PLP Response to the New Plan for Immigration

About PLP

The Public Law Project (PLP) is an independent national legal charity which was set up to ensure those marginalised through poverty, discrimination or disadvantage have access to public law remedies and can hold the state to account. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

PLP's response is informed by our practical experience and expertise as practising public lawyers and researchers. More information about PLP's work is available on our website at www.publiclawproject.org.uk

Introduction

1. PLP has a range of serious concerns about the consultation process which has been adopted in respect of the New Plan for Immigration. The policy paper which underpins the consultation is based on a series of highly contestable assumptions about the behaviour of asylum seekers and other people subject to immigration control. The consultation does not present a fair or balanced picture of the issues: for example, the "in practice" case studies provided within the policy paper reflect only one end of the range of cases which will be affected by the proposed changes. The policy paper draws on a Home Office research paper about which we have serious methodological concerns.[1] These include the fact that it is based on management

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

data;[2] does not clearly define the terminology used;[3] and includes data about matters which do not obviously relate to the making of claims and appeals from detention.[4]

2. The questionnaire which has been provided for responses is underpinned by the flawed, contestable and tendentious assumptions and assertions in the policy paper. This is deeply regrettable. Rather than engage with a questionnaire compromised in this way we have opted to submit this written response on those issues on which PLP is qualified and best able to comment. PLP does not have the organisational expertise, mandate or resources in the limited time available to respond to many of the proposals, and we have confined our response to relevant parts of chapters 5 and 8 of the policy paper. Even within those chapters, many of the proposals are too lacking in detail for it to be possible to provide an intelligent and/or evidence-based response. This problem is aggravated by the fact that the inter-relationship between the different proposals is also unclear.

3. PLP was able to attend two roundtables to which we were invited by Britain Thinks on different aspects of the consultation,[5] at which a very limited amount of further information about the proposals was provided. We also attended a meeting organised by the Ministry of Justice legal aid policy team,[6] prior to which we were provided with a paper with further detail on the legal aid proposals. We are aware that there have been several other meetings, with the Ministry of Justice, the Home Office and with Britain Thinks, to which PLP was not invited; and further – but still limited- detail about the proposals appears also to have been provided at those meetings. This is not an acceptable way to conduct a public consultation. All those who may have an interest in responding to a consultation should be given

[2] Despite the Home Office having acknowledged to the Public Accounts Committee in September 2020 that it needed to improve its management data and that it did not have the "right sort" of data: https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/407/407.pdf

[3] For example, it is unclear whether the data on judicial review include only issued claims or also cases in which a pre-action protocol letter was sent.

[4] Such as information about "physical disruption" and rule 35 reports – the latter should inform the decision whether to maintain detention and will not necessarily form the basis of a claim to remain in the UK.

[5] We were invited to attend a third, but due to limited capacity and resources were unable to do so.

[6] We were also invited to attend a roundtable on wasted costs orders but as we do not act with sufficient regularity in immigration appeal proceedings to be able to meaningfully draw on our own experiences and are not aware of any empirical research relevant to the issue we declined the invitation.

sufficient information about the proposals to enable them to engage intelligently with what is being proposed.[7]

4. Finally, the timescale for the consultation, a 6-week period over the Easter holidays and including 3 bank holidays, which also overlaps substantially with a similarly short consultation period on proposals for reform to judicial review,[8] is inadequate for proper consideration and response.

5. In the circumstances, PLP's response is limited to four areas of the consultation, namely:
   a. The proposals to provide more generous access to legal advice (chapter 5);
   b. The proposal to provide 'a quicker process for judges to take decisions on claims which the Home Office refuse without the right of appeal' (chapter 5);
   c. The proposal to introduce fixed recoverable costs for immigration judicial reviews (chapter 5);
   d. The proposal to legislate for a statutory minimum notice period for removal (chapter 8).

6. We begin with some general comments about chapter 5 of the consultation paper.

7. Where we have not responded to any particular proposal or part of the policy paper, that should not be taken as an indication of support for the proposal.

Chapter 5: Streamlining Asylum Claims and Appeals

8. Access to justice and the right to a fair hearing are fundamental constitutional principles. Asylum claims and appeals involve the determination of claims concerning the most fundamental rights: the right to life, to freedom from persecution, to freedom from torture. As has repeatedly been recognised by the courts, they raise issues of such moment for the people concerned that they require the highest standards of fairness and the most anxious scrutiny to be given to

[7] *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168, endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 (SC), at [25].
[8] https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/

claims. We should be proud that we have a judicial system which ensures such scrutiny and fairness. We should recognise the value, in a democratic society governed by the rule of law, in ensuring the fair and thorough consideration of claims to refugee status.

9. It is against that context that the emphasis in the policy paper on fairness in the system must be seen. As is stated at page 2, "that system – all of it – must be a fair one". One of the three major objectives of the proposed reforms is said to be "to increase the fairness and efficacy of [the UK immigration system] so that we can better protect and support those in genuine need of asylum" (p3).

10. In light of the stated importance of fairness to the Home Office's objectives we make the following overarching observations about chapter 5:

    a. It is surprising that there is so little attention given to the need to improve the fairness of initial decision-making procedures and the quality of initial decisions. In 2019/20, 50% of appeals against Home Office decisions were allowed by the First-tier Tribunal.[9] Around 1/3 of judicial reviews against Home Office decisions are either allowed or settled in the claimant's favour. The best way to reduce the amount of court time being used in the immigration system, while continuing to ensure fairness, would be to improve the quality of initial decision-making and focus on getting it right first time.
    b. We welcome the recognition that access to legal advice throughout the process needs to be improved (p28). We comment below on the specific legal aid proposals shared by the Ministry of Justice. We also call on the government to go further and bring all immigration matters back into scope of legal aid. The need for such a change is supported by research recently carried out by PLP with the University of Exeter. It would help to ensure that people subject to immigration control can access specialist immigration advice on their rights to remain in the UK whatever their reasons for wishing to do so.

[9] Tribunal Statistics Quarterly, October-December 2020, table FIA3
https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020

c. It is also important to ensure that people have practical and effective access to such advice when they need it. The High Court recently found that the Legal Aid Agency had unlawfully failed to ensure that there was a duty immigration advice scheme for immigration detainees held in the prison estate.[10] There are significant problems with the duty scheme operating in the immigration detention estate which need to be addressed.[11] There are significant areas of the country where there is little or no immigration legal advice provision so that it can be difficult or impossible in practice for people to access much needed advice.[12] These issues need to be addressed.
d. Consideration needs to be given to the reasons why people may not raise a claim on the first occasion that they come into contact with the immigration authorities. The policy paper is underpinned by an unevidenced assumption that this is a result of people 'gaming' the system. This is only one of many possible explanations. There are many other reasons why people may not seek protection at the earliest opportunity including trauma, lack of knowledge, misunderstanding, and bad advice. Claims may be raised at a later stage, or new claims made after an earlier claim has been refused, because circumstances have changed, new evidence has come to light, good advice has been obtained, or people have simply got more confidence.

11. The imbalance in the policy paper is particularly evident in the treatment of statistics and case studies in chapter 5. We do not intend to respond to each and every point with which we take issue but by way of illustration:

a. The statement that "90% of [judicial reviews against the Home Office in 2019] were dismissed or refused" (top of p6) appears to refer to statistics on the number of cases refused permission on the papers. This overlooks:
   i. The significant number of such cases in which permission was subsequently granted on oral renewal;

[10] *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin)
[11] See for example https://www.freemovement.org.uk/legal-aid-advice-in-detention-centres-generally-poor/ and https://www.thejusticegap.com/growing-concerns-about-incompetent-legal-advice-for-immigration-detainees/
[12] https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf

ii. That cases may be – and frequently are- refused permission on the basis they are academic because the Home Office has agreed to reconsider its decision after the claim was issued, and
iii. That according to the Home Office's own research, 19-28% of judicial review claims brought against it are settled.

b. No reference is also made to the fact that the number of judicial reviews being issued has fallen each year since 2015/16.
c. There are many examples of people who have been recognised as refugees, or saved from removal to a country where they were at risk of torture or inhuman treatment, or who faced long-term separation from partners and children, because they have been able to make asylum or human rights claims or bring judicial review proceedings. Yet the policy paper only cites examples of people whose claims have been unsuccessful.

12. The policy paper also fails to recognise the constitutional importance of judicial review in upholding the rule of law. It treats the process of judicial review solely as a use of resources and a means for migrants to 'frustrate' removal. Judicial review is a vital constitutional safeguard which ensures that public authorities, including the Home Office and Immigration Enforcement, can be held to account for their compliance with the law. If the Home Office really wants a system which is fair, it must ensure fair access to this vital safeguard when things go wrong, at all stages of the immigration process.

Better access to legal advice

13. We understand from information provided by the Ministry of Justice that the 'new legal advice offer' referenced in the policy paper encompasses two distinct proposals. Firstly, up to 5 hours of free, non-means tested legal advice from a legal aid provider where a 'notice' has been served by the Home Office indicating an individual has been 'prioritized' for removal. Secondly, legal advice for potential victims of modern slavery/human trafficking on referral into the National Referral Mechanism. We address each in turn.

14. We welcome the proposal to expand the provision of free immigration advice under the legal aid scheme. The provision of legal

aid to individuals who seek redress is not simply a matter of compassion, but a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law[13] and an essential precondition of a fair and democratic society. Failure to provide it can amount to a breach of fundamental rights[14] under the common law and/or the European Convention on Human Rights.

15. However, we consider the current proposal will not be effective in ensuring that individuals are able to resolve issues with their immigration status at an early stage. PLP's view is that the stated aim can only be achieved by additionally restoring legal aid for all immigration matters, ensuring that remuneration levels to providers are sustainable, and raising financial eligibility limits, including the lower capital limit that applies in immigration cases. Until those steps are taken, there will continue to be large numbers of people who are unable to obtain advice about their immigration situation with potentially severe consequences.

16. Under the proposal, there will remain several categories of people who will be unable to resolve their immigration issues at an early stage: those who are not financially eligible for legal aid, but unable to afford legal advice in any event; those who are financially eligible, but whose matter is not within the scope of legal aid or are unable to access 'Exceptional Case Funding' ('ECF'); and those who are financially eligible, whose matter is in scope or have a grant or ECF, but who are nonetheless unable to find a provider to assist them.

17. The current system, whereby the majority of immigration matters are outside the scope of legal aid, with ECF retained as a safeguard where fundamental rights may be at risk, is failing. ECF is operating as a barrier to access to justice. Thousands of vulnerable people are failing to access the scheme, with grant rates consistently failing to reach anticipated levels of 5,000 to 7,000 per year[15]. Individuals face long delays in obtaining a grant of ECF, due to both delays in

[13] *R(Unison) v Lord Chancellor* [2017] UKSC 51, at [6] and [66], *per* Lord Reed.
[14] *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, at [56], *per* Lord Dyson MR.
[15] Justice Committee, 'Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15' (2015), at [31] (https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf)

processing applications[16] and the need for assistance in navigating a complex system[17]. Where they are able to submit an application for immigration advice, the overwhelming majority of applications are successful[18], indicating a potential waste of taxpayer's money in processing the applications. Where they are successful, there are long delays in identifying a provider willing and able to take on the case[19].

18. Further, the removal of most immigration matters from the scope of Legal Aid has exacerbated problems with the sustainability of Legal Aid. There are significant areas of the country where there are no immigration legal aid providers at all[20]. The proposal does not address how the Government will ensure that legal aid advice under the scheme is practically accessible to all individuals served with a notice by the Home Office. The proposal further does not identify how the Legal Aid Agency will ensure the quality of advice provided, given the existing concerns in other areas of the Legal Aid scheme, such as the Detained Duty Advice scheme for immigration detainees.

19. We have nonetheless considered the detail of the proposal and in addition to the general observations above, we have attempted to address the detailed proposals below.

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[16] PLP has repeatedly raised concerns about the lack of an effective urgent procedure and wrote to the Lord chancellor concerning this issue on 15 March 2021. See: https://publiclawproject.org.uk/latest/plps-letter-to-the-lord-chanceller-on-ecf-changes-during-covid/.

[17] Public Law Project, 'The case for broadening the scope of legal aid' (April 2021), at pp 17 and 18 (https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf): individuals waited on average 124 days to access assistance from a specialist project run by Hackney Migrant Centre.

[18] Ministry of Justice, *Legal Aid Statistics Quarterly, England and Wales January to March 2020* (2020) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)

[19] Public Law Project, *The case for broadening the scope of legal aid* (April 2021), at pp 17 and 18 (https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf). Individuals referred to Hackney Migrant Centre waited on average 197 days to find a solicitor. See also the Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (February 2019), at [287] (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)

[20] See: Wilding, *Droughts and Deserts* (2019) (http://www.jowilding.org/assets/files/Droughts and Deserts final report.pdf) on reasons for the market failure in immigration and asylum legal aid and map (p 9) identifying local authority areas with no immigration and asylum providers.

Proposal 1: legal aid for individuals who are being actively prioritised for removal from the UK

Payment should be at hourly rates, not fixed fees

20. Stakeholders, including PLP, have repeatedly[21] raised concerns that payment by fixed fee creates perverse incentives and encourages poor quality provision. Fixed fees create an incentive to turn away complex cases and 'cherry pick' certain types of cases where advice can be given more quickly. Conversely, payment at a sustainable hourly rate ensures providers are fairly remunerated when they advise clients with a complex history and undertake work preparing ECF applications. We welcome the clarification that time spent preparing ECF applications, as well as on travelling to meet clients in detention, will be claimable under the proposed scheme.

21. In the context of this proposal, there is likely to be significant variety in the amount of work necessary to properly advise an individual. Some individuals served with a notice will present with clear instructions that amount to a protection claim, in which case brief advice can be given and the matter can proceed under in scope legal aid. Other individuals will arrive with a complex immigration history and record of poor representation, with previous attempts to regularise their status that have failed to identify the salient issues. These matters may require many hours of work to establish that there is a viable immigration application (i.e. based on Art. 8 ECHR) that could be pursued with the benefit of ECF, with the viability of the application for ECF itself taking some time to establish and prepare.

Providers should be required to take on matters they deem to have merit

22. Given the difficulty that many individuals currently in receipt of ECF experience in accessing a provider[22], as well as the desirability of avoiding a situation where incentives are created to avoid 'difficult' or complex (but viable) cases, it is important that any scheme incorporate a requirement that providers take on cases that they

[21] Most recently in our submission to the Justice Select Committee's inquiry into the future of legal aid https://committees.parliament.uk/writtenevidence/12982/pdf/

[22] Public Law Project, *The case for broadening the scope of legal aid* (April 2021), at pp 17 and 18 (https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf)

deem to have merit. That would mirror the requirement under the current legal aid contract in respect of detainees advised under the Detained Duty Advice scheme.

Interaction with the existing legal aid scheme

23. Care should be taken to ensure that the detailed arrangements of the proposed scheme do not further undermine the sustainability of the existing scheme. Work undertaken should not reduce the likelihood that a provider will 'escape' the fixed fees for controlled work when the matter proceeds under normal legal aid funding.

Need for clear guidance on when a notice should be served

24. It is of concern that a potential party to litigation (the Home Office) has the power to determine whether and at what stage its opponent (the individual facing removal) receives legal advice. In the absence of clear guidance about when a notice must be served there is a risk that individuals will be unable to access the scheme and will be unlawfully removed from the United Kingdom in breach of their fundamental rights without having had the opportunity to access legal advice.

Need for better access to Home Office records

25. We note that in order to effectively advise their clients, providers require ready access to Home Office records. At present, providers encounter significant difficulty in obtaining Home Office records, which are essential to providing accurate and full advice. Steps must be taken to ensure the accessibility of Home Office records if this scheme is to be effective. Further, the period of notice given to access legal advice must adequately take into account the time taken to obtain required documentation form the Home Office.

Proposal two: legal advice for potential victims of modern slavery/human trafficking on referral into the National Referral Mechanism (NRM)

26. The Government's intention to identify and support more victims of modern slavery/human trafficking is welcomed. However, we agree with the views expressed by other stakeholders, with more expertise

in these issues, that it is unclear what gap would be met by 'bolt on' advice to people already receiving advice from a legal aid provider.

27. Advice on the national referral mechanism can already be provided where it is relevant to an in-scope matter (such as an asylum claim) being pursued under legal aid and any 'bolt on' should not impact the sustainability of existing arrangements by reducing the likelihood that the provider 'escapes' the fixed fee.

28. We agree with other stakeholders' views expressed in the 22 April 2021 meeting that the proposal should be reviewed with a view to ensuring that potential victims of trafficking/modern slavery who do not already have access to a lawyer or do not have an in-scope immigration issues are able to access this advice.

Quicker process for judges to take decisions on claims refused without a right of appeal

29. It is vitally important that any reforms to the remedies available do not curtail access to justice. It is wholly unclear from the policy paper what is proposed here or what the rationale for it is. Any attempt to speed up the process must not be at the expense of fairness.

30. At the Britain Thinks roundtable on 27 April 2021, it was indicated that this would involve a "direct" application to the Upper Tribunal. Applications for judicial review in most immigration cases are already brought in the Upper Tribunal. The Upper Tribunal is able to – and frequently does – deal expeditiously with urgent claims for judicial review in immigration cases, including where removal is imminent. It is impossible to understand from the information in the policy paper and that provided at the roundtable what change is intended or why reform is thought necessary. Without further detail as to what is proposed we are unable to provide a meaningful response to this proposal.

Fixed recoverable costs for immigration judicial review.

31. Judicial review is an important constitutional safeguard and therefore has special status within our legal system. Ensuring the system of judicial review is accessible is imperative: without an

accessible system of judicial review, people will not be able to enforce their rights and entitlements, as provided to them by Parliament. This is an essential part of the realisation of the Rule of Law in this country and the importance of access to judicial review is the same whether the subject matter of a particular case relates to immigration, planning law, social security, or commercial regulation.

32. As a preliminary observation, we are unclear why these proposed changes are being consulted on by the Home Office while there has recently been the Independent Review of Administrative Law ('IRAL'), established by the Ministry of Justice, and the government is simultaneously consulting on judicial review reform. This is particularly worrying given that the IRAL noted there was a need for 'coherence in constitutional change.'[23] The IRAL's Terms of Reference included consideration of the need for reform to streamline judicial review procedure in relation to costs and its Call for Evidence included a request for evidence on the following question:

> *Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved?*[24]

33. In light of the submissions which it received to its Call for Evidence, including from the Home Office, the IRAL panel concluded that (para 4.14):

> *…the potentially serious impact of the current costs regime in judicial review cases on access to justice, and the concern of defendants as to the impact of that regime on their functioning – and what might be done about that impact – 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.*

34. The Ministry of Justice's consultation on reform of Judicial Review, published at the same time as the IRAL report, makes no proposals to reform the law on costs. It is therefore surprising and concerning that the New Plan for Immigration, published just one week later,

[23] The Independent Review of Administrative Law (March 2021), at [14] (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf)

[24] It appears that respondents to the Call for Evidence were divided as to whether there was a need for reform in relation to costs and proportionality: see the IRAL Report, at [C6].

proposes such reform in relation to judicial review, without there having been any change in circumstances and without carrying out the kind of robust, empirical research into the impact of such costs that the IRAL panel considered necessary.

35. The Home Office proposes to 'expand the fixed recoverable costs regime to cover immigration judicial reviews (JRs).' It suggests this approach 'would specify the amount in legal costs that the winning party can recover from the losing party. By setting this out in advance, both sides will benefit from a greater degree of certainty about the potential cost and risks attached to contesting a case.' The Home Office's proposal to introduce fixed recoverable costs would represent a significant departure from how costs are allocated in judicial review cases. The current rule is that costs follow the event. This means that the losing party will normally bear both their own costs and those of the other side, the amount assessed by the court (if not agreed) applying principles of reasonableness and proportionality. The underlying rationale for this approach is that a party has been compelled by the conduct of the other party to come to court in order to vindicate their legal rights. It forces all parties—claimants and defendants alike—to confront the merits of the litigation at an early stage and throughout the process. In deciding what order to make on costs, the judge will have regard to all the circumstances, including: the conduct of the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention.

36. PLP is strongly of the view that the introduction of fixed recoverable costs in immigration judicial review cases would undermine access to judicial review and also fail to meet the policy objectives that the Home Office sets out. There are four main problems with the proposal:

a. On the basis of the available data, immigration judicial review cases do not come at disproportionate cost to the taxpayer;
b. The proposed change will go no distance to address the Home Office's concern about their lack of ability to recover costs awarded against claimants, and they already have powers to address this concern in any event;

c. Sir Rupert Jackson's extensive review of civil litigation costs considered judicial review and suggested an alternative better way forward that is overall more equitable; and
d. Fixed recoverable costs will likely have significant chilling effect on meritorious and arguable judicial review claims.

37. First, there is an assumption in the *New Plan* that immigration judicial review cases won by the Home Office come at 'considerable legal costs for the parties and the taxpayer.' This is not backed up by empirical data on costs actually awarded in these cases. When a claim fails to get permission, the Upper Tribunal will award costs against the applicant. The level of the Respondent's costs which are sought is specified by the Government Legal Department. The sum of costs will include the costs of preparing and filing an Acknowledgement of Service on the basis of the number of hours involved, reading the claim, advising and corresponding with the client, and drafting the summary grounds of defence. If the Government Legal Department has not submitted an Acknowledgement of Service, or applied for costs within it, then the judge will typically not make any costs order. If permission is granted, then a decision on the award of costs will be reserved for the conclusion of the substantive hearing. If a claim is settled following the grant of permission—as is the norm in such instances—then the consent order will typically include an agreement that the Home Office pay 'reasonable costs.'[25]

38. There is generally a lack of data on costs in judicial review.[26] Furthermore, the publication the Home Office cites in the *New Plan* for the proposition that immigration cases 'involve considerable legal costs for the parties and the taxpayer'—*Home Office annual report and accounts: 2019 to 2020*—contains no trace of relevant data. The one empirical study on this area of litigation that looked at costs found that, where there was an order for a specific amount of costs at permission, the range of awards ran from £90 to £1,148.[27] The average award in was £458. This is a small amount and represents

[25] *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607, at [60]-[63].
[26] The Independent Review of Administrative Law (March 2021), at [4.10] (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf)
[27] Thomas and Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (July 2019) (https://drive.google.com/file/d/1IsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view)

the reality that the immigration judicial review system is highly efficient at quickly dealing with claims while incurring limited costs for all parties. If the Home Office has further data pertaining to this proposal, then it ought to publish it and allow it to be interrogated at a granular level. There is no evidential basis available for the assumption that the current system is too costly, including for the taxpayer. The Independent Review of Administrative Law found that 'government departments that gave an estimate of their cost in financial and human resources gave little indication that the cost was overwhelming or in any way disproportionate to the value of maintaining "the lawfulness of executive action."'[28] If the Home Office is still of the view, without clear foundation, that there is a costs problem then it should consider options that are far more likely to reduce costs to the taxpayer without inhibiting access to justice, including reducing the complexity of immigration law,[29] making better initial decisions, and having better pre-action processes.[30]

39. Second, there is a disconnect between one of the central objectives of the policy and the proposed solution. The Home Office states it is concerned about enforcing litigation debts arising out of immigration judicial review cases: '[i]n the cases which the Home Office ultimately wins, it is rarely able to recover costs.' We do not have access to data on the scale of this alleged problem. The Home Office and the Government Legal Department collect data on how much litigation debt from immigration judicial review remains outstanding and how many claimants who have to pay costs in practice do so, but this information has not been published despite an FOIA request being lodged.[31] Nor is the Home Office publishing this data as part of this consultation. We do not even know how often the Home Office actually seeks to enforce cost orders. Even if litigation debt from immigration judicial review cases is not paid often, it is difficult to see how introducing fixed recoverable costs makes any difference to this situation. Furthermore, the Home Office has already

[28] The Independent Review of Administrative Law (March 2021), at [35] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf
[29] Law Commission, *Simplification of the Immigration Rules: Report* (Law Com No 388) (https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/)
[30] Thomas and Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (July 2019) (https://drive.google.com/file/d/1IsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view)
[31] Freedom of Information Act request (28 October 2018) (https://www.whatdotheyknow.com/request/litigation_debt)

introduced a mechanism to respond to the issues of non-payment of litigation debts in immigration cases. In 2016, a specific power to refuse immigration applications on the basis that an applicant owes a litigation debt was introduced as a general ground of refusal in Part 9 of the Immigration Rules. Home Office guidance explains that a litigation debt can arise from all types of litigation, including judicial review. It instructs caseworkers to take into account all litigation debts, including those accrued before 6 April 2016 when considering applications made on or after 6 April 2016. There is now an operating presumption in favour of refusal of all application types, save for a few exceptions. To check for debts, there is communication between the Home Office's Litigation Finance Team and caseworkers considering applications. Though there is a general presumption in favour of refusal where an unpaid litigation debt exists, Home Office caseworkers must consider whether refusal is reasonable taking account of all relevant factors, including: how the debt was accrued; level of cooperation with Home Office debt recovery attempts; the location of an applicant; the purpose of the application; an applicant's ability to pay; how long the debt has been outstanding; and the amount of the debt.

40. Third, Sir Rupert Jackson's extensive review of civil litigation costs considered judicial review and suggested an alternative better way forward. Jackson LJ's *Final Report* was published in December 2009. It concluded that qualified one-way cost-shifting is 'the right way forward' for judicial review. This was because: it is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases (where costs caps operate); it is undesirable to have different costs rules for environmental judicial review and other judicial review cases; the permission requirement is an effective filter to weed out unmeritorious cases, therefore the present approach is not necessary to deter frivolous claims; it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the financial risks involved; and it has proved satisfactory in Canada. Sir Rupert ultimately suggested the following costs rule should be adopted:

> *a. Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the*

amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

i. the financial resources of all the parties to the proceedings, and

ii. their conduct in connection with the dispute to which the proceedings relate.[32]

41. PLP still considers this to be the best approach in all judicial review cases, including immigration cases.[33] In November 2016, Jackson LJ began a further review of civil litigation costs, specifically focused on extending fixed recoverable costs across the range of civil litigation including judicial review. There was general opposition to introducing fixed recoverable costs in judicial review because of the constitutional importance of judicial review and the variability of costs.[34] As part of this further review, a working group was set up under Martin Westgate QC. The group was given the task of 'work[ing] up the detail of a model based on the current regime for Aarhus claims that could be applicable to judicial review claims more generally.' The final Westgate Group's recommendations concluded that the introduction of a version of the Aarhus model, in most cases, would be an improvement on the current costs rule in judicial review. Sir Rupert's Supplemental Report concluded that costs in judicial review are too variable to permit the introduction of fixed recoverable costs[35] and that;

In my view, if QOCS in JR is not acceptable, the Aarhus Rules should be extended to all JR claims. This is necessary in order (a) to increase access to justice and (b) to promote the public interest. I accept that it is both tiresome and expensive for hard pressed

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[32] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) (https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf)

[33] See: *The Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs* (January 2017) (https://publiclawproject.org.uk/resources/plps-submission-to-lord-justice-jacksons-review-of-fixed-recoverable-costs/); (https://publiclawproject.org.uk/resources/plps-submission-to-lord-justice-jacksons-review-of-fixed-recoverable-costs/attachment/170130-fixed-costs-recovery-review-plp-submissions-final_index/)

[34] Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report; Fixed Recoverable Costs* (July 2017), at [2.1] (https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf)

[35] ibid, at [2.7(i)].

public authorities to face (as they do) (a) a stream of unmeritorious claims and (b) and a much smaller number of meritorious claims. The fact that most claims are knocked out at the permission stage is not a complete answer. By then the defendant authorities will often have incurred significant costs in investigating the facts and drafting the acknowledgement of service. Despite those unwelcome burdens falling on public authorities, the ready availability of JR proceedings in which public bodies are held to account for their actions and decisions, is a vital part of our democracy. Both JR and a free press are, in their different ways, bulwarks against the misuse of power.

The government did not act on these recommendations and has since refused to provide any public reasons.[36]

42. Fourth, and most importantly, fixed recoverable costs will likely have a significant chilling effect of meritorious and arguable claims.[37] To put this simply: what the Home Office is proposing risks inhibiting the constitutional safeguard of judicial review. The ability of claimants to recover their reasonable costs of bringing judicial review proceedings in full when they are successful is critical to their ability to access judicial review. As PLP explained in its submission to Sir Rupert Jackson's review of fixed recoverable costs in 2017:[38]

It is increasingly difficult for individual applicants of modest or limited means to access advice and representation in public law matters. Even leaving aside the risk of an adverse costs order, judicial review proceedings are prohibitively expensive for very many individual claimants, charities and other small organisations, and small and medium-sized enterprises.

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[36] Monidipa Fouzder, 'MoJ can't find key Jackson costs note' (The Law Society Gazette, 15 July 2019) (https://www.lawgazette.co.uk/news/moj-cant-find-key-jackson-costs-note/5070994.article). It should be noted that this proposal was "highly recommended" in the submissions to IRAL Report, at [C56].

[37] See: Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report; Fixed Recoverable Costs* (July 2017), at [2.5], where he noted that there were 'formidable arguments against introducing a simple grid of FRC into the field of JR… this would fetter access to justice in a vital area of civil litigation'. (https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf)

[38] *The Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs* (January 2017) (https://publiclawproject.org.uk/content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL_index.pdf)

Access to justice for these kinds of claimants nearly always depends on the availability of legal aid or conditional fee arrangements ('CFAs') in which lawyers agree to act for no (or significantly reduced) fees unless the claim is successful.

[…]

For most, if not all, firms and organisations, including PLP, providing civil legal services under a contract with the Legal Aid Agency, as well as barristers in independent practice, it is necessary to cross-subsidise legal aid income. For most non-commercial firms who act predominantly for legally aided individuals, this cross-subsidisation is achievable only because they are entitled to recover their costs from their opponents at their normal commercial rates when successful. As Lord Hope explained in In re appeals by Governing Body of JFS & Others [2009] UKSC 1, [2009] 1 WLR 2353 ('JFS'):

> It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council Scott* Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. …

Although those comments were made in the context of a suggestion that there should be an order that each side bear its

own costs whatever the outcome of the appeal, the points made by Lord Hope are just as important in considering the impact of fixed costs. Legally aided claimants are by definition impecunious and will be unable to pay their lawyers for work done on their cases which exceeds the amount of any fixed costs.

[…]

CFAs only work as a funding mechanism to improve access to justice in judicial review whilst the potential to recover costs inter partes subsists. Such funding mechanisms are inherently risky in any case, but in tortious claims the risk involved in establishing liability may be relatively straightforward to assess, particularly with the availability of pre-action disclosure and longer timeframes for investigating the merits before issue (or before pleading in any detail). In judicial review cases it is notoriously difficult to accurately assess merits, particularly in a case raising new issues of law.

PLP continues to believe that, for these reasons, the introduction of fixed recoverable costs in judicial review proceedings – whether in relation to immigration cases or more generally – would significantly impede access to justice and thereby undermine the important constitutional right to judicial review. That would undermine the rule of law and the commitment in the 2019 Conservative party manifesto to ensure that judicial review remains available for individuals to protect their rights against an overbearing state.

Statutory notice periods prior to removal

43. Chapter 8 of the New Plan includes a proposal to (p41):

> *"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"*

44. This proposal is one of five proposals put forward in support of the aim of ensuring "that people who have no right to be in the UK, especially those who are a danger to our citizens are swiftly removed from the UK" (p40). PLP does not have relevant experience or

evidence to comment on the other proposals and therefore does not propose to do so. The absence of a response should not be taken as support for any of the proposals.

45. Q40 of the New Plan Stakeholder Questionnaire asks respondents to give their views as to the length of this minimum notice period, suggesting 72 hours, 5 working days, 7 calendar days, or some other period. It notes that the purpose of the notice period is to "give the opportunity to seek legal advice and bring legal challenges ahead of removal".

46. PLP is unaware of any further published information about the background to or rationale for this proposal or how it is intended to operate in practice. It has not been specifically discussed at any of the consultation meetings in which PLP has been invited to participate. It is unclear how it relates to other proposals being consulted on, including the proposals in chapter 5 on access to legal advice, a new expedited process for claims made from detention, or the new quicker process for judges to take decisions on claims refused without the right of appeal. It is also unclear how it relates to the new concept of a 'priority removal notice' which has been referenced at consultation meetings (but not in the consultation paper).

47. The consultation paper does not provide consultees with sufficient information to respond intelligently to this proposal. In particular it does not explain how placing the notice period in statute will assist in achieving the object of removing those with no right to remain in the UK. Nor does it make clear:

a. At what stage notice of removal will be given;
b. What practical opportunities those served with the notice will have to obtain access to legal advice and to the court after being served with the notice;
c. What form the notice will take.

48. At present, the minimum notice period prior to removal is set out in Home Office policy, specifically in Chapter 60: Judicial reviews and injunctions of the General Instructions on Immigration returns,

enforcement and detention[39] and in Arranging removal.[40] This policy provides for notice of removal to be given in 3 different forms: notice of a removal window; notice of removal directions; or limited notice of removal. In October 2020, the policy of giving notice of a removal window or limited notice of removal was found by the Court of Appeal to be unlawful because it incorporated 'an unacceptable risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on article 2 and/or article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal'.[41] The policy has not been amended since that finding was made but in practice the Home Office now gives notice of removal directions in all cases.

49. PLP therefore proceeds on the basis that what is being consulted on is a proposal to put in statute a requirement to give a minimum period of notice of removal directions, that is, a notice which specifies the date of departure, is in form IS151D, and encloses a copy of the removal directions issued to the carrier.[42] That is because notice of a removal window or of a limited notice window would give rise to an unacceptable risk of interference in the right of access to justice, and so inconsistent with the stated objective of the consultation to ensure that the system is a fair one, and the consultation paper does not suggest any other form of notice of removal.

50. On that basis, PLP considers that the notice period needs to be sufficient to ensure access to justice prior to removal in each case.

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[39] Home Office, *Immigration returns, enforcement and detention General Instructions; Judicial reviews and injunctions* (22 April 2021) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979820/judicial-reviews-chapter-60-v21.0.pdf)

[40] Home Office, *Immigration returns, enforcement and detention General Instructions; Arranging removal* (4 October 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919645/arranging-removal-v2.0ext.pdf); See also: Home Office, *Immigration returns, enforcement and detention General Instructions; Liability to administrative removal (non-EEA): consideration and notification* (6 April 2017) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/606982/GI-Non-EEA-admin-removal-v3.pdf)

[41] *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, at [147] *per* Hickinbottom LJ.

[42] Home Office, *Immigration returns, enforcement and detention General Instructions; Judicial reviews and injunctions* (22 April 2021), at p 12 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979820/judicial-reviews-chapter-60-v21.0.pdf)

Specifically, the person served with the notice must be able in practice to find and instruct a lawyer who:

a. is ready to provide legal advice in the limited time available prior to removal, which should also entail ensuring that the provider of the advice would be paid;
b. is willing and able to provide legal advice under the seal of professional privilege in the limited time available prior to removal which should also entail being able to find and locate all relevant documents (which could be voluminous) and without enough time to consider them and to obtain any additional material on which they seek to rely;[43] and
c. (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.[44]

51. As Sullivan LJ explained in *R (Medical Justice) v SSHD* [2010] EWCA Civ 1710 at [19], what is required is access to "effective legal advice",

> "*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*."

52. When the policy of giving a minimum period of notice before removal was first introduced, the period of 72 hours was selected as the minimum necessary to ensure effective access to justice prior to removal. It was accepted at the time as being "quite tight".[45]

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[43] In *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin), at [103] Silber J explained that in order to access justice before removal it is necessary that:

> *first a lawyer has been consulted, second the lawyer can properly be funded, third he or she then has had an opportunity to consider the relevant papers, fourth he or she is than able to take instructions and fifth the lawyer has been able to reach a conclusion which enables him or her to make a threat of proceedings*.

[44] *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin), at [45] and see also, [60]; and see *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, at [94].

[45] The background to the adoption of the 72 hour notice period is described in the judgment of Silber J in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin), at [5]-[30]; see also: *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, at [27]-[32].

Stakeholders including ILPA considered that even then it was too tight. The uncontested evidence filed by Medical Justice and FB in the challenge to the removal windows policy showed that this period is no longer sufficient – if it ever was – to accomplish all the necessary steps to ensure access to justice. Indeed, the Home Office's own data showed that for those in detention it was practically impossible to even obtain an initial appointment with a duty adviser in 72 hours. Additional issues arise for those who are detained in a prison; who need advice on a claim which is not 'in scope' for general legal aid (such as an Article 8 claim); or who are served with notice of removal while in the community in an area of the UK where there is little or no immigration advice provision.[46] PLP therefore considers that 72 hours would be inadequate.

53. It is impossible, however, for PLP to comment on what period of notice *would* be adequate to ensure access to justice prior to removal without further information as to the system within which the notice will be served. As set out at paragraphs 4-5 above, in order to give an intelligent response to the question of what is an adequate notice period, it would be necessary to understand the rationale for this proposal; how it relates to other proposals being consulted on; and the circumstances in which the notice will be served.

[46] See the summary of the evidence in *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, at [59].