, J.Herlighy and C. Brewin, "Impact of sexual violence on disclosure during Home Office interviews". British Journal of Psychiatry (2007) 191, pp.75-81.

[46] Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office Presenting Officer function, November 2019 – October 2020, p.10.

*Case Study*

*Mr A, a victim of torture by his government, claimed asylum in 2013. He was processed in the 'Detained Fast Track', and he was unrepresented. He did not disclose his torture, which included sexual torture. His appeal was dismissed. Mr A was detained for a year, during which time his mental health deteriorated until he became suicidal and developed psychotic symptoms. He was eventually released and became homeless, until he was admitted to a psychiatric hospital in 2017. At discharge in 2019 he was provided with housing advice that led to his being referred to a Law Centre. They made fresh representations on his behalf and he was granted a second appeal. With the benefit of expert medical evidence, he won his appeal. The fact that he was unrepresented at the first appeal was a material factor, if not the sole factor, which led to him having a second appeal. A one-stop process which did not include the fresh claim safeguard would have led to this torture victim being unlawfully returned to face the risk of further torture and death.*

Case study

*Mr X faced deportation action in 2016 following his conviction for wounding with intent to do grievous bodily harm. He appealed but was unrepresented. The Home Office were represented, but not by a lawyer. Mr X produced no evidence in his appeal and did not make any arguments about which specific legal provisions applied to him. In a determination made in 2019, the Judge misdirected himself as to the applicable law. The Home Office did not immediately seek to remove him. In 2020, Mr X found a solicitor, who saw that the previous judgment was erroneous and made fresh representations on Mr X's case. Although there had already been an appeal, no relevant findings had been made in the judgment because the wrong law had been applied. Thus, there was still a good prospect of success on appeal.*

80. Most asylum-seekers are of limited means. They are not permitted to work or receive public funds. However, the number of legal aid providers is dwindling because of cuts to legal aid, creating a dearth of legally-aided advice for asylum seekers.[47] These problems must be solved if the government wants to ensure that the first asylum appeal is comprehensive.

[47] *Droughts and Deserts: A Report on the Immigration Legal Aid Market*, Dr Jo Wilding, April 2019 (University of Brighton, Joseph Rowntree Trust), available at http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf

81. When an asylum claim does come back to the First Tier Tribunal a second time, the policy document wrongly describes this as "starting the whole appeal process again" (page 24). In fact, the previous determination will form the starting point of the second judge's analysis, and will only be displaced if there is good reason to depart from it once all the evidence is considered in the round (*Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702). If new evidence could have been submitted earlier, it "should be treated with the greatest circumspection" and "should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator" (para 40(4)). This guidance will however, be of less or no relevance where either the existence of the additional fact is beyond dispute, or there is some very good reason why the Appellant's failure to adduce relevant evidence before should not be held against him (ibid., §40, 42).

82. The government must be aware that its proposals to keep refugee status under periodic and indefinite review will vastly increase its own asylum workload. If such a review concludes that asylum status be revoked they would presently have a right of appeal (s.82 NIAA 2002). Does the government propose in future to exclude the refugee from appealing to the Tribunal on the grounds that the Tribunal has already found for him once? It is difficult to see how the proposals will not lead to repeat appeals, undermining the government's stated aims.

83. Measures which we believe would genuinely help the smooth running of the one-stop appeals process include:

- Minimising the use of detention early in the asylum process. Housing asylum seekers in the community maximises their access to legal advice, facilitates the gathering of evidence and benefits their mental health. They will thus be more likely to disclose their experiences fully and to present their cases effectively during their first appeal.
- Improving Home Office decision-making. Nearly half of asylum appeals are being allowed in the First Tier Tribunal. If the government is right that "nearly all'" refused applicants appeal, this indicates that half the Home Office's refusal decisions are reversed. In judicial review, we estimate that an arguable public law error is identified in around one in five claims, despite the narrow limits of the judicial review jurisdiction (see Q30, below). Given the comparative costs of administrative versus judicial decision making, that is a significant waste of resources.
- Interviewing applicants and making decisions promptly. The Home Office need adequate resources to cope with their case load. Some refugees are now waiting years

for an initial decision on their claims, and are obliged to rely on the taxpayer for their subsistence throughout that time.

- Properly funding the Tribunal so that it has the courtrooms and judges to hear asylum appeals. Even before the Covid-19 pandemic, appellants were waiting too long for their appeals to be heard. An average asylum appeal took nearly a year (40 weeks) to be determined in 2018/2019.[48]
- Ensuring that legal aid providers are adequately remunerated so that they can continue to operate.
- Making Home Office presenting officers subject to the same professional duties as solicitors and barristers, so that they cannot mislead Tribunal judges and must present legal authorities to the Tribunal even if they support the Appellant's case.
- Mandating ongoing training in asylum and immigration law for Home Office presenting officers so that they are able to effectively assist the Tribunal when appellants are unrepresented.
- Better case management at pre-hearing stage, for example by allocating one judge and presenting officer to carry the case through from case management hearing to full hearing, and listing cases with realistic time estimates.
- The Home Office empowering its representatives to make concessions at the Tribunal when its position has become untenable, and to take instructions promptly.
- Improve access to the Court of Appeal from the Upper Tribunal. The restrictive second appeals test now operating envisages that arguably erroneous determinations of the Upper Tribunal will stand because there is no wider public importance in correcting them. The only remedy for individual appellants in such cases is to make a repeat asylum claim.
- Not serving removal decisions on applicants at the last possible moment before planned removal flights. This Home Office practice makes it impossible to avoid challenges to erroneous decisions being made late in the day.

## Question 30. Please use the space below to give further feedback on the proposals in chapter 5.

84. When contemplating any changes which might impact upon access to appeals and judicial review of immigration and asylum decisions, it is important to bear in mind that decisions in

[48] See above.

this field routinely have very serious consequences for people's lives and livelihoods, whether they relate to work, study, residence, human rights to private and family life (including the physical and psychological integrity of the person) or claims for international protection from serious harm or persecution.

85. Furthermore, the ability of the public to have confidence that state authorities do not act unlawfully is a cardinal principle of the rule of law. As such, it is a public interest of primary importance. It follows that people living in a well-ordered country must know that public authorities will not act unlawfully, and they must have a means by which they can seek to exert their rights when they think they have been infringed.

86. The independence of the judiciary is also an essential component of the rule of law. As emphasised by the Independent Review of Administrative Law Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty (March 2021):

> *The Panel consider that the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers.*

***Volume and merit of litigation***

87. The Home Office claims that the court system is presently beset with unmeritorious appeals and claims for judicial review of its decisions (page 3). The evidence presented does not support that view. Only 57% of First Tier Tribunal asylum appeals were dismissed between 2016 and 2018 (page 9). In 2019/20 that figure dropped to 52%, in line with its steady decline over the last 10 years.[49] As set out at Q29 above, the overall number of appeals lodged is currently falling, and the Tribunal is determining appeals a little faster each year. Each allowed asylum appeal indicates that someone has been protected from persecution, death, or serious harm, who would otherwise have been removed from the United Kingdom.

88. Claims for judicial review of immigration and asylum cases have also been falling steeply in recent years, from 15,727 in 2015/16 to 5,679 in 2019/20.[50] The success rates for judicial

[49] Tribunal Statistics Quarterly Q4 2020, Table FIA 3, https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020 [accessed 15 April 2021]
[50] Ibid.

review on first sight appear low, but true rates of success are obscured by the procedure applied to these claims.

89. The Tribunal Statistics Quarterly provides the outcomes of judicial reviews in the Upper Tribunal for the last three years:[51]

| | | UTIAC Judicial Reviews | | |
|---|---|---|---|---|
| | | **Paper** | **Oral renewal** | **Substantive hearing** |
| 2017/18 | **Determined at hearing / papers** | **8,119** | **2,803** | **223** |
| | Allowed/Granted % | 8% | 26% | 35% |
| | Dismissed/Refused % | 92% | 74% | 65% |
| | Totally Without Merit | 1,091 | | |
| 2018/19 | **Determined at hearing / papers** | **6,628** | **2,267** | **127** |
| | Allowed/Granted % | 9% | 27% | 38% |
| | Dismissed/Refused % | 91% | 73% | 62% |
| | Totally Without Merit | 1,179 | | |
| 2019/20 | **Determined at hearing / papers** | **5,405** | **1,825** | **102** |
| | Allowed/Granted % | 10% | 31% | 29% |
| | Dismissed/Refused % | 90% | 69% | 71% |
| | Totally Without Merit | 825 | | |

90. It is difficult to make sense of these figures without a broad understanding of the judicial review process. There is no untrammelled right to judicial review. Anyone who wishes to lodge a claim must first file an application for permission to bring the claim. Where the claimant is legally aided, their representatives conduct all work "at risk" at this stage. If they do not get permission to proceed, they are not paid for their work. The first stage of judicial consideration is conducted purely on the papers. If a judge considers that the application raises an arguable public law error, permission will be granted on the papers; if not, it will be refused. If permission is granted, the Tribunal will issue case management directions for the substantive hearing. If permission is refused on the papers, the applicant may renew the application, to be considered at an oral hearing. If permission is refused after the oral hearing, the applicant's only recourse is to appeal the refusal of permission to the Court of Appeal. If

[51] Tribunal Statistics Quarterly Q3 2020, Table FIA 3, https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020 [accessed 15 April 2021], Table UIA 3.

permission is granted, the Tribunal will issue case management directions for the substantive hearing. Deadlines apply at all stages.

91. Judicial review claims in the Upper Tribunal almost always conclude in one of the following ways:

- Permission refused on the papers; applicant decides not to renew;
- Permission refused on the papers, applicant renews for reconsideration at an oral hearing, but permission refused after oral permission hearing;
- Permission granted (on the papers or after consideration at an oral hearing), claim proceeds to substantive oral hearing, where it succeeds or fails;
- Parties settle the claim by consent.

92. In scenarios (b) and (c), the unsuccessful applicant/claimant can appeal to the Court of Appeal. A successful appellant against the refusal of permission will be remitted to the Upper Tribunal for a substantive oral hearing of the claim.

93. It seems fairly clear that the 6,063 cases allegedly 'concluded… on paper' in the paragraph on page 26 of the Policy Statement were all, in fact, paper applications for permission. The Policy Statement gives the misleading impression that these cases were thus concluded by being dismissed, whereas in fact many of these cases will proceed to an oral permission hearing.

94. The figures do not show how many of those specific applications were then renewed orally, but, as the number of oral renewal determinations has been 34% of the paper determinations for the last 3 years running, it is safe to take that as the relevant proportion. Of those, the proportion granted has risen from 26% in 2017/18 to 31% in 2019/20. The web-page referenced in the footnote indicated that the rise in success rate at oral renewal has continued to rise:

> *During October to December 2020, 310 UTIAC Judicial Review applications were determined by paper hearing, of which 7% were allowed to continue to the substantive hearing stage. A further 91 were reconsidered at an oral renewal, of which 36% were allowed to continue to the substantive hearing stage. There were 12 substantive hearings which were determined in October to December 2020, of which 33% were granted in favour of the appellant (see table UIA_3).*

95. Independent research is broadly consistent with this picture. In the 2019 report *Immigration Judicial Reviews: An Empirical Study*, Professor Robert Thomas and Dr Joe Tomlinson,[52] found at pages 37-8 and 41 (emphasis added):

> *The majority of claims are refused permission on the papers. Refusal rates almost consistently exceed 90 per cent. However, when interpreting this data, it is important to bear in mind the following points. First, claimants refused on the papers can renew their application at a hearing. Claims refused on the papers may be granted permission through oral renewal.*
>
> *Second, some claims are settled before the paper permission stage by the Government Legal Department on behalf of the Home Office. Third, when a claim has been settled by the parties and then reaches the permission stage, it will be refused by the judge on the ground that because the challenge has been settled, it now raises an academic issue and should therefore be refused. Such "academic" refusals are categorised as a refusal of permission.* ***For these reasons, it is difficult to measure precisely the actual overall success rate****. Nonetheless, it is the case that a substantial proportion of the paper permission caseload, and certainly well over half of it, is refused permission on the papers.*
>
> *…*
>
> *The overall success rate for applicants at oral renewal hearings is higher than at the paper permission stage. The proportion of oral renewals granted permission is around 20%.53 This compares with around 10% of paper permission claims granted permission.*

96. The true current picture appears to be that around 10% of permission applications are granted on the papers. About 38% of the refusals then apply for oral renewal, of which about 33% are granted permission at oral renewal stage. This means that around 21% of judicial review applications are granted permission, either at paper consideration stage or on oral renewal.[54] The massive drop in numbers of cases between oral renewal and substantive consideration is

[52] https://www.nuffieldfoundation.org/project/immigration-judicial-reviews [accessed 15 April 2021].
[53] Or 1 in 5. The latest statistics show that it has risen to around 1 in 3 since the report was written.
[54] That is, the initial 10% plus a third of the 34% proceeding to oral renewal: 10%+11.33%=21.33%.

predominantly accounted for by the fact that the parties usually settle by consent after permission has been granted.

97. As Thomas and Tomlinson pointed out in 2019, some permission applications are refused by the Tribunal because the applicant has achieved his or her aim through negotiated settlement, so the claim has become 'academic'. In view of this, the actual baseline statistical prospects of success of judicial review claims is comfortably over 1 in 5. This rate of success may be expected to be lower than those in appeals because of the nature of review: whereas in an appeal a judge comes to their own view of the evidence and the balance of competing interests, in judicial review the Tribunal limits itself to asking whether the Secretary of State was lawfully entitled to act in the way that she did.

98. This shows that around one in five judicial review claims identify decision-making that is either quashed by the Tribunal because it is unlawful; or is so likely to be unlawful that the Home Office concedes that the decision needs to be reconsidered. This shows that judicial review is working well. By no stretch of the imagination can this be described as a waste of 'valuable judicial and court resources.'

99. Rather than focussing its energies on trying to restrict people's ability to scrutinise its decisions, the Home Office should be addressing the poor quality of its decision-making. A 20% success rate at identifying significant unlawfulness in decisions *on the public body's own terms* (as opposed to findings of unlawfulness based on the Tribunal's own differing judgment) is extraordinarily high and clearly indicates problems with decision-making.

100. Furthermore, it should be remembered that judicial review claims are designed for use where there is no other means of challenging a decision by a public body. So, while it is true that a significant proportion of judicial review claims are made at a late stage, that is wholly unsurprising in a procedure of last resort. Far from indicating abuse of the procedure (as the Policy Statement implies), it is precisely what one would expect if the procedure was being used appropriately: the procedure of last resort is being used as a last resort.

101. Therefore, success/failure rates do not make out the case for reducing access to the procedure.

### *Proposal: Develop a "good faith" requirement setting out principles for people and their representatives when dealing with public authorities and the courts, such as not providing misleading information or bringing evidence late where it was reasonable to do so earlier*

102. The proposed 'good faith' requirement appears to cover the same ground as section 8 Asylum and Immigration (Treatment of Claimants) Act 2004, in respect of applicants. When the courts attempted to apply section 8, they concluded that it must be interpreted to mean that the behaviours listed were "potentially" damaging to credibility rather than actually damaging (*JT (Cameroon)* [2008] EWCA Civ 878). The fundamental duty of all independent judges is to assess the evidence before them fairly. They cannot be compelled to believe or disbelieve any class of witness, however reprehensible their behaviour might be. Nor can they be directed to exclude certain types of people from universal human rights protections. Parliament can direct judges to take into account certain matters as potentially relevant to credibility, but it cannot go further. We doubt whether such elaboration is worthwhile.

103. Insofar as the proposal suggests that it will be extended to legal representatives, such professional obligations already apply.

104. The 'good faith' requirement ought to be common to the applicant and the state. The state should undertake to do its utmost to assist the applicant to make his or her asylum claim effectively, to safeguard the applicant's welfare, to uphold the norms of international humanitarian law and to communicate its decisions to the applicant at the earliest possible opportunity (rather than serving them at the last minute, often shortly before removal flights). If the state breaches these duties, judges could be directed to give less weight to the Home Office's evidence in asylum appeals.

### *Proposal: Integrating NRM decisions into the One Stop process*

105. The proposal is that the one-stop process will include 'grounds for asylum, human rights or referral as a potential victim of modern slavery. People who claim for any form of protection will be issued with a 'one-stop' notice, requiring them to bring forward all relevant matters in one go at the start of the process.'

106. The difficulties experienced by victims of modern slavery in disclosing their experiences is well-known. The Home Office's Modern Slavery: Statutory Guidance for England and Wales

(under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland states the following:

*13.10. Victims may not recognise themselves as a victim of modern slavery or be reluctant to be identified as such. It is important that First Responders and other frontline staff are aware of the indicators of modern slavery in order to help identify potential victims who are reluctant or unable to self-identify.*

*13.11. Victims of modern slavery may initially be unwilling to disclose details of their experience or identify themselves as a victim for a variety of reasons. These reasons include, but are not limited to, the following:*

*• they may be in a situation of dependency - this could be due to a large number of factors including age, debt, immigration status, employment status, threats to their person or family, or other forms of psychological and physical control. They may be dependent on their exploiter for shelter, food or employment.*

*• there is stigma attached to trafficking - knowledge and understanding of the concept is limited and most individuals will associate the term with prostitution*

*• they may fear reprisals against them, their children, families or friends - in most trafficking situations, agents know, or will attempt to find, personal information about the victim, their home, family and friends. It is very common for agents and traffickers to use threats against the victim's family, especially children, in order to manipulate and control the victim.*

*• they may feel they are dishonouring their family or community by not continuing in their situation - although it is also important to note that family members and communities can be involved or complicit in modern slavery*

*• they may be distrustful of authorities - given their experiences with authorities in other countries or as a result of indoctrination by traffickers or through fear of being accused of being complicit in the modern slavery situation; some exploited people may be viewed as 'colluding' with their 'employer' in their illegality, for example, accepting the 'cover' of the person exploiting them from the immigration authorities. They may also have been groomed into believing that they are complicit in the process.*

*• they may fear being discovered as being in the UK illegally - they may fear deportation.*

*• they may suffer from Stockholm syndrome, where due to unequal power, victims create a false emotional or psychological attachment to their controller.*

*• they may be romantically 'involved' with their trafficker/exploiter - such 'relationships' can add to the confusion when attempting to identify victims of modern slavery.*

*• they may be unable and/or unwilling to think of themselves as 'victims' - they may not understand that they have been exploited, or may not be aware that aspects of their exploitation are relevant and are unaware their situation would constitute modern slavery.*

*• they may see their current situation as temporary and blame it on their lack of understanding of the culture and labour market in the UK*

*• they may tolerate their situation because they see it as a 'stepping stone' to a better future – victims may compare it favourably to experiences at home - in this situation those working with victims must consider objective indicators such as the seizure of identity documents or use of threats by the employer or exploiter; such indicators will help frontline staff identify if the person could be in a modern slavery situation*

*• they may be unaware of the intentions of the trafficker or exploiter to exploit them*

*• they may not understand what modern slavery means - this is particularly likely with child victims and adults with additional forms of vulnerability*

*• they may not be aware of support structures and their entitlements*

*• children may not have the same cultural understanding of childhood as is held in the UK and feel they are young adults responsible for earning money for their family - they may see an exploitative situation as a sacrifice to be made for their family*

107. It is useful to set out the Home Office's own guidance on the issues surrounding disclosure from victims of modern slavery in its entirety, because this cannot be reconciled with these proposals to subject these vulnerable people to such an inflexible process. These proposals also appear to conflict with The Slavery and Trafficking Survivor Care Standards[55] and the Helen Bamber Foundation's Trauma Informed Code of Conduct for professionals working with survivors of human trafficking and slavery.[56]

[55] https://www.antislaverycommissioner.co.uk/media/1235/slavery-and-trafficking-survivor-care-standards.pdf

[56] http://www.helenbamber.org/wp-content/uploads/2019/01/Trauma-Informed-Code-of-Conduct.pdf

108. In relation to the proposals around appeals, again the detail is unclear. Currently rights of appeal and grounds of appeal are governed by s.82 and 84 of the Nationality Immigration and Asylum Act (NIAA) 2002:

> *82 Right of appeal to the Tribunal*
> *(1) A person ("P") may appeal to the Tribunal where—*
> *(a) the Secretary of State has decided to refuse a protection claim made by P,*
> *(b) the Secretary of State has decided to refuse a human rights claim made by P, or*
> *(c) the Secretary of State has decided to revoke P's protection status.*
> *…*
> *84. Grounds of Appeal*
> *(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—*
> *(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;*
> *(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*
> *(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).*
> *(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.*
> *(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—*
> *(a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;*
> *(b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection."*

109. As can be seen, the statutory appeals framework currently includes neither the decision that a person is not a victim of trafficking as an appealable decision under s.82, nor the potential

for the decision to breach the UK's obligations to victims of trafficking and modern slavery as a ground for appeal under s.84. It is not clear how the Home Office proposes to incorporate modern slavery as a ground of appeal.

110. A claim to be a victim of trafficking ('VoT') is not a claim for international protection. The Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16th May 2005) 'ECAT' is not just engaged by removal directions. The obligations imposed by ECAT are much broader than that. Indeed the obligations under ECAT reach beyond solely the decisions of UKVI and the Home Office. ECAT requires VoTs to be identified so that signatory states can better combat crime, as well as requiring states to assist victims in their recovery.

111. Trafficking claims therefore attract different procedures and entitlements. While they may rest on the same facts as an asylum claim, we consider that attempts to conflate the two will result in unfairness, delay and injustice. The different procedures which apply to trafficking claims are summarised below.

112. The identification mechanism established in the UK for potential VoTs is the National Referral Mechanism ('NRM'). The obligation to identify and investigate where there is a credible suspicion that a person is a victim of trafficking and / or modern slavery arises both under ECAT and under Art.4 ECHR.

113. The NRM provides for a 'First Responder' (which includes *inter alia* UKVI, the police, local authorities and certain non-public bodies) to refer the potential victim to the 'Single Competent Authority' ('SCA').

114. The SCA are required to make an initial 'reasonable grounds' ('RG') decision within 5 working days of the NRM referral being received or 'as soon as possible' if the person is in detention. An RG decision is made by applying a very low threshold, *"I suspect but I cannot prove."* If the RG decision is positive, entitlements follow, including a 'recovery and reflection' period of at least 45 days (Art.13 ECAT). Under Art. 12, victims are in summary entitled to:

- *Appropriate and secure accommodation;*
- *Psychological assistance;*
- *Material assistance;*
- *Access to emergency medical treatment;*

- *Translation and interpretation services, when appropriate;*
- *Counselling and legal information in a language that they can understand);*
- *Access to education for children.*

115. The recovery and reflection period can be extended if necessary. Importantly, Art.13(1) of ECAT makes clear that the period granted must be sufficient to enable the objectives to be achieved. If the RG decision is negative it can only be challenge by way of judicial review. Following an RG decision, the SCA is required to investigate the claim and make a 'conclusive grounds' ('CG') decision, this time on the "balance of probabilities". If the CG decision is positive the victim may require (and is entitled) to further support and assistance to aid recovery, advice on compensation or a residence permit. If the decision is negative, again, it can only be challenge by way of judicial review.

116. All of these rights continue until the victim has left the UK and must be offered in all settings (prison, detention, care proceedings, or otherwise). The obligations of a number of agencies including local authorities and police are affected by an RG decision.

117. These rights plainly go considerably further than those enjoyed by claimants for international protection. This gives rise to two significant issues.

118. First, a procedure designed to accommodate asylum-seekers is unlikely to adequately discharge the United Kingdom's obligations to VoTs given the specific duties owed to VoT.

119. Secondly, whereas it is relatively straightforward to identify the appropriate decision giving rise to an appeal against a refusal of asylum, the proposal does not make clear which aspect of NRM decision-making will give rise to a right of appeal.

120. We do consider that a new ground of appeal based on a breach of ECAT will potentially benefit all parties. Indeed, much of the factual basis of an international protection claim will be germane to a claim to resist removal on the grounds that removal would breach ECAT. The First Tier Tribunal can hear evidence: it is the 'expert fact-finding tribunal,' and its jurisdiction is not confined to public law errors. The SSHD would benefit from having to defend fewer trafficking related judicial reviews. It is noted by analogy that contravention of the UK's obligations under ECAT provides an exception to automatic deportation under the UK Borders Act 2007:

**33 Exceptions**

(1) Section 32(4) and (5)–

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

...

(6A) Exception 6 is where the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16th May 2005). ('ECAT')

121. However, the Policy Statement does not address how this will work in practice. It is not explained when the right to appeal will be generated, nor how the right of appeal will interact with the obligations on other agencies. In such circumstances it is hard to comment any further on the generalised proposal to integrate NRM decisions into the One Stop process.

122. In conclusion, we have serious concerns about combining two distinct processes. International protection concerns risk on removal, whereas a claim to be a victim of modern slavery attracts entitlements *inter alia* to services in the UK.

123. Stepping back, we note our serious concern regarding the tone and content of the Policy Statement and associated press releases, in the way that the government is portraying (without evidence) the modern slavery system and those who are subject to its processes.[57]

## *Proposal: Provide more generous access to advice, including legal advice, to support people to raise issues, provide evidence as early as possible and avoid last minute claims*

124. Again, the Policy Statement's proposal regarding a "new legal advice offer" is so vague that it is not possible to comment meaningfully on whether it will effectively achieve the

[57] https://www.gov.uk/government/news/alarming-rise-of-abuse-within-modern-slavery-system

government's stated aims. In principle, we would of course support proposals which would ensure better access to free, high quality and independent legal advice. We would emphasise the critical importance of independence, experience and quality. Investment in legal aid is crucial, to ensure that quality legal advice is available right from the start of an applicant's asylum claim. We will scrutinise the specific proposals brought forward in due course. Access to good legal advice requires the existence of good, affordable legal advice in the market; professional regulation; access to a selection of providers for applicants, and processes which afford advisors the opportunity to provide their services. Reversing cuts to legal aid, providing applicants with practical help to find lawyers and housing asylum seekers in the community would all further the government's stated aims.

## *Proposal: Expedited Appeals*

125. Again, this proposal is at such a high level of generality that it is difficult to provide meaningful comments. The Policy Statement document is also confusing: the bullet points on pp27-28 discuss expedited process for detained cases and a new 'fast-track' appeal process for unfounded or late claims; yet the body of the document under 'Expedited appeals' on p29 discusses measures to 'streamline' the process and narrow the issues in *all* appeals. The concluding sentence of the section on p29 suggests that the 'expedited appeals' proposals will *"prevent[…] unmeritorious appeals that can be a way of preventing removal"*, yet nothing that has been identified under this heading could logically go to that objective. This lack of clarity, and detail, significantly undermines the value of this consultation process and the input that we are able to provide.

126. As far as 'standard' appeals are concerned, our members often find that their clients have to wait several months for a hearing date even when both parties are fully prepared for their appeal. Reducing these waiting times, while ensuring that the timetable for case preparation is reasonable, would benefit all parties. That means making sure that the Tribunals have enough sitting days available to deal with their backlog and new asylum appeals.

127. In principle we would strongly support reforms which would narrow the issues at hearing, and ensure shorter and more focused hearings. This is in the interests of our clients, for whom the Tribunal process is often unduly stressful, and in some cases traumatic. However we doubt that these objectives can be achieved without investment and reform in the Home Office's operations, in particularly in respect of the management of caseloads and Home Office

Presenting Officers. We note the Policy Statement's comments regarding the recent Tribunal reform project. In theory, the project established a process of frontloaded case preparation, followed by Home Office 'meaningful review', with a view to narrowing the issues prior to hearing (the Home Office having seen all of the evidence that has been prepared). However our members' experience has been that the Home Office often responds with cursory 'review' documents which make no concessions; or in many cases the Home Office does not respond at all and the case simply proceeds to final hearing. The hearing is then conducted by a different Presenting Officer, who has just picked up the case for the first time, and as highlighted in the Independent Chief Inspector of Borders and Immigration's report cited below, has been given inadequate time to prepare for the appeal. This frequently results in unfocussed cross-examination, during which evidence is adduced that was already set out in writing, questions are asked in ignorance of what the documentary evidence says, and not infrequently Presenting Officers *depart* from and *expand* on the issues already identified in the refusal letter, and treat cross-examination as an exploratory process. Obviously, this lengthens appeal hearings. It also wastes judicial time, where issues have been maintained, when they could or should have been conceded.

128. The suggestion that individual hearings be made shorter is only desirable or indeed acceptable if it does not prejudice the fairness of proceedings. We would observe that appeal hearings in immigration cases, even in asylum and protection appeals, are already relatively short, particularly in view of the gravity of the subject matter which is often under consideration, and the gravity of the consequences which may follow a decision wrongly made.

129. If the government wants to ensure that all possible issues are dealt with in one hearing, it should plan for the likelihood that some hearings will be longer. Similarly, if the government wants to avoid the need for fresh claims to remedy unfair or inadequate processes the first time round, it needs to prioritise getting the process right.

130. Regarding the use of remote technology, our members have not found that online hearings are shorter than hearings in person. Although they do save representatives time spent waiting and travelling, they can make it more difficult for appellants to give their evidence effectively. For some appellants, online hearings take substantially longer while they attempt to use unfamiliar technology.

## *Proposal: introduce an expedited process for claims and appeals made from detention, providing access to justice while quickly disposing of any unmeritorious claims*

131. We do not believe that the proposal to reinstate a detained, expedited asylum appeals process can be implemented in any way that avoids causing unfairness to appellants. As was explained in *Detention Action v First Tier Tribunal (IAC), Upper Tribunal (IAC) and the Lord Chancellor* [2015] EWHC 1689 (Admin), the High Court found that the then 'detained fast track' appeals process was structurally unfair. Under that process, appeals by asylum applicants who were detained were subject to much shorter time limits and more limited case management powers. The appeal had to be heard within 7 days of the appealed decision, the Tribunal had no power to alter the time for complying with a rule or direction, and adjournments could only be granted for 10 working days. If the Tribunal believed the appeal could not be justly determined, it could transfer the case out of the expedited process. Notwithstanding this last provision, the procedure was nevertheless found to have unfairness built into it. The truncated timescales, coupled with detention, put appellants at a serious disadvantage. It was unacceptable for one party to litigation to have the power to put the other party at serious procedural disadvantage.

132. Subsequent to the Detention Action case mentioned above, the Ministry of Justice launched a consultation on proposals to expedite appeals by immigration detainees.[58] Following that consultation, the government's view was that there was a need for specific rules in respect of appellants in detention. It was recognised that this is not a matter of government policy, but is a decision for the Tribunal Procedure Committee. The Tribunal Procedure Committee then launched their own consultation, and published their report in 2019.[59] We note the following points from that report:

- *the Home Office and MoJ had agreed that, in the short term, it would not be operationally practical to include FNOs held in prison within any fast track rules. FNOs held in prison present a number of logistical challenges, particularly related to their attendance at hearings, since they are detained throughout the prison estate and must be brought to hearings held at various secure (often criminal) court*

[58] https://www.gov.uk/government/consultations/expedited-immigration-and-asylum-appeals-for-detained-appellants

[59] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

*buildings. Both the Home Office and MoJ expected these challenges to be overcome in the future, but were not able to commit to doing so in time for the launch of any fast track rules or by any particular date*.

- *In order to ensure that such a system would deal with cases fairly, it would need to include rigorous procedural safeguards to ensure that unsuitable cases were not included within the fast track system. The importance of such safeguards must not be underestimated. ... The TPC has no doubt that many appeals involving detained appellants would not be suitable for resolution within 28 working days and would therefore need to be removed from any fast track system. This flows inevitably from the intention of initially applying any specific rules to all appeals involving detained appellants and from the practical challenges identified in the replies to the consultation summarised above.*
- *if new fast track rules were to be introduced, there would need to be an early oral case management hearing for all cases where an appellant was in immigration detention. A key function of that case management hearings would be to decide whether the appeal should be heard under the Principal Rules or any fast track rules. The TPC concluded that such a system was capable of offering an adequate safeguard, by ensuring that unsuitable cases were not placed within any fast track system. However, such hearings would absorb a substantial amount of judicial and administrative resource, which would then not be available to be used to resolve cases. It would delay the hearing of cases that were taken out of any fast track process, since any 'fast track' hearing that had been listed would need to be cancelled and a new hearing listed. There was a real prospect that a substantial proportion of detained cases that entered a 'detained fast track' would need to be removed from the system as unsuitable. There was also the danger of satellite litigation being created around the tribunal's case management decisions, causing further delay.*
- *The need for robust safeguards also means that specific rules would not lead to any greater certainty in relation to how long an appeal would take to conclude. An inevitable consequence of such safeguards would be that many cases would be dealt with outside the fast track timescales, since the purpose of such safeguards would be to identify unsuitable cases and ensure they were dealt with differently. Specific rules would therefore create no greater certainty than the existing Principal Rules.*

133. The Tribunal Procedure Committee concluded "*If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired*." It is unclear how the government proposes to overcome the hurdles identified in both the Detention Action case and by the Committee. We would note that this proposal increases the likelihood that fresh or repeat claims will be necessary.

134. The Policy Statement asserts that "very few" of the claims raised from detention amount to a valid reason to remain in the UK, based on the quoted statistic that of the claims or "issues" raised from detention in 2017, 83% were "ultimately unsuccessful". We would observe:

- This statistic appears to mean that up to about 1 in 5 people who made claims from detention in 2017 had a genuine and proper right to remain in the UK, which was ultimately recognised by the Home Office. Many of these will have been based on risk of death or serious harm if removed, or a devastating effect on family, partner or children. 1 in 5 is a significant proportion, given the stakes involved in these cases.
- On review of the source,[60] it is not clear that it is accurate to say that 83% were *ultimately* unsuccessful. The source information is unclear. It states that *"Analysis of the outcomes of these issues is complicated because many are yet to receive a decision. Applications and referrals may raise complex factors, or the decisions may be subject to criminal or other legal proceedings, and therefore sometimes it can take many months, or even years, to reach a decision. However, the decision-making body did not agree with the claim in most instances. Looking back at issues raised during detentions ending in 2017 for immigration offenders from the community, 12% resulted in a positive decision for the individual or some form of concession being made, 83% did not result in a positive decision, and 5% are ongoing"*. The source goes on to state that:
    - 18% of appeals to the Tribunal lodged by people from this 2017 detained cohort were allowed.
    - Around 20% of judicial review claims lodged by people from this 2017 detained cohort were either successful in court or conceded by the Home Office (with a further 6% of claims 'closed by the court for procedural reasons', which may or may not reflect success for the applicant).

[60] https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention [accessed 16 April 2021]

135. It is not clear whether or not the 83% figure includes the cases which succeeded following appeal or other challenge. Scrutinising the source data and doing our own calculations, it appears that this 83% figure has been derived by combining the figures for 'asylum applications' (Table 6a) with 'human rights and other rights-based applications' (Table 6b). This heightens our concerns, as the data regarding human rights and other applications apparently relates to first-instance decisions only, and does not apparently include those people who succeed on appeal or following JR.

136. The data relates to a single year. This is an obviously inadequate evidential basis for the Policy Statement's sweeping assertions about the merit of claims which are brought by people in detention facing removal. All the more is it inadequate as an evidential foundation for fundamental reform, and in particular for reducing access to justice for people in detention raising issues of this gravity.

137. The statistics regarding the 2017 cohort's success by way of appeal (1 in 5) and success by JR (1 in 5) in fact send a stark warning, which the government does not appear to have recognised. If access to justice is further reduced or trammelled for people in detention facing removal, there is a risk or likelihood that a significant number of people who have genuine claims to be in need of protection from persecution, or other legitimate bases to be in the UK, will be wrongly removed. These statistics indicate that reducing access to justice for people in detention is highly likely to lead to people being removed from the UK to face death, serious harm or devastating consequences for families, partners and children.

138. The data sends a particular warning regarding decision-making on people who have committed crimes ('Foreign National Offenders'). The source data confirms that 24% of appeals by 'FNOs' in the 2017 cohort were successful with a further 4% ongoing; while 29% judicial reviews of FNOs were successful or settled by the Home Office (a further 6% were 'closed by the court for procedural reasons'). In other words, Home Office decision-making in relation to FNOs is particularly likely to be wrong or unlawful. This suggests it is *particularly* important that people who have committed crimes retain access to effective appeals and Judicial Review.

### *Proposal: provide a quicker process for Judges to take decisions on claims which the Home Office refuse without the right of appeal, reducing delays and costs from judicial reviews*

139. Judicial review applications are already subject to the requirement for Claimants to lodge their claim "*promptly and in any event within three months*" and there is no good reason for further restriction on that test for immigration-related matters.

- Expedited processes are available where appropriate;
- "*Cart*" judicial reviews are already subject to a heavily curtailed timetable compared with the usual judicial review deadlines;
- Claimants would welcome prompt listing of judicial review permission applications and of substantive hearings;
- The Home Office frequently applies for and is granted extensions on the lodging of Acknowledgement of Service and other pleadings, citing pressure of work;
- In contrast, detainees are frequently expected to be able to prepare cases from behind bars without proper access to specialist lawyers, under time limits which cannot be extended.

### *Proposal: Introduce a new system for creating a panel of pre-approved experts (e.g. medical experts) who report to the court, or require experts to be jointly agreed by parties*

140. Again, this proposal is made in very general terms, and without detail.

141. The Policy Statement states that the Home Office wishes to "ensure greater confidence in the system" by vetting the expert witnesses who are permitted to give evidence in asylum appeals.

142. State interference with, or control over, the witnesses that are permitted to give evidence in cases against the State is a striking and highly problematic proposal, to say the least. It is highly likely that such a scheme would compromise the fairness and independence of the appellate process. These are adversarial proceedings, in which the executive is defending its decisions before an independent judiciary. It is fundamentally unfair for one party to proceedings to have this sort of control over the witnesses available to the other party.

143. Absolutely no evidence is presented to justify the proposal. Nothing is provided which suggests a problem with the quality or independence of experts currently instructed in appeal proceedings.

144. Expert witnesses are subject to (the usual, well-established) duties of expert witnesses appearing in court. If experts do not comply with their duties, or if they are not independent, the Tribunal can and will reject their evidence, or give it less weight. And if the Home Office has reason to question the independence or expertise of the witness, they are free to argue their case to the independent judge, who will then decide what value to give the expert evidence.

145. The Policy Statement asserts that a "very small number" of experts are presently instructed. Again, no evidence is provided to support this suggestion, which itself is extremely vague. It is also entirely unclear how the proposal - to limit the available pool of experts to those on a pre-selected panel - will increase the number of experts acting in these cases.

## *Proposal: expand the fixed recoverable costs regime to cover immigration judicial reviews (JRs)*

146. The assertion that the Home Office 'is rarely able to recover costs' in cases which it 'ultimately wins' is neither evidenced nor particularised. As Judicial Review is a costs jurisdiction, costs are routinely awarded against the 'losing' party. It is unclear whether the Home Office means it is not being awarded costs or that its opponents do not pay costs orders made against them. It is therefore impossible to judge the appropriate remedy, if there is one.

147. The proposal is that the government is '*considering extending 'Fixed Recoverable Costs' to apply to immigration-related judicial reviews*'.[61]

148. Whilst this a proposal in principle, and the response must be on the same lines, it has to be stated at the outset that the lack of any specificity in the proposal means that a whole host of intractable problems are glossed over: how would the scheme interact with legal aid? How would the scheme address the applicable costs in cases that settle before a final hearing? How would payment for interlocutory applications be dealt with? What about cases with multiple

[61] It is assumed that the reference to "immigration judicial reviews" is a reference to judicial reviews in the UT(IAC), and not all judicial reviews with an immigration context, such as challenges to immigration detention, trafficking decisions, delegated legislation and the like, which are heard in the Administrative Court. If the proposal in fact incorporates those claims, then all of the criticisms in this document would be magnified ten-fold, and the damage done to the constitutionally vital ability to hold the executive to account would be disastrous.

Claimants, multiple Defendants, Interested Parties and Interveners? Would claims which raise particularly complex matters, or novel points of law, or where the documentation is extensive qualify for an increased payment? What about cases in which the principal driver of costs is the repeated failures of the Home Office to abide by directions and/or their duty of candour, such as in *R (on the application of Saha and Another) v Secretary of State for the Home Department* [2017] UKUT 17(IAC)?

149. Even were the proposal acceptable in principle, it is apparent that there are very significant obstacles to the production of a workable system.

150. Restricting this response to points of principle, the flaws with this proposal are well-known to the government (or should be, given their repeated rejection by previous independent costs committees). They fall into three broad categories: (a) the substantial variability between judicial review claims, which makes them inapt for the fixed costs regime (b) the importance of the decisions only amendable to judicial review, which in the immigration context can be vital to individual claimants (such as asylum issues), or relate to the correct interpretations of complex immigration rules, which are then the basis for decisions in whole cohorts of cases and (c) the lack of a proper evidence base or sound reasons for the proposed change.

151. The reality appears to be that the motivation for introducing this provision is to have a chilling effect upon the number of judicial reviews brought against the Home Office: so much is evident from even the Summary of Government Submissions to the Independent Review of Administrative Law ("the Summary").[62]

***Substantial variability***

152. Every judicial review practitioner knows that judicial review can turn on something as straightforward and narrow as proof that a single document was delivered in time (with the consequence that an Applicant continues to benefit from s.3c leave, and is entitled to appeal a refusal of his application to the First-Tier Tribunal). On the other hand, where there is a lengthy and complex immigration history, and some matters were dealt with in a previous appeal (for example, under the Detained fast-Track appeal scheme) the papers that a Claimant

62 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf

must address, and accurately and fairly summarise in his Grounds of judicial review, can fill an entire filing cabinet.

153. The proposal would incentivise Claimant lawyers to take on the former type, even perhaps where they would now hesitate before doing so, whilst it would disincentives them from taking the latter type of challenge forward. This would have detrimental effects upon both access to justice, and as far as systemic challenges are concerned, the administration of justice.

***The importance of decisions***

154. To give one example in *R (on the application of Dzineku-Liggison and Others) v Secretary of State for the Home Department* [2020] UKUT 222 (IAC), the Upper Tribunal identified that the Home Office's Fee Waiver Guidance v3 was unlawful. The application of the guidance had led the Home Office to refuse to waive the fees ordinarily payable by migrants seeking an extension to their leave, granted in recognition of their Article 8 rights, even where they had shown that they were unable to pay the fee. That in turn rendered their applications for leave invalid, which in turn deprived them of the ability to even appeal the adverse decisions, and so left judicial review as the sole remedy.

155. This was a decision that was hugely important for the five Applicants, who would otherwise have been left at the mercy of the "hostile environment", but the decision of the Upper Tribunal now constrains the application of the guidance by the Home Office to its legal limits, with consequential benefits to the whole cohort of applicants in the same situation.

***The number of judicial review applications***

156. The proposals have been motivated by the perception that there are "too many" judicial reviews. Whether or not there are "too many" immigration judicial review claims, there are certainly more than there were 20 years ago (though equally: considerably fewer than 6 years ago, following the introduction of LASPO)[63]. The true drivers for the current level of claims however, have been:

[63] There were approximately 18, 000 (a figure which combines those in UTIAC and the Administrative Court) immigration judicial reviews commenced in 2015, since which time there has been a steady and continuing decrease. The current level is 10, 000 and continues to fall. *The Independent Review of Administrative Law, 2020 Appendix D*

I. the persistently poor quality of decision making by the Home Office: a criticism that has been made in repeated reports by the Independent Chief Inspector of Borders and Immigration for several years[64]. These failings are magnified by the constant failure to grapple with claims at the stage of the Pre-Action Protocol letter.[65]

II. the labyrinthine complexity of Immigration law as a field, the impact of which is worsened by the constant tinkering with the Immigration Rules (themselves very poorly drafted and extremely hard to follow) and amendments to Home Office policy, coupled with a steady stream of immigration legislation.[66]

III. the steady erosion of rights of appeal in this field of law, meaning that in more and more cases judicial review is the sole remedy.

***Claimant Costs***

157. The vast majority of judicial review claims in this field of law are funded by way of legal aid. Since the introduction of LASPO, solicitors and barristers working under a legal aid contract

[64] For example: "*Meanwhile, some familiar concerns persisted: for example, poor record keeping; the failure of first-line Quality Assurance processes to identify and correct errors; and gaps and errors in data collection and management information. While these systemic weaknesses remain, it will be hard for the Home Office to satisfy the Inspectorate and others that misgivings about overall decision quality, and about senior management awareness of pressure points and "backlogs", are misplaced*." Annual report 2017-1018

[65] For example in *QJ (by his Litigation Friend) v SSHD* JR/1236/2020, the Applicant had made further asylum representations in 2014. In 2018, these were accepted as giving rise to a fresh claim for asylum, albeit one that was refused. The decision was appealed, and QJ served further compelling medical evidence in the course of the appeal. On the day of the full hearing of the appeal, SSHD withdrew the decision on the basis that they would re-consider granting asylum. In December 2018 SSHD not only refused to grant asylum, but now held that all of the materials did not amount to a fresh claim. The refusal letter was in identical terms to the previous refusal, save that no right of appeal was granted. Following a PAP SSHD explicitly accepted that she had overlooked all of the new material, and agreed to re-make the decision within three months. She then failed to do so. Following a further two PAPs she then stated that she would re-make the decision within a (further) three months. Three months later she then again remade the decision in identical terms to the previous occasion, again denying a right of appeal. Following two yet further PAPs she once again stated that she would again re-make the decision, but now refused to even commit to doing so within 6 months. She then defended the claim rather than conceding the judicial review, only to capitulate once permission had been granted; the reality is that her own decision making contained basic errors, as she admitted, and rather than using the PAP process as an opportunity to resolve the issues in the case, she simply drafted replies that were intended to stave off an obviously meritorious claim

[66] Per Beatson LJ in *Sayaina v Upper Tribunal* **[2016] EWCA Civ 85: "**The frequency of changes made to the rules and policy guidance in the current points-based system of immigration control has led to much litigation. It has been observed that the system is Byzantine and in some respects inaccessible: see *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 *per* Jackson LJ at [4] and *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 *per* Underhill LJ at [59]. In the light of these observations, in *Hossain v Secretary of State for the Home Department* [2015] EWCA Civ 207 at [29] – [30] I stated that the detail, the number of documents that have to be consulted, the number of changes in rules and policy guidance, and the difficulty advisers face in ascertaining which previous version of the rule or guidance applies and obtaining it are real obstacles to achieving predictable consistency and trust in the system."

are, in the vast majority of cases only paid for their work if the claim is granted permission[67]. The perception on the part of the Home Office, if it be genuine, that the Upper Tribunal is clogged up with unmeritorious claims is wholly at odds with reality: legal aid lawyers have no incentive to bring such claims: quite to the contrary to do so would be a swift road to financial ruin.

158. The proposal appears to be motivated by the reported perception in the Summary that Claimant costs are inflated.[68] Without belittling the importance of inflated costs, if and where they exist (and no evidence has been supplied that Claimant solicitors are breaching their professional obligations in this way), the comment shows weak understanding and poor litigation strategy by the Home Office. Further, the perception is wholly one-sided: from the point of view of Claimant solicitors, a persistent frustration with the costs regime is that even work that is accepted as having been necessary, and where the costs have been incurred due to the litigation failings of the Defendant, are often written off by the Courts on the basis that the expenditure was "disproportionate". With no data or analysis to refer to, the reduced costs recovery the Home Office complain of could, with just as much justification, suggest that the Courts unduly favour public bodies in costs matters, rather than being a cause for complaint on their part.

159. Be that as it may, the costs of assessment are indeed borne by Claimants, if they do not recover more than the Defendant offers. The comment in fact suggests that Defendants are responsible for inflating costs, through not making realistic offers for costs; a perception that is strengthened by exposure to the generic and speculative grounds that the Home Office raise in Points of Dispute[69].

***"Equity"***

[67] There are minor exceptions, such as work in relation to an interlocutory application, or where a decision is withdrawn before a final permission decision.

[68] Departments regularly drive down claimant litigation cost bills through negotiation, in some cases by over 40%, suggesting that in many cases there is inflation of costs. There appears to be little disadvantage to legal firms in inflating bills and going to costs assessment (they are awarded costs of doing so even if the final sum ordered by the court is closer to the Department's last offer than theirs). *Summary para 333*

[69] Once the receiving party has served its Bill of Costs, the paying party explains its opposition to some or all of the Bill in its "Points of Dispute". The parties then have an opportunity to negotiate an outcome, rather than commence the assessment process.

160. All judicial review claimants face potential costs liabilities as it is, if they lose. Whether or not it is true that the Home Office rarely recovers its costs when it wins, it is hard to see how *limiting* the size of recoverable costs is going to help it recover *more* of them. Similarly, if the Home Office is right that borderline, speculative or even abusive claims are not being deterred by costs liabilities under the current system, it is inconceivable that *limiting* those liabilities would act as *more* of a deterrent.

161. Nor, for the same reason, is it at all likely that it would operate to encourage the Home Office to concede matters at Pre-Action Protocol stage or settle the one in five claims it will eventually settle any earlier. If anything, it would have the reverse effect, by providing the Home Office a measure of protection from the consequences of its poor decision-making.

162. The perceived "lack of equity", in that the Home Office rarely recover their costs may be a real issue, but it is apparent that it is relatively minor when the field is considered as a whole. The Summary helpfully makes plain that the total shortfall in recovery the Home Office suffer is considerably less than £4 million[70], as that figure includes not only UTIAC JRs, but also claims in the Administrative Court, and claims for damages in the County Court/QBD, and further some at least of those monies will indeed be recovered. The reality is that the "under recovery", under the most optimistic scenario, can scarcely top 1% of the Home Office legal budget. That is a very flimsy basis for driving such a significant change.

163. The introduction of a fixed costs regime would itself introduce a substantial lack of equality of arms. Many of the flaws with the proposal have already been identified in the objections that have been raised on each occasion the issue was raised, including in Sir Rupert Jackson's *Final Report following the Civil Litigation Costs Review*, published back in 2010, which recommended an extension of qualified one way costs shifting (QOCS) to JR cases.

164. By 2017 in his Review of Civil Litigation Costs: Fixed Recoverable Costs (Supplemental Report) (2017)[71] Sir Rupert was constrained to accept that "*it is probably realistic to proceed on the*

[70] the Home Office spent over £75m in 2019/20 defending Immigration & Asylum Judicial Reviews and related damages claims. The Home Office recovered approximately £4m of its own costs, much of which will be written off in future years given the difficulty in recovering debts from those who bring such challenges *Summary, para 32*

[71] https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf,

*basis that [it] is not going to come*". He proposed the extension of the "Aarhus Rules"[72] to all judicial reviews. The Review proposed extending these rules to all JRs where the Claimant was an individual not in receipt of legal aid, would be optional and would be means tested. The cap on adverse costs liability would be (as under the existing Aarhus regime) £5,000 for a claimant and £35,000 for a defendant. The Review concluded that this was "*the right balance between (a) the need to protect the public purse and (b) the need to hold public authorities to account*".

165. Neither the introduction of Qualified One way Costs Shifting to judicial review proceedings, nor the extension of the Aarhus approach to all judicial reviews are perfect solutions, but they have much more to recommend them than this proposal. The fact that both those proposals have been ignored, and the government is now suggesting the extension of the fixed costs regime, in the absence of any proper investigation, data,[73] or analysis which has been rejected on each previous occasion, exposes their true motivations.

166. In the circumstances, it is difficult to avoid the conclusion that the proposed 'fixed recoverable costs' system is not in fact devised in order to 'promote fairness, certainty and balance to the way in which costs are incurred in these cases' at all. The only significant effect it is likely to have is to protect the Secretary of State by reducing the costs burden on her when she makes an unlawful decision and loses judicial review claims. But this is not a good reason for introducing the measure, because:

- Such costs are not a consequence of claimants abusing the judicial review process. Rather, they are a consequence of the process being used properly to challenge poor Home Office decision-making; and
- The system is likely to operate in a way that gives the Home Office an unfair advantage by reducing claimants' access to high-quality legal advice and representation.

167. Legally aided practices have already been put under strain by the LASPO reforms, in which context it is particularly important that they are able to recover their fees at *inter partes* rates

[72] These apply in certain judicial reviews concerned with environmental standards, and were brought in to ensure Claimants were not put off seeking judicial review by costs considerations, pursuant to the Aarhus Convention

[73] The impact of both the current costs regime and any amendments thereto "**needs further careful study by a body equipped to carry out the kind of research and evaluation that we have not been able to apply to this question"** *The Independent Review of Administrative Law, 2021* para 4.14

when successful: *ZN (Afghanistan) & anor v SSHD* [2018] EWCA Civ 1059, per Singh LJ, endorsing the point made by Hayden J in the case of *Sino v SSHD* [2016] EWHC 803 (Admin) at §28:

> *"The appellate courts have expressed concern at the prospect that those lawyers who practise in publicly funded work, often taking on challenging points on behalf of individuals to whom neither the profession nor the public would be instinctively sympathetic, might not be able to recover remuneration at inter parties rates in cases where they were essentially successful. The real risk is that publicly funded practises would soon be unsustainable and access to justice compromised more widely*"

168. For these reasons, the introduction of the measure would inhibit the rule of law by undermining the ability of claimants to challenge unlawful conduct by the Secretary of State. That, on the face of it, would appear to be the real motivation for the proposals.

## *Proposal: encourage the increased use of wasted costs orders in asylum and immigration matters*

169. We were advised of further details of this proposal at the round table on 26 April 2021, and in the first instance wish to register concern about additional details being provided in this manner, in respect of what is supposed to be a public consultation. Anyone who was not in that meeting will be unaware of the additional details provided. One of those details was that the stated policy objective for these proposals is to reduce the number of adjournments and postponements in the First Tier Tribunal. Some data was provided verbally during the meeting, however when questioned, it was clear that the impact of the MyHMCTS reforms had not been taken into consideration when making this proposal. Reform is expected to reduce the number of adjournments and postponements as appeals are only listed once the appeal is ready. This was accepted in the meeting and undermines the stated policy objective.

170. 'Wasted costs orders' are costs awarded against parties' representatives for abusing the processes of the court. Section 29 of the Tribunals, Courts and Enforcement Act 2007 gives both Tribunals a discretion to award wasted costs. They are described in subsection (4)-(5):

> *(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—*
>
> *(a) disallow, or*
>
> *(b) (as the case may be) order the legal or other representative concerned to meet,*

*the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.*

*(5) In subsection (4) "wasted costs" means any costs incurred by a party—*

*(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or*

*(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.*

171. Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Rule 10(3)(c)-(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 already contain wide powers to make costs awards against a person who has 'has acted unreasonably in bringing, defending or conducting proceedings'.

172. It is unclear whether the 'Wasted Costs Orders' proposed in the Policy Statement (hereinafter 'WCO') bear any relationship to the wasted costs orders as conventionally understood. In certain respects they appear to be considerably more draconian than the power provided in Section 29 of the 2007 Act; in other respects the concept is considerably vaguer. They are described on page 29:

*…we propose to introduce a duty on the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal (FtTIAC) to consider applying a WCO in response to specified events or behaviours, including failure to follow the directions of the court, or promoting a case that is bound to fail. While the grant of a WCO is at the sole discretion of the judge we are considering introducing a presumption in favour of making one. In addition, as WCOs only cover the costs of the parties to the claim, we are also considering introducing a mechanism to cover the court's costs.*

173. Novel elements are:

- The legally incoherent presumption at the judge's discretion in favour of making a WCO 'in response to specified events or behaviours';
- The inclusion of 'failure to follow the directions of the court, or promoting a case that is bound to fail' as examples of 'specified events or behaviours'; and;
- 'A mechanism to cover the court's costs.'

174. Vague elements are:

- The ‘specified events or behaviours’ to which they will apply apart from ‘failure to follow the directions of the court, or promoting a case that is bound to fail’; and
- Who would be liable to such orders.

175. Even if the WCO rules are framed in such a way as to have equal application to both parties, the impact will fall disproportionately upon appellants, because the Home Office is able to treat adverse costs orders as operating costs. The burden of meeting them does not fall upon the Secretary of State or a Presenting Officer personally, but upon the taxpayer, so they have little deterrent effect. By contrast, costs orders against appellants and their representatives do fall upon them personally.

176. As the Secretary of State does not bring cases in the tribunals, it is by no means clear that she can ever said to be ‘promoting a case that is bound to fail’, because she does not promote cases, she resists them. This is true even when her refusals are so absurd or otherwise weak that appeals against them are highly likely to succeed. No doubt the principle could be reformulated in a way that would make her liable for costs when she resists cases that are bound to succeed or makes hopeless applications for permission to appeal her losses, but it is not clear that this is what is being proposed. On the face of it, this is another sanction designed to be one-sided and to take effect mainly against appellants.

177. In fact, the existence of a WCO for promoting a case that is bound to fail is unlikely to have much effect on anyone, because cases that are ‘bound to fail’ in the immigration jurisdiction are very rare. The Secretary of State has a duty to certify appeals which are ‘clearly unfounded’ under section 94 of the Nationality, Immigration and Asylum Act 2002, which almost always has the practical effect that no appeal is brought in the First-tier Tribunal. Appeals and judicial review claims may only be brought in the Upper Tribunal with the permission of a judge who assesses the claim to have a real prospect of success.

178. Section 29 wasted costs orders can operate to prevent parties recovering costs or to force representatives to bear costs occasioned by their own bad behaviour. Case-law has established that they cannot be made against Presenting Officers, who are not representatives of the Secretary of State. This is a clear imbalance, but, at present, it is of little consequence because wasted costs orders are rarely made against representatives.

Under the proposed WCOs, the imbalance is likely to become much more serious because of the presumption in favour of making them.

179. It is hard to avoid the conclusion that, as with the 'fixed recoverable costs' scheme, the true aim of this measure is not to reduce costs, administrative burdens or to speed up the process, but to load the scales in the Secretary of State's favour by obliging appellant's lawyers to operate subject to routine penalties, in the hope that this will disincentivise lawyers from accepting appellants' instructions.

180. In respect of such a mechanism being used to cover the court's costs, we note that no such provision exists in any other jurisdiction, and we further note with concern that, from the round table meeting that ILPA attended on 26 April 2021, it appears that the Home Office are leading the process of deciding what will be the "trigger events" that will decide whether such a costs order is made.

*Proposal: Introduce a new fast-track appeal process. This will be for cases that are deemed to be manifestly unfounded or new claims, made late. This will include late referrals for modern slavery insofar as they prevent removal or deportation.*

181. Expedited detained appeals processes risk repeating many of the problems that affected the "*Detained Fast Track*" process. This will lead to injustice for foreign nationals, including risk of putting the UK in breach of international protection obligations, and to longer-term costs for the Home Office.

182. A "*manifestly unfounded*" claim is not the same thing as a "*new claim, made late*" and any process designed to conflate the two will inevitably lead to injustice and meet legal challenges e.g. country conditions may change suddenly due to war; a health emergency may occur.

183. A "*new claim, made late*" may be complex and is not necessarily suitable for a fast-track process. New claims made after previously-rejected claims must already meet the fresh claims test set out at paragraph 353 of the Immigration Rules, and are only admitted for substantive consideration if they meet the well-established common law principles in *Ladd v Marshall* [1954] EWCA Civ 1. One of the principles that must already be considered is whether the evidence could with reasonable diligence have been submitted earlier. The proposals add

nothing other than a new test to be litigated and return inevitably to the initial common law test.

184. There are very good reasons why new claims may be made late, often relating to the inability of detainees to obtain skilled legal advice at an early stage of proceedings.

185. The Government's own guidance notes that there are very good reasons why modern slavery claims may be made late: "*Victims may not be aware that they are being trafficked or exploited, and may have consented to elements of their exploitation, or accepted their situation.*"[74] A referral in relation to modern slavery cannot be "*made*" by the appellant or by their lawyer: only staff at designated first responders Organisations, which include police forces, certain parts of the Home Office and UK Borders and Immigration, can make a referral. If referral is made, a "*reasonable grounds*" decision is due in five days.

186. A focus needs to be placed on quality and fairness in decision making, rather than on speedily refusing as many cases as possible.

187. Realistic time frames for the listing of cases would be welcomed by all parties, but the choice is not between undue hastiness through a fast-tracked process and undue delay. Better use of clear directions, sanctions for failure to comply with directions, use of new technology for case management could all be used to better manage Tribunal caseloads.

## Chapter 6: Supporting Victims of Modern Slavery

### Question 32: Please use the space below to give further feedback on the proposals in chapter 6.

***Proposal: Identify victims as quickly as possible and enhance the support they receive, while distinguishing more effectively between genuine and vexatious accounts of modern slavery and enabling the removal of serious criminals and people who are a threat to the public and UK national security***

[74] https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales

188. We address the disturbing characterisation of victims as criminals below. In respect of removal, GRETA's "Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection" states the following:

> *15. The Convention recognises that trafficked people may have international protection needs, and it requires Parties to duly assess such protection needs. The essence of international protection is to provide relief from a potential future danger. Accordingly, the duty of international protection applies not only to victims of trafficking, but also to those at risk of being trafficked, should they return to their country of origin. Any removal of a person to a territory where they are at risk of being trafficked will constitute a violation of the principle of non-refoulement*.[75]

189. While we would welcome identification of victims to be done quickly, this must not come at the cost of quality decisions being made. There is no acknowledgement of the issues with decision making within the NRM system, and as set out in the above quote, the consequences can be severe, as many people who have been trafficked in the past will be susceptible to re-trafficking.[76]

## *Proposal: Clarify the definition of "public order" to enable the UK to withhold protections afforded by the NRM where there is a link to serious criminality or a serious risk to UK national security*

190. As is set out in the government's "*Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland*"[77], the "public order" test is applicable in the following circumstances:

- *14.236. The Recovery Period will not be observed if either:*
  - *grounds of public order prevent it*
  - *it is found that victim status was claimed improperly*

[75] https://rm.coe.int/guidance-note-on-the-entitlement-of-victims-of-trafficking-and-persons/16809ebf44#
[76] See e.g. https://www.gardencourtchambers.co.uk/news/vietnam-risks-of-re-trafficking-on-return#
[77] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974794/March_2021_-_Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.1_.pdf

- *15.30. In cases where individuals are being held in detention, a positive Reasonable Grounds decision does not require the individual to be released where there are reasons of public order not to do so*.

Therefore, the proposals appear to seek to expand the circumstances in which the government can curtail a victim's recovery period, and to hold them in immigration detention for longer.

191. The Policy Statement states that "*the lack of a clear domestic policy on what constitutes this has inhibited deployment of this exemption in the UK. This is resulting in individuals who have committed acts of serious criminality or who may pose a threat to UK national security evading detention and removal from the UK*."

192. The government is aware that many victims have been subject to criminal exploitation, where they are forced to commit crimes, and may have been convicted as a result of this. The "National Referral Mechanism statistics UK, quarter 1 2020" show the following:

> *Overall, potential victims were most commonly referred for criminal or labour exploitation, accounting for 28% (791) and 24% (699) of all referrals respectively. An additional 11% (306) of referrals stated that potential victims had been exploited for both labour and also criminal exploitation*.[78]

193. It is wholly inappropriate to blame victims for the crimes they were forced to commit, yet these proposals seem predicated on the basis that people in the NRM are criminals, rather than victims of crime. This position is also contrary to section 45 of the Modern Slavery Act 2015, which states that a person is not guilty of an offence if they were compelled to do the act, and the compulsion was attributable to slavery or exploitation.[79]

194. It is important to put what is being proposed here into context, in respect of the effect on detention if a "public order" test was to be applied, and the Home Office deem a potential victim of trafficking should not be released. In *EOG v Secretary of State for the Home*

[78] https://www.gov.uk/government/statistics/national-referral-mechanism-statistics-uk-quarter-1-2020-january-to-march/national-referral-mechanism-statistics-uk-quarter-1-2020-january-to-march-second-edition (these dates were used as less likely to have been substantially impacted by the pandemic as the later dates)

[79] https://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted

*Department* (Rev 1) [2020] EWHC 3310 (Admin)[80] at paragraph 26, the average number of days to reach a Conclusive Grounds decision was 462. Article 10 of ECAT states that a "*person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2*".[81] It is difficult to see how detention could be maintained in line with *Hardial Singh* principles given the delays in the NRM, and decision making in the NRM, as is the case elsewhere in the Home Office, is often wrong and requires challenge.

## *Proposal: Strengthen our operational processes for considering Reasonable Grounds decisions and consult on clarifying the Reasonable Grounds threshold to ensure decision-makers can properly test any concerns that an individual is attempting to misuse the system*

195. As with the proposal to 'clarify' the well-founded fear of persecution test, it appears that the intention behind this is to make it more difficult for victims to obtain a positive reasonable grounds decision and thereby access the recovery and reflection period. We agree that any such proposal should be consulted on, such consultation should take place openly and supported by evidence, unlike that on the expansion of the Adults at Risk policy to victims of trafficking.

## *Proposal: Fulfil our obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) to continue to identify and protect genuine victims*

196. The Policy Statement refers to legislating for victims to receive a grant of discretionary leave, this is currently set out in guidance.[82] The proposal is that leave will be granted to "*confirmed victims with long-term recovery needs linked to their modern slavery exploitation … to victims who are helping the police with prosecutions and brining their exploiters to justice*." The Policy Statement is silent on the applicability of these proposals to children, however it is important to be explicit that these standards will not fulfil the government's obligations towards child victims of trafficking. The standard for children is set out at Article 14 (2) ECAT, which states that *"the residence permit for child victims, when legally necessary, shall be issued in*

[80] https://www.bailii.org/ew/cases/EWHC/Admin/2020/3310.html
[81] https://rm.coe.int/168008371d
[82] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941844/dl-for-victims-of-modern-slavery-v4.0ext.pdf

*accordance with the best interests of the child and, where appropriate, renewed under the same conditions*." The explanatory report to ECAT goes on to state at paragraph 186: "*In the case of children, the child's best interests take precedence over the above two requirements. The words "when legally necessary" have been introduced in order to take into account the fact that certain States do not require for children a residence permit.*" ECPAT's report "Child trafficking in the UK 2020: A snapshot" highlights concerns about poor immigration outcomes for child victims of trafficking[83] and we endorse their recommendations in the New Plan for Immigration consultation response, namely that:

- All survivors of child trafficking should receive a timely decision from the NRM.
- Child victims subject to immigration control should be automatically considered for immigration leave upon receiving a positive conclusive ground decision from the NRM.
- The length of leave granted should be in line with the child's best interests so that they can recover from exploitation and transition to adulthood in safety and stability - a minimum of 5 years and with the subsequent ability to apply for indefinite leave to remain (ILR).

197. In respect of the government's stated desire to fulfil its obligations under ECAT, the Policy Statement:[84]

- conflates victims of modern slavery with foreign national offenders
- refers to the system being 'abused'[85]
- gives examples of those in the National Referral Mechanism as 'child rapists, people who pose a threat to national security and illegal migrants who have travelled to the UK from safe countries'
- states that NRM referrals are used to prevent and delay removal or deportation
- seeks to expand its ability to withhold protections from victims where the Home Office considers there to be 'public order' reasons

[83] https://www.ecpat.org.uk/child-trafficking-in-the-uk-2020-snapshot page 35
[84] Policy Statement, page 31
[85] Policy Statement, page 31

198. Separately, the government is implementing plans that will result in victims of modern slavery being held in immigration detention for longer periods,[86] while attempting to hide the scale of the issue.[87] This is despite the Group of Experts on Action Against Trafficking in Human Beings (GRETA) recommending that the UK authorities "*improve the identification of victims of trafficking in detention centres and ensure that following a positive reasonable grounds decision, possible victims of trafficking are speedily removed from detention and offered assistance and protection as provided in the Convention*" (meaning ECAT).[88] The government has already started to depart from its ECAT obligations, and the proposals in this Policy Statement seem likely to continue that trend.

199. If the government is genuinely concerned with meeting its obligations under ECAT then it needs to abandon the proposals to cause further harm to victims, and to instead focus on better quality and faster NRM decisions, particularly at conclusive grounds stage. The harm caused to people by these delays is set out in *O & Anor, R (On the Application Of) v The Secretary of State for the Home Department* [2019] EWHC 148 (Admin):

> *51. The Claimants also rely on expert evidence from Professor Cornelius Katona, the medical director of the Helen Bamber Foundation, a highly experienced psychiatrist. He says:*
>
> > *"18. Victims of trafficking, like others who have experienced abuse and trauma, experience a profound loss of their sense of safety and security. People who do not feel safe and secure are often unable to undertake trauma-focussed work until they reach a degree of symptomatic and situational stabilisation that enables them to regain that sense of safety and security. Such stabilisation is determined by external factors; for example being away from a combat situation, having a long-term roof over one's head, having enough money to meet essential living needs, having a support network to rely on, and (in the immigration context) recognition as a victim of trafficking and consequent grant of leave to remain.*

[86] https://committees.parliament.uk/publications/5150/documents/50839/default/ pages 9 – 12

[87] https://afterexploitation.files.wordpress.com/2021/02/hidden-futures-how-data-denial-threatens-the-fight-against-slavery-after-exploitation.pdf

[88] https://rm.coe.int/16806abcdc page 44

*19. Without that stability it is much more difficult for patients to engage fully in and thereby benefit from trauma-focussed work. Continuing uncertainty regarding their NRM status impedes their sustained recovery. By this I mean that they may be able to achieve symptomatic improvement (i.e. the ability to function superficially on a day-to-day basis) but not sustained improvement in the form of the ability to cope with further setbacks without mental deterioration, If however they regain a sufficient sense of stability, safety and security to engage fully in trauma-focused therapy, such therapy can in turn enable to develop the ability to cope with future setbacks."*

*52. He goes on:*

*"22. Thus the suggestion that as long as victims have access to support, they should be able to recover is an oversimplification of the complex therapeutic journey experienced by the clients with whom we work.*

*23. It is also significant that until people are granted leave to remain they often cannot work or resume study. It is important to see these activities not just as means to improving the survivor's economic position but as important ways to help survivors of trauma to rebuild their self-worth and self-esteem, which are important for their ability to integrate properly into society."*

*53. I also received evidence as to the effect of delays such as those described by the solicitors. Mirjam Thullesen is a registered psychotherapist specialising in the assessment and support of survivors of trauma, especially human trafficking. In her witness statement, she says:*

*"In my experience the impact on mental health is one of the most significant problems caused by delay in CG decision making. The simple reason for this is the state of uncertainty in which potential victims remain while waiting for an outcome from the NRM identification process. The CG decision, as the outcome of the NRM identification process is a critical juncture for potential victims; it is life changing. A positive CG decision may entitle a person to a grant of leave to remain in the UK, for example when continued treatment for physical or mental health conditions require it or if they are assisting police with an investigation into their traffickers."*

200. While they are waiting for a decision, those in the NRM should be permitted to work. These are recommendations that if adopted, unlike those in the Policy Statement, would demonstrate the government's commitment to protection of the victims of the crime of human trafficking.

## Chapter 8: Enforcing Removals including Foreign National Offenders (FNOs)

### Question 40: This question relates to the proposals around providing prior notice of a set period (known as the notice period) before the individual is removed. This notice period provides the opportunity to seek legal advice and bring legal challenges ahead of removal.

In your view, should this notice period be:
1. A minimum of 72 hours, as is currently the case
2. 5 working days
3. 7 calendar days
4. Other length of time (please specify and explain your answer)

201. See below.

### Question 41: Please use the space below to give further feedback on the proposals in chapter 8.

### *Proposal: Consult with Local Authority partners and stakeholders on implementing the provisions of the Immigration Act 2016 to remove support from failed asylum-seeking families who have no right to remain in the UK*

202. We note a difference in language between this proposal as set out in the Policy Statement ("remove support from failed asylum seekers") and in question 38 ("remove support from asylum seeking families"). It is therefore unclear if the New Plan for Immigration intends to remove Local Authority support from failed asylum families or remove asylum support from failed asylum seekers, or both. It is also unclear why plans to remove asylum support from failed asylum seekers was placed in Chapter 8 of the Policy and Consultation which deals with Foreign National Offenders. Being a failed asylum seeker is not the same as being a foreign national offender and the two should not be conflated.

203. If the intention is to remove Local Authority support from failed asylum seeking families/failed asylum seekers then very few details on how they plan to do this are contained in the Policy Statement, other than evoking the provisions contained in the 2016 Immigration Act.

***The 2016 Immigration Act and failed asylum seeking families***

204. The current provision for supporting destitute asylum seeking families who are appeal rights exhausted (ARE) but who have a child/children born before their asylum claim was determined is found under s94(5) of the 1999 Immigration and Asylum Act. Under this provision s95 support continues until the youngest child is 18 years old. The 2016 Immigration Act intended to remove this support with ARE families given a 90 day grace period before support stopped.

205. The 2016 Immigration Act proposed to repeal s4[89] support[90] and introduce a new s95A[91] asylum support by amending s95 of the Immigration and Asylum Act 1999. Section 95A would provide asylum support to failed asylum seekers who faced a 'genuine obstacle' to leaving the UK. Details of what a genuine obstacle would constitute was to be published in Regulations, but it was likely that a genuine obstacle would mean someone who was medically unfit to travel or taking all reasonable steps to leave, thereby replacing s4(2)(a)[92] and, s4(2)(b)[93]. Those applying for s95A support were expected to apply within a grace period, grace periods where to be confirmed in the Regulations, however the Government indicated this would be 21 days for single adults and 90 days for families[94]. If a family did not qualify for s95A support then they would be destitute.

***Destitute families and Local Authority support***

[89] S4 support was to be repealed and s4(2)(a) and (b) replaced with s95A support, s4(2)(d) and (e) were to be replaced by s95 support in limited circumstances – see the Asylum Support Appeals Project briefing for more details - Overview of the changes to asylum support in the Immigration Act 2016: ASAP update, April 2021

[90] Paragraph 1, Schedule 11, Immigration and Asylum Act 2016

[91] Paragraph 9, Schedule 11, Immigration and Asylum Act 2016

[92] Regulation 3(2)(a) The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

[93] Regulation 3(2)(b) The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

[94] Paragraph 26, Home Office document, Reforming support for migrants without immigration status: The new system contained in Schedules 8 and 9 to the Immigration Bill

206. Families who are destitute can approach Local Authorities for assistance under s17 Children Act 1989 in England, (in Scotland it is s22 of The Children (Scotland) Act 1995). Schedule 3 of the Nationality, Immigration and Asylum Act 2002, applies to a family when they approach a Local Authority for support and when the parent is:

- In breach of immigration laws, for example, is a visa over stayer, illegal entrant, or appeal rights exhausted (ARE)
- An ARE asylum seeker who has failed to comply with removal directions
- Have refugee status that has been granted by another EEA country

207. Local Authorities are prohibited from providing support under Schedule 3, unless it would be a breach of human rights not to do so.[95] The assessment will look at if there is a legal or practical barrier to leaving the UK such as:

- There is an ongoing legal barrier to return, for example, a pending appeal or Human Rights application.
- There is a practical obstacle to return, for example, health reasons.

208. If it would be a breach and the child is found to be in need then support can be provided to the family under s17 Children Act 1989 (s22 of The Children (Scotland) Act 1995 in Scotland). The Local Authority will regularly review this support and can withdraw it if circumstances change, i.e. refusal of immigration appeal etc.

***2016 Act – paragraph 10A support***

209. Under the 2016 Immigration Act Local Authorities would be prohibited from providing s17 support for accommodation and destitution needs if the families would qualify for a new type of statutory support that would be provided by Local Authorities. The new support would be established by inserting a new paragraph 10A into Schedule 3 of the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2016. The proposal was set out in Schedule 12 of the 2016 Immigration Act.[96] Under paragraph 10A support, Local Authorities would be prohibited from providing accommodation/financial support under s17 if destitute families

[95] Paragraph 3 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002
[96] Paragraph 6 of Schedule 12 2016 Immigration Act

were *Zambrano* carers or had no immigration status, i.e. ARE families. Paragraph 10 of Schedule 12 of the 2016 Immigration Act 2016 sets out when a Local Authority can provide paragraph 10A support.

210. The NRPF Network noted that[97]:

> *Provisions A-C place the position established in case law, with regards to the local authority being obligated to provide support whilst a family have a procedural right to pursue a human rights claim, on a statutory footing. (Birmingham City Council v Clue [2010] EWCA Civ 460 & KA, R (on the application of) v Essex County Council [2013] EWHC 43).*

211. On the surface Condition E seemed to provide a wide scope for providing support to ARE families, however the Home Office guidance stated[98] that the Regulations would set out specifically what factors Local Authorities 'may or must, or must not, take into account in making this decision'.[99] The guidance also references case law found in *Kimani v Lambeth Borough Council* [2004] 1 WLR 272 which established that it is not a breach of human rights to refuse support to a family where there is no legal or practical barrier to the family returning to their country of origin to avoid destitution.

212. The provision of paragraph 10A support will mean a child will no longer be considered a child in need due to destitution and therefore not trigger a s17 duty. However, Local Authorities can still provide s17 support if needs are identified not relating to accommodation and financial support.

213. Local Authorities can also provide emergency support under paragraph 10A support while carrying out an assessment to ascertain if the family is eligible for such support.[100]

***Concerns with the proposal***

[97] Page 5, NRPF Network, Immigration Bill 2015-16: local authority support for families (England)
[98] Paragraph 52,Home Office document, Reforming support for migrants without immigration status: The new system contained in Schedules 8 and 9 to the Immigration Bill
[99] Paragraph 52,Home Office document, Reforming support for migrants without immigration status: The new system contained in Schedules 8 and 9 to the Immigration Bill
[100] Paragraph 54, Home Office document, Reforming support for migrants without immigration status: The new system contained in Schedules 8 and 9 to the Immigration Bill

214. There are several concerns with the proposal to remove asylum support and local authority support from failed asylum seeking families. By removing s95 asylum support for families who become ARE destitute families will turn to Local Authorities for assistance. Local Authorities will have to carry out an assessment[101] to establish if a family is entitled to support, and possibly provide emergency support during this assessment period. This will create a huge burden on Local Authorities both in terms of financial cost and staffing. No details are included in the proposal as to how this cost will be met by Local Authorities.

215. Further, the NRPF network has noted[102]:

> *If local authorities determine that the criteria of paragraph 10A are not satisfied and refuse or withdraw support, they are still faced with managing the challenge that currently exists when a family does not leave the UK. The effectiveness of Home Office engagement with such families, in terms of encouraging take up of voluntary return programmes and progressing enforcement action, will be a key factor in addressing this issue.*

216. The Policy Statement is silent on how the Home Office proposes to engage with families to encourage voluntary returns or the impact on children should families not return, yet are denied support and face destitution and street homelessness.

217. The Home Office has not, in the 2016 Immigration Act or in the Policy Statement, detailed how they will engage with their s55 duty under the of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the wellbeing of children. In light of the recent findings *ST (A Child By his Litigation Friend VW) v Secretary of State for the Home Department* [2021] EWHC 1085 (Admin) that the NRPF scheme does not comply with s55 Borders Citizenship and Immigration Act 2009, this is a particular concern. The removal of support for families cannot be seen to be in the best interest of the child. The Asylum Support Appeals Project noted in 2015 that:

> *Given that, to date, the HO has rarely terminated support to families, it is not currently in the habit of considering s55 in the context of asylum support.*

[101] Page 7, NRPF Network, Immigration Bill 2015-16: local authority support for families (England)
[102] Page 8, NRPF Network, Immigration Bill 2015-16: local authority support for families (England)

*Henceforward decisions to cease support will not be lawful unless there has been a s55 assessment*[103].

218. The 2016 Immigration Bill, in repealing s4 support and replacing it with s95A support for those with a genuine obstacle to leaving the UK, provided no appeal right for refusals of s95A support, leaving judicial review as the only remedy for challenging a refusal of s95A support. The Asylum Support Appeals Project noted in 2015 that the lack of an appeal right against s95A decisions would impact families and create a further burden on Local Authorities:

*Para 10A support cannot be provided if the family is, or should be, getting s95A support. To qualify for para 10A support the family will need to satisfy one of four conditions A to D:- have an outstanding application (A) or appeal (B), not failed to have cooperated with removal directions (C) and 'the provision of support is necessary to safeguard and promote the welfare of a dependent child' (D). Currently, if a family or individual approaches a local authority for support, or is already on local authority support, and the local authority is aware that that they should be on Home Office support, then the social worker can assist in the application to the Home Office, and, if necessary, the subsequent appeal to the AST. ASAP has advised in many asylum support appeals in this category, and the usual outcome is that the appeal is successful. However, in the future, without a right of appeal regarding s95A, the local authority will either have to provide the support itself, whilst considering whether to judicially review the Home Office, or risk being judicially reviewed itself for leaving the family destitute in breach of s10A. A right of appeal to the AST will assist in simplifying this complex question of where the duty lies between central and local government*.[104]

219. It is unclear if ARE families will be able to apply for s95A support after the 90 day grace period has come to an end under these proposals. If they are not able to then this would place further burden on Local Authorities. It is also concerning that in condition E for paragraph 10A support, that the Home Office will tell Local Authorities what to take into consideration when

[103] Asylum Support Appeals Project - ASAP response to Home Office Consultation on Asylum Support changes in the Immigration Bill 2015 - September 2015

[104] Page 7, Asylum Support Appeals Project, Immigration Bill 2015-16, Briefing for House of Lords Second Reading 22 December 2015

making a decision to provide Para 10A support, when Local Authority Social Services are better placed to assess what is required to safeguarding and protecting a child's wellbeing.

220. The proposed changes to asylum support contained in the 2016 Act were not implemented, except for the abolishing of s4(1) asylum support which was later replaced by schedule 10 support. At the time the Home Office committed to undertaking a New Burdens Assessment with Local Authorities.[105] The Policy Statement does not detail how it will overcome the issues encountered in 2016 when proposing these changes or what it considers has now changed that will make it possible to implement the changes proposed in 2021 when it was not possible in 2016.

221. As with the rest of the Policy Statement, there is no evidence that these proposals will meet their stated policy objective of "*ensuring the swift return of those not entitled to be in the UK*". Instead, they will just build further inefficiencies into the system, while ensuring that people, including families with children, are forced into destitution and street homelessness.

### *Proposal: Consider whether to more carefully control visa availability where a country does not co-operate with receiving their own nationals who have no right to be in the UK*

222. This proposal is not particularised beyond the above, so we are unable to meaningfully engage with it. A potential concern is the impact of this proposal in relation to the separation of families.

### *Proposal: Increase the early removal provision for Foreign National Offenders who leave the UK from 9 months to 12 months to encourage departure and also add a new 'stop the clock' provision so that they must complete their sentence if they return. This would be in addition to any sentence for returning in breach of a deportation order*

223. In *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin)[106] it was held that there has been an unlawful failure to ensure that those in prison who are detained under immigration powers are able to access legal aid advice. These proposals seem to target people before they are detained under immigration powers. Our concern is that people may agree to the early removal provision without having received legal advice and therefore without knowing that they may in fact be able to appeal their deportation successfully. It will be essential to ensure

[105] Page 8, NRPF Network, Immigration Bill 2015-16: local authority support for families (England)
[106] https://www.bailii.org/ew/cases/EWHC/Admin/2021/418.html

that anyone affected by such a provision is able to seek legal advice as to their right to stay in the UK *before* being required to make such a decision.

## *Proposal: Amend the list of factors for consideration of granting bail and the conditions of bail*

224. This proposal is to create a duty on immigration judges to consider "non-compliance with proper immigration processes (without good reason)" as a factor in deciding whether or not to grant immigration bail. It appears from the round table meeting on 28 April 2021 that this proposal has arisen from a belief on the part of the Home Office that immigration judges are not sufficiently taking into consideration the Home Office's bail summaries when considering whether or not bail should be granted. It was rightly accepted by the Home Office at the round table that immigration judges already take non-compliance into account. It is therefore unclear what codification is intended to achieve.

225. We would also comment that Home Office bail summaries regularly contain inaccuracies, and an unevidenced accusation of "non-compliance with proper immigration processes (without good reason)" is likely to lead to further periods of unlawful detention.

## *Proposal: Place in statute a single, standardised minimum notice period for migrants to access justice prior to removal and confirm in statute that notice need not be re-issued following a previous failed removal, for example where the person has physically disrupted their removal.*

226. This is not fully particularised and so what is being proposed is unclear, nor how the system would differ to that held to be unlawful in *FB (Afghanistan) & Anor, R (On the Application Of) v The Secretary of State for the Home Department* [2020] EWCA Civ 1338. What was made clear in that case is that a sufficient period of notice must to given, such that the person affected is not unlawfully deprived of access to justice. We refer to paragraph 94:

> *Even closer to this case, in the 2010 Medical Justice case at [43], Silber J said that effective legal advice and assistance requires sufficient time to be given between service of notice of a decision by the Secretary of State which puts the individual at risk of removal (in that case, notice of removal directions) and removal itself:*
>
> > *"… to find and instruct a lawyer who:*

*(i) is* ready *to provide legal advice in the limited time available prior to removal, which might also entail ensuring that the provider of the advice would be paid;*
*(ii) is* willing and able *to provide legal advice under the seal of professional privilege in the limited time available prior to removal which might also entail being able to find and locate all relevant documents; and*
*(iii) (if appropriate) would after providing the relevant advice be* ready, willing and able *in the limited time available prior to removal to challenge the removal directions." (emphasis in the original)*

*On appeal, upholding Silber J, Sullivan LJ said (the 2010 Medical Justice case (CA) at [19]):*

*"I refer to 'effective' legal advice and assistance because the mere availability of legal advice and assistance is of no practical value if the time scale for removal is so short that it does not enable a lawyer to take instructions from the person who is to be removed and, if appropriate, to challenge the lawfulness of the removal directions before they take effect*."

227. When considering ability to access legal advice, a relevant consideration when determining the relevant period that must be allowed will be the lack of resource in the sector.[107] When people are detained facing removal, legal aid should be provided on a no means and no merits assessment basis, and all work should be deemed in scope, rather than requiring Exceptional Case Funding applications to be made, in order to facilitate legal advice provision as quickly and efficiently as possible.

228. In relation to the need to find and locate all of the relevant documents, the current process (even prior to the impact of Covid-19) operated by the Home Office to provide people with a copy of their file is inadequate, as the Home Office will not provide a full copy of a person's file, even when this is specifically requested.[108] They will provide an electronic summary only, and this alone can take several weeks to obtain. On receipt of the electronic summary, a further request can be made for the full file. This summary is inadequate for a lawyer to be able to properly understand and advise on a person's case, and is why the full file of papers is

[107] Dr Jo Wilding, 'Droughts and Deserts: A report on the immigration legal aid market', April 2019 https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf

[108] https://www.gov.uk/government/publications/requests-for-personal-data-uk-visas-and-immigration/request-personal-information-held-by-uk-visas-and-immigration

requested in the first place. For any removal notice process to operate at all lawfully, provision must be made for the Home Office to provide a **full** copy of a person's file, quickly.

## Public Sector Equality Duty

### Question 44: Thinking about any potential equality considerations for the intended reforms in each of the areas, are there any mitigations you feel the Government should consider?

229. We have provided a substantial amount of evidence in our response as to the harm that will be caused to people by these proposals, including serious damage to their mental health. With more time, we could have provided even more evidence. Those who may not have had protected characteristics (i.e. disability) may be pushed into this category if the proposals are implemented. Various mitigations have been detailed in our response, however the overarching answer is that these proposals should be abandoned, and the Home Office properly trained and resourced to make quality decisions quickly. A vital part of a properly functioning asylum system is a strong and healthy legal aid sector, and investment here will assist the Home Office to achieve those aims.

### Question 45: Is there any other feedback on the New Plan for Immigration content that you would like to submit as part of this consultation?

230. The consultation process has breached several of the government's consultation principles. The New Plan for Immigration Consultation was launched on 24 March 2021. On paper this is a six-week consultation period to respond to a 52 page Policy Statement. In this context the timeframe was already too short, but it also included Easter which was described as amounting to five working days in the previous version of the government's consultation principles.[109]

231. ILPA is aware that sector colleagues in Scotland and Wales have expressed concern about the fact that this consultation period was launched and takes place almost exclusively during

109 https://webarchive.nationalarchives.gov.uk/20150201005847/https://www.gov.uk/government/publications/consultation-principles-guidance

purdah for their elections, which runs from 25 March to 6 May 2021.[110] The government's consultation principle K states:

> ***Consultation exercises should not generally be launched during local or national election periods.***
> *If exceptional circumstances make a consultation absolutely essential (for example, for safeguarding public health), departments should seek advice from the Propriety and Ethics team in the Cabinet Office. This document does not have legal force and is subject to statutory and other legal requirements.*[111]

There are no exceptional circumstances that exist here.

232. In addition, there was already a consultation taking place with the potential for serious impact in immigration and asylum work, being the government's consultation on judicial review reform.[112]

233. We are also concerned about the lack of published evidence to support the assertions being made in the Policy Statement. There are 31 footnotes in the policy paper, three (14, 15, 27) of those directly refer to unpublished internal management information. Full Fact looked at one of the assertions[113], made by the Home Secretary on the Today programme and also at page 18 in the policy paper, as follows:

> "*For the year ending September 2019, more than 60% of those claims were from people who are thought to have entered the UK illegally, many of whom passed through safe European countries before making unnecessary and dangerous journeys – including by small boat – to reach the UK*."

234. The footnote for this states "Home Office Internal Management Information [unpublished]". Full Fact said:

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110 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970989/May_2021_Elections_-_Guidance_on_Conduct_.pdf

111 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

112 https://www.gov.uk/government/consultations/judicial-review-reform

113 https://fullfact.org/europe/government-asylum-claims-based-unpublished-data/

"*However, the Home Office did not provide Full Fact with the data meaning that, beyond noting that the figure might therefore be slightly out of date, we can't assess whether it is reliable as it is unpublished.*

*It is inappropriate for the government to use unpublished evidence to support claims. Figures like these should be published in full so that anyone can check where they're from and how they're calculated.*

*Previously, the Office for Statistics Regulation has also said: "When management information is used publicly to inform Parliament, the media and the public, it should be published in an accessible form, with appropriate explanations of context and sources," which does not appear to have been the case in this instance*."

235. All the data relied on for the Policy Statement should be made available, if it is robust enough to inform such serious policy changes then there is no reason for this to be withheld from Parliament, the media and the public.

236. Another four of the footnotes (19, 20, 22, 25) refer to a 'Research and analysis' document published on 16 March 2021, 'Issues raised by people facing return in immigration detention'.[114] Again, this page states under the section "About this data" that "*All statistics in this report are taken from internal management information*". It also caveats the research by saying that "*trends in prevalence should be interpreted with caution*", "*reasons for release can be complicated and may involve multiple factors*" and "*a negative outcome does not mean that the issue was raised spuriously*". None of these caveats are mentioned in the Policy Statement.

237. The figures provided in this document also exclude cases where Rule 35 reports and medico legal reports (MLR) were provided, on the basis that "*they are not challenging the decision to remove the individual from the UK but are instead providing medical advice in relation to detention of the individual which would require consideration under the Adults at Risk policy*."

[114] https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention

Both Rule 35s and MLRs can be used as evidence of torture, which in addition to showing that a person is unsuitable for detention, can support their asylum claims. This statement is therefore incorrect, and the exclusion of these cases where strong evidence of torture has been provided will clearly have had an impact on the figures, to make the success rate appear lower than it actually is.

238. The consultation process is clearly unsuitable for anyone within the asylum system to engage with. First of all, it is not possible to submit a response without setting up an online account[115], this creates two issues, the first being digital exclusion of those without access to technology and the knowhow to be able to navigate that process. Secondly, the need to set up an account is likely to discourage those within the asylum system from participating honestly as they will worry that saying anything negative about the Home Office will impact their asylum claim. It would be possible to facilitate access in another way, to allow people to disclose their experiences and views anonymously, but it seems that no consideration has been given to this.

239. The Policy Statement is also only available in English, and belatedly on 18 April 2021, Welsh.[116] If the submission webpage is available in any language other than English then it is unclear how this can be accessed.

240. Finally, we are concerned about the fact that new information and additional detail was provided during the round table consultation meetings, and has not been made publicly available. This will have impacted on respondents' ability to address these proposals accurately.

5 May 2021

[115] https://newplanforimmigration.com/en/
[116] https://www.gov.uk/government/consultations/new-plan-for-immigration#history