The Children's Society response to the Ministry of Justice's consultation on 'Judicial Review: Proposals for further reform'

November 2013

Introduction

1. The Children's Society is a leading national charity, driven by the belief that every child deserves a good childhood. We provide vital help to the most vulnerable children, young people and families in our society through a range of services. We work with around 48,000 children each year, supporting them and advocating on their behalf to tackle discrimination and disadvantage in their daily lives. Our services include helping young people and families to find safe accommodation and access the support and services they need, so that children's welfare is protected. For further details, please contact lucy.gregg@childrenssociety.org.uk.

2. We have intervened in judicial review cases against local authorities on behalf of vulnerable children and young people and we are currently the claimant in a case challenging the Ministry of Justice on changes to legal aid.

Key Messages

3. The proposed reforms restricting the role of judicial review both for individuals and voluntary organisations wishing to bring a claim, pose a serious threat to the rule of law. Judicial review is a crucial check on the government and an important tool in ensuring that laws are interpreted and enforced properly.

4. Judicial review is particularly important for children and young people. It helps instigate reform of laws which do not protect children's rights as well as make sure national laws comply with international legislation. Judicial review provides a key mechanism for marginalised children and young people to have their rights upheld and has a place in raising awareness, fostering public discussion and bringing about pressure for progressive social and legislative change.

5. The government's proposals fail to recognise the particular vulnerabilities and barriers which children face in accessing justice and seeking redress and do not account for the vital role that judicial review can play role in holding the state to account for decisions that fundamentally affects children's lives.

6. The case for the proposed reform has not been clearly made by the government and the available statistics do not support the need for reform. The increase in immigration and asylum judicial reviews is caused by multiple factors and to attribute this solely to unmeritorious claims is incorrect and misleading.

7. Our advocates find that in many cases, judicial review is the only option for children and young people, particularly where no right to appeal exists or to seek appropriate

remedies where policies have been breached by public bodies. We find that despite intense advocacy from our staff, in many cases the threat of legal action is required for public bodies to act lawfully, leading usually to a settlement in the young person's favour. This includes cases where children and young people are at risk of homelessness and where there are serious safeguarding concerns. Without judicial review many children and young people would become or remain homeless and at significant risk of exploitation and abuse.

8. We believe it is necessary that voluntary organisations are able to continue to stand as a claimant or intervene in judicial reviews. The expertise brought by these organisations and the ability they have to act on behalf of others who may be unable to do so is vital. It ensures that cases with a clear public interest which would affect many children's lives are properly heard. Without this mechanism, we believe the government's actions will be insulated from judicial scrutiny and consequently the rule of law will be significantly weakened.

Statistical evidence does not justify these reforms

9. The figures highlighted by the government fail to make a compelling case that a significant increase in the use of judicial review across all areas of law exists. The consultation document cites official statistics which show that since 2007 the volume of non-immigration and asylum judicial reviews issued has remained fairly stable at just over 2,000 per annum[1].

10. In justifying its proposals the government draws on the Administrative Court records for cases lodged between 2007 and 2011, stating that around 50 judicial review claims are issued each year lodged by NGOs, charities, pressure groups and faith organisations[2]. This is however, footnoted by stating they are '*Based on a manual analysis of case level information. Due to uncertainties in recording and interpretation this analysis is largely illustrative*.' This is an important caveat given that it can be difficult to identify the nature of the claimant's interest in the matter from court records alone, which rarely, if ever, specifically record this information.

11. An independent research study by the Public Law Project and the University of Essex[3] investigated in more detail the parties in judicial review and the nature of challenges at final hearing. Their findings showed that of 502 judicial review hearings over a 20 month period, 77% of claims were brought by individuals whilst only 3% were brought by interest groups and charities. Only three non-environmental challenges reaching final hearing were brought by NGOs in wider public interest matters. These facts contradict government assertions of abuse and raise important questions regarding the rationale and evidence relied upon by the government in proposing far reaching restrictions on access to judicial review.

[1] Paragraph 10 of the consultation document
[2] Paragraph 78 of the consultation document
[3] An empirical research study conducted jointly by the Public Law Project and the University of Essex, funded by the Nuffield Foundation on the effects and value of judicial review. The full project report is to be published. http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

Immigration and asylum judicial review cases

12. The only significant area of growth in the overall number of judicial review applications has been in immigration and asylum, which more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012[4]. The transfer of immigration and asylum judicial review cases from the Administrative Court to the Upper Tribunal will take place from 1 November 2013[5]. As this has not yet come into effect and the outcome of this change is unknown, we find it concerning that further proposals for fundamental reform are being made.

13. Nonetheless, the success rate for immigration judicial reviews is respectable. Of the 126 claims that proceeded to a substantive judicial review hearing in 2011, the success rate was 43% – a clear indication that it is wholly wrong to categorise such claims as without merit[6]. This also does not take into account the number of claims that were settled pre-permission. Figures we have obtained from the Ministry of Justice through a freedom of information request[7] indicate that 50% of all judicial review cases in 2011/12 brought by young people aged between 18 and 25 years old related to immigration. This demonstrates that any changes to immigration judicial review would have a disproportionate impact on this age group.

14. The growth in immigration and asylum applications requires much greater scrutiny in order to understand why an increase has occurred. To argue that this increase is due to unmeritorious claims is not borne out by our work with children and young people and legal experts have argued this increase can be attributed to a number of factors[8]. These include, but are not limited to:

    a. **Poor decision-making by the Home Office:** Research has consistently highlighted problems with the quality of decision-making by the Home Office in asylum claims generally[9], as well as in family[1011] and children's[12] cases specifically. Often this is due to, among other things, a lack of adherence to guidance by Home Office decision-makers or a lack of learning from previous cases[13] as well as a 'culture of disbelief' within the Home Office[14]. This results in an inadequate, disjointed and inefficient system.

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[4] As illustrated on page 8 (chart 1) of the consultation document.
[5] http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf
[6] R. Thomas, *Immigration judicial reviews* UK Const. L. Blog (12th September 2013) Available at http://ukconstitutionallaw.org
[7] Obtained on 10th October 2013
[8] Para 8 of ILPA's response to the last judicial review consultation, available at: http://www.ilpa.org.uk/data/resources/17007/13.01.24-ILPA-response-to-Ministry-of-Justice-consultation-on-Judicial-Review-proposals-for-reform.pdf
[9] Amnesty International (2013) *A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK* : http://www.amnesty.org.uk/uploads/documents/doc_23149.pdf
[10] UNHCR (2013) *Untold Stories; Families in the asylum process*: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/aUNHCR_Report_Untold_Stories.pdf
[11] For example, the first report of the Independent Family Returns Panel highlighted that of the families that the UK Border Agency (UKBA) had considered to have no right to be in the UK and should return, 41% (77 out of 186) were subsequently granted leave to remain in the UK – see p8, Independent Family Returns Panel Annual Report, 2011/12
[12] UNHCR (2009*) Sixth Report of the Quality Initiative Project*: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/6_QI_Key_Observations_Recommendations6.pdf
[13] Amnesty International (2013) *Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK* http://www.amnesty.org.uk/uploads/documents/doc_23149.pdf
[14] The Children's Society (2012) *Into the Unknown: Children's journeys through the asylum process* http://www.childrenssociety.org.uk/news-views/press-release/children-seeking-safety-uk-face-damaging-culture-doubt

b. **Essential to uphold the rule of law**: Senior judges have recently warned the government that judicial review is increasingly essential[15] to vindicate the rule of law. In children's cases specifically, judicial review has been necessary to correct unlawful practice. For example, in May 2013, the Home Office policy for granting discretionary leave (DL) was declared unlawful – through a judicial review – because it failed to consider the welfare and best interests of each child before deciding the period of time for which leave to remain should be granted. The court found was argued that the Home Office's failure to consider granting Indefinite Leave to Remain as a matter of course is wrong and it was recognised that successive grants of discretionary leave for a limited period can leave children in limbo and may be contrary to their welfare. The Home Office's DL policy has since been amended following this judgment in order to comply with the section 55 duty to promote and safeguard the best interests of children when considering the duration of leave to grant to children. This judgment therefore has implications for similarly decided cases and for how the policy and rules are to be interpreted.

c. **Complexity and frequency of change in immigration law**: In 2012 alone there were nine statements of changes in the Immigration Rules and ten judgments were handed down by the Supreme Court in immigration-related cases. The need to simplify the complex rules and regulations that govern immigration decision-making has long been highlighted. Indeed, when announcing the abolition of the UK Border Agency in March 2013, Theresa May noted that one of the agency's main problems was that the agency's "*complicated legal framework often works against it*"[16]. In addition, the complexity of appeal rights and the removal of appeal rights through frequent legislative amendments have contributed to this situation.

d. **Reduction in the availability of good quality legal advice**: The reduction in the availability of legal aid, including the removal of legal aid from non-asylum immigration cases in Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) as well as the forthcoming residence test, will only increase the number of cases brought for judicial review. A lack of legal aid reduces the likelihood of sound decision-making early on in immigration and asylum cases as a consequence of reduced access to good quality advice about an individual's prospects of success or options for alternative remedies.

Judicial review only option for many children and young people

15. Children who are subject to immigration control routinely have to contend with a number of complex administrative and judicial proceedings. This is especially true for separated children who are in the UK alone, for example, unaccompanied asylum-seeking children, trafficked children and children who have been abandoned by their carers. Officials working for public bodies make decisions that directly impact on individual children's welfare and the care and services they receive.

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[15] *Judicial review is increasingly essential, judges warn government*, The Guardian February 2013: http://www.theguardian.com/law/2013/feb/13/judicial-review-judges-supreme-court

[16] Oral statement by the Home Secretary to the House of Commons on the future of UK Border Agency on 26 March 2013 https://www.gov.uk/government/speeches/home-secretary-uk-border-agency-oral-statement

16. There are many circumstances in which judicial review is the only mechanism through which a child or young person can challenge a decision made about their life by a public body. The lack of other avenues through which to challenge these decisions is arguably another reason for the increase in judicial reviews mentioned in point 14. These specific circumstances include, but are not limited to the following areas:

    a. Children whose age is disputed: Many of the separated migrant children and young people who arrive in the UK do not hold valid documentary proof of their age, and many find that their stated age will be disputed by either the Home Office or a local authority[17]. The consequences of getting the decision on a young person's age wrong are serious. Assessed as over 18, they may be placed in immigration detention with adults, or asked to live in asylum accommodation with adults and without care, supervision or access to child-appropriate support and services such as education. There is no statutory guidance on assessing age and no independent multi-agency panel responsible for carrying out age assessments. Where a young person disagrees with the local authority's decision and wishes to challenge it, but where the dispute over age does not affect the young person's immigration application, the only option is judicial review. A seminal case in 2009 strengthened this route by making the Judicial Review Court the ultimate fact finder in age disputed cases. A young person's age determined by a judicial review is now binding on all statutory bodies and the young person[18]. The result has been the judicialisation of age assessment and an increase in the number of challenges. Consequently, there is continuing unhappiness expressed by the judiciary about the resource implications of their current roles in these processes. Despite this, judicial review is the only mechanism whereby an age assessment can be finally concluded.

    b. Children who are referred to the National Referral Mechanism (NRM) as potential victims of trafficking who receive a negative reasonable or conclusive grounds decision: Within the NRM, there is no system for appealing against a negative decision on whether a child is a victim of trafficking at either the reasonable grounds stage or the conclusive grounds stage. The only way to challenge an unlawful decision is judicial review. The right to challenge these decisions is very important. Our research about the care arrangements of trafficked children highlighted[19] that negative results can occur despite knowing that a young person has come in to the UK through an 'agent' or 'trafficker'. The NRM's decision-making has been widely criticised with concerns that cases have been turned down inappropriately (i.e. people who have, in their opinion, been trafficked have not been identified as such)[20] and that there is variation in how the definition of 'victim

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[17] Office of the Children's Commissioner (2012) *The Fact of Age:* http://www.childrenscommissioner.gov.uk/force_download.php?fp=%2Fclient_assets%2Fcp%2Fpublication%2F590%2FFINAL_FACT_OF_AGE_REPORT-_17_07_12.pdf.

[18] Supreme Court's judgment in *A v Croydon*(2009)

[19] Franklin, A. and Doyle, L. (2013) *Still at Risk: A review of support for trafficked children*. The Refugee Council and The Children's Society http://www.childrenssociety.org.uk/sites/default/files/tcs/still_at_risk_-_full_report_-_refugee_council__the_childrens_society.pdf

[20] *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons* (2010) The Anti-trafficking Monitoring Group http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf

of trafficking' is interpreted by case-owners[21]. Given this, decisions must be open to some form of review. Additionally, we question whether the absence of a formal appeal or review procedure is consistent with the right to an effective remedy, guaranteed by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13).

c. Children unlawfully detained: Children and families may be detained under immigration powers at ports of entry for a 24 hour period or at Cedars Pre-Departure Accommodation prior to their planned enforced removal from the UK for up to one week. Unaccompanied children are also detained in some cases in adult Immigration Removal Centres when they are wrongly treated as adults. For example, in an independent inspection into the handling of asylum applications made by unaccompanied children published this week, of eight applicants in the research sample who were detained, six were detained on the basis of a local authority age assessment. Four of these were later released on the basis of a local authority assessment (or re-assessment) finding them to be children under 18[22]. Detainees can apply for bail but the only way they can challenge the lawfulness of their detention is through judicial review. Given the overwhelming evidence of the serious harm caused to children by detention[23] this is a vital safeguard.

17. Judicial review is also a vital tool for vulnerable migrant families. For example, judicial review is the only available remedy if a family is unlawfully given the wrong type or length of leave, or is unlawfully subject to'no recourse to public funds' condition. For families facing enforced removal within the Family Returns Process, judicial review may be the only available remedy to prevent their unlawful removal from the UK.

Threat of legal action can ensure child protection

18. The government's intention is to restrict legal aid for the stage leading up to the permission stage of judicial review meaning that lawyers may not be paid if permission is not granted. The government's revised proposal provides for a discretionary payment for work done on a permission application. However in our view this will not effectively address the problems with the proposal and would still mean that lawyers will not be able to carry the risk for unpaid work. Ultimately this means that vulnerable children and young people will be left without vital legal support. .

19. Over 40% of all applications lodged in 2012 were withdrawn before any decision on permission was made. This should not necessarily lead to the assumption that many of these cases are unmeritorious. Evidence suggests that many of these cases may be

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[21] ECPAT UK and Children's Rights Alliance for England (2013) *Alternative Report on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* http://www.ecpat.org.uk/sites/default/files/final_opsc_submission_pdf.pdf

[22] Independent Chief Inspector of Borders and Immigration (2013) *An Inspection into the Handling of Asylum Applications Made by Unaccompanied Children* http://www.ilpa.org.uk/data/resources/21153/13.10.31-CI-An-inspection-into-the-handling-of-asylum-applications-made-by-unaccompanied-children-February-June-2013-October-2013.pdf

[23] Lorek et al. (2009) *The mental and physical health difficulties of children held within a British immigration detention center: A pilot study* Child Abuse & Neglect 33 p573–585 http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/Yarl%27sWoodDoctor%27sReport.pdf The Children's Society (2011) *What Have I Done? The experiences of children and families in UK immigration detention* http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/immigration%20experiences_full%20report.pdf

settled on terms favourable to the claimant[24]. Experience by legal experts[25] highlights these cases are either conceded by the Treasury Solicitors or withdrawn by the claimant often because it is recognised that the decisions made by the Home Office are not legally sound and could not be defended in court. The initial decision is then reconsidered by the Home Office which in effect represents a successful legal challenge by the claimant. The number of claims that are conceded and the reasons for this are not recorded within the official statistics[26].

20. Figures we have obtained from the Ministry of Justice through a freedom of information request[27] indicate that children and young people are disproportionately involved in judicial reviews that end at an early stage. 54% of all judicial reviews recorded under community care in 2011/12 (which ended either where no proceedings were issued or where the case concluded before permission was applied for and considered by a court[28]) were made by individuals under 25 years old. This group comprises only 32% of the population of England and Wales.[29] Furthermore, 42% of all judicial reviews brought by children (those under 18) in their own right fall under the category of community care, representing the biggest single area of challenge for children. This is likely to be because the issues relate to matters concerning children's care and support arrangements which are likely to be vital to their welfare.

21. These statistics are reflected in our direct practice. We advocate directly on behalf of children and young people, but we are often forced to refer them to solicitors to challenge statutory agencies regarding unlawful practice in order to secure the services they are both entitled to and in desperate need of. Without the means to challenge authorities, destitute families and unaccompanied children in particular[30] risk becoming or remaining street homeless and continuing to suffer abuse and exploitation. Where a child or family is homeless, this requires a fast response which cannot always be done through advocacy or complaints procedures.

22. Since 2008, The Children's Society in Birmingham has made 110 'child in need' referrals under Section 17 of the Children Act 1989 to Birmingham children's services on the basis that a family was destitute and the child's welfare needs were not being met. Only 8% of these families were supported by children's services following the initial referral. 86% were eventually supported, usually following an intervention by a solicitor. This is despite significant advocacy (e.g. letters, telephone calls, meetings and use of complaints procedures) from our support workers prior to any legal action being taken.

23. The average time between the referral and the family gaining support was 14 days, with the longest time being 43 days. The majority of these families survived by

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[24] Bondy, V., & Sunkin, M. (2009).The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing.
[25] Law Practitioners Association evidence to Crime and Courts Bill - Human Rights Joint Committee http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/67/6706.htm#a13
[26] R. Thomas, *Immigration judicial reviews* UK Const. L. Blog (12th September 2013) Available at http://ukconstitutionallaw.org
[27] Obtained on 10th October 2013
[28] Refers to cases recorded at endpoint A and endpoint E on Legal Aid Agency 'Certificate Outcomes – Checklist' http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/certificate-outcomes-checklist-version-2.pdf
[29] 2011 Census: Age by single year, local authorities in the United Kingdom (Table QS103UK)
[30] Pinter, I. (2012) *I don't feel human: Experiences of destitution among young refugees and migrants*: http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/thechildrenssociety_idontfeelhuman_final.pdf

relying on community support from friends and families, church and other faith and voluntary organisations. This kind of ad hoc support does not meet the welfare needs of children and means they are growing up in very precarious and sometimes extremely risky circumstances. Relying on this kind of support has negative consequences for child health, safety and well-being. Research highlights that in order to cope with destitution in some cases adults may be forced into criminality or transactional or commercial sex work in order to survive.[31]

24. A recent Newsnight investigation revealed that 15,728 children aged 16 and 17 years old asked for help with homelessness from local authorities. Of the local authorities that responded to the FOI request, 148 had unlawfully housed children in bed and breakfast accommodation in 2012[32] despite statutory guidance stating that this type of accommodation is not suitable for children[33]. In our experience legally aided support, such as a letter before action, is often necessary to challenge such decisions. For example, The Children's Society recently supported a migrant child who was abandoned by his carer in the West Midlands. The local authority acted unlawfully and provided him only with bed and breakfast accommodation. Despite advocacy from our services, we were only able to challenge the authority effectively with the help of a legally-aided solicitor and now he is properly supported under Section 20 of the Children Act 1989 with access to services as a looked after child. A recent Serious Case Review in Manchester highlighted how in extreme cases this can lead to disastrous outcomes for children, including suicide[34].

CASE STUDY: Destitute young person from Iran who was 'appeal rights exhausted'[35]

Peter is a young Kurd who came to the UK alone from Iran to seek protection. The Home Office rejected his asylum claim before his 18th birthday and six months later social services stopped his support and told him to go back to Iran[36]. They called the police, who went to his house and broke down the door while he was not at home. They called him and told him to come to the police station. He was told that he could not go back to his house.

He was made homeless for nine months. During this time he slept on buses, stayed with friends and sometimes in a mosque. He was not able to eat every day. He stayed in unsafe places and regularly experienced violence and abuse on the streets. When he was

[31] Crawley, H; Hemmings, J and Price, N (2011) *Coping With Destitution: Survival and livelihood strategies of refused asylum seekers living in the UK*: http://policy-practice.oxfam.org.uk/publications/coping-with-destitution-survival-and-livelihood-strategies-of-refused-asylum-se-121667

[32] BBC Newsnight FOI requests – broadcast on 26 September 2013 - *Councils housing homeless teenagers in B&Bs* by Jim Reed - http://www.bbc.co.uk/iplayer/episode/b03brt5d/Newsnight_26_09_2013/

[33] Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8260/Provision_20of_20accommodation.pdf

[34] The Serious Case Review of Child S in Manchester involved a teenager who was abandoned by his father. After a period of street homelessness and despite being an unaccompanied child, he was eventually placed in bed and breakfast accommodation by the local authority where he later committed suicide. He had not receive the support he was entitled to as a child: http://resources.leavingcare.org/uploads/60fec78b9daa74ee5c0b036e096a8854.pdf

[35] Pinter, I. (2012) *I don't feel human: Experiences of destitution among young refugees and migrants:* http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/thechildrenssociety_idontfeelhuman_final.pdf; Wirtz, L. (2009) *Hidden Children: Separated children at risk* http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/Hidden_children_full_report.pdf

[36] Many of the young Iranians we work with, who are refused international protection, cannot get documentation to return as there is currently no embassy in the UK. This leaves them in limbo without a regular immigration status or access to services, but unable to leave the UK.

homeless he had a headache every day and was coughing a lot. He tried to commit suicide more than once.

Despite The Children's Society's advocacy the local authority would not rehouse him so we supported him to get a legal aid lawyer to challenge the local authority. Following this challenge the local authority agreed to rehouse Peter.

IMPACT: A solicitor under these proposals may not take on a case like Peter's if they believe they may not be paid. Peter may therefore still be homeless or living in very precarious circumstances.

25. It is never ideal for a child to be involved in litigation. Any reform making it less likely that a case can be settled at an early stage will be detrimental to children. The best outcomes for children are achieved when the public body settles early in the process.

26. Furthermore, whilst a case settling early is beneficial for the individual concerned, it means issues that are broader and affect a larger number of people will not necessarily be heard by the court. This means it is even more important that voluntary organisations remain able to continue to bring claims despite having no private interest in the matter.

Changes to the test for standing will make many challenges impossible

Question 9: *Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?*

27. We seek to promote the rights and welfare of children in many different ways for example, through campaigning, policy initiatives, research and producing reports, engaging with local authority and government bodies, engaging with other stakeholders. Litigation would always be the last resort, unless our many efforts have failed and we feel very strongly that without litigation, the children and young people we seek to protect, will be at risk of harm.

28. The proposals to limit the test for standing so that only those with a 'direct and tangible' interest in the matter in question can bring proceedings[37] are deeply concerning. Application of the current sufficient interest test is an appropriate method of determining whether a person or organisation is properly placed to bring a judicial review and that there is no problem with cases being brought by those with no direct interest in the matter.

29. The rules on standing have been made deliberately flexible because there is a public interest in meritorious cases being heard by the courts where these cases concern the legality of government action. This is particularly the case for children and young people whose vulnerabilities affect their ability to access justice and seek redress. There are significant barriers to children being able to recognise legal problems, seek appropriate, good quality legal advice and representation and understand and navigate complex administrative and legal processes.

[37] Paragraph 80 of the consultation document

Question 10: *If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis?*

30. No alternatives would provide a reasonable basis.These proposals fundamentally misunderstand the role of judicial review. Judicial review is about public interest not private interest. Judicial review ensures the power of the state is controlled. Without this mechanism the checks on government will be undermined. It is for this reason that we believe judicial review should not be restricted to those directly affected by the matter at hand.

Question 26: *What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?*

31. Changes to the rules on Protective Cost Orders (PCO) whereby a PCO would not be made available in any case where there is a private interest, regardless of whether these is a wider public interest, would place organisations like The Children's Society in a impossible position. We would not be able to bring a claim for judicial review unless we were directly affected by the decision under challenge; but the proposals on PCOs would mean that if we are able to meet the new standing test we would be barred from obtaining a PCO. We are very concerned this has severe implications for challenging lawfulness of decisions made by a public body and will leave the state less unaccountable to public scrutiny.

Question 34: *Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?*

32. We are currently the claimant in a challenge to the Ministry of Justice to bring back immigration into the scope of legal aid for unaccompanied or separated children. We have set out The Children's Society's concerns about the impact of the loss of legal aid in these cases, following commencement of LASPO. This includes case studies of the children and young people we support that are being or will be affected by these policies.

33. This challenge would be almost impossible to bring under these proposals. A child is very unlikely to challenge the government to exercise the powers contained under s.9(2) of the LASPO[38]. The complexity of the challenge and the need to find evidence from a variety of sources means an individual claimant, particularly a lone child will not have the resources, knowledge or capacity to be able to pull together the level of information and evidence required to launch a strong challenge. Furthermore, many individual children may not want to bring a challenge in their own name as they may they fear negative consequences, especially where they are subject to pending immigration matters.

34. Despite this, we consider that there is a clear public interest in this case since the UK

[38] This states that the Lord Chancellor can add services to Part 1 of Schedule 1.

is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). The UK has recognised that all children are to be treated in accordance with these principles by removing the immigration-related reservation to the UNCRC in 2008 concerning children subject to immigration control and establishing the section 55 safeguarding duty under the Borders, Citizenship and Immigration Act 2009. With these commitments in mind, we strongly believe that without specialist free legal advice and representation, separated children will not be able to exercise their rights when pursuing their immigration case and that their best interests will not be protected. Furthermore, we have also raised concerns in our challenge about what is likely to be a substantial cost-shift and cost increase to local authorities. This will not only place a huge burden on local authorities, but will also create even greater conflicts of interest. This will make them less able to provide support to these children, resulting in many children falling through the gaps in provision and forced into debt, abuse and exploitation in order to pay for their legal fees.

35. If an individual is able to bring a claim, this will only cover details of their individual case and will fail to address how the issue affects a broader group of people. This will result in only a piecemeal application of the law failing to provide a remedy for all people affected by the same unlawful practice. Any favourable result for the claimant will impact only on that individual, leaving others without recourse to justice or a remedy.

36. The consultation document also highlights that judicial reviews brought by interested groups have a higher success rate than those brought by individuals[39]. This is likely because the quality of argument is maximised, with groups and public interest litigants often best placed to mount well informed challenges and are often the most able and focused claimants. This arguably reduces the burden on the courts and on taxpayers because a broad test of standing may enable groups and representatives to bring claims, reducing multiple individual challenges.

37. Furthermore, if organisations such as charities or faith groups are unable to bring judicial reviews, some government action will be impossible to challenge as there are times when an individual is not able to bring the challenge. For example, in a judicial review brought by the immigration detention charity Medical Justice, the courts decided that the Home Office policy of deporting people with less than 72 hours' notice, so that they did not have time to get legal advice, was unlawful because it violated the common law right of access to the courts.[40] This challenge could not have been brought by the individuals affected by the unlawful policy, because they had been deported without sufficient time to get legal advice on the lawfulness of their deportation or the lawfulness of the policy as a whole. Only an organisations could challenge the unlawful policy, and if Medical Justice had not brought the challenge, the unlawful policy might still be in existence.

[39] Paragraph 78 of the consultation document

[40] *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

Third Party interventions provide necessary expertise

Question 31: *Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?*

38. The proposals to change the rules on third party interventions which would establish a presumption that third parties would be liable to pay the additional costs incurred as a result of their intervention are very concerning[41]. As a charity with limited resources, in order to proceed to assist the Court free of threat and uncertainty, the cost risks of an intervention must to continue to be protected. Nevertheless, interveners currently *do* stand their own costs but judicial discretion over the matter of costs is applied and we believe this to be the correct and proper approach.

39. An intervener can bring particular expertise either in specialist legal arguments or in the evidence they can provide. To be granted permission the court will want to see that the potential intervener has reason, through experience or workload to be made party to proceedings and that their involvement will add a dimension not available through the parties alone. Based on specialist knowledge about how particular decisions impact upon the group(s) they represent, voluntary sector organisations are often well placed to make informed submissions to a court to assist a court in making its decision. Furthermore, government ministers are frequent interveners in cases in the UK courts.[42] If the government's proposal is implemented, the result will be that the court will only be able to hear from organisations if they can afford to bear the costs. Many charities who are concerned with large sections of society affected by the courts' decisions would be unable to afford the costs risk. So interventions would continue to be made, but only by those representing well-resourced financial interests or the executive. Increasing the costs risk of intervening will restrict the ability of expert voluntary sector organisations to contribute to important cases and will diminish the quality of judicial decision-making on these matters.

40. The Courts themselves have hugely appreciated interventions by expert organisations as these often assist Judges in a more thorough consideration of the matters. Interveners need to have the permission of the Court. This means that a Judge looking at such an application will not give permission for the intervention unless it is considered, that this will assist the Court.

41. In 2010, The Children's Society intervened in a judicial review brought by a young person against the local authority of Barking and Dagenham[43], claiming that he was entitled to accommodation support as a 'former relevant child' (i.e. a young person who was provided with accommodation by social services for 13 weeks or more while still under 18 and to whom the local authority now owes a range of leaving care duties). After his claim failed in the High Court, The Children's Society decided to intervene in his appeal to the Court of Appeal. We aimed to assist the court in realising the broader implications of the decision to withhold support. The Court of

[41] Paragraphs 167-179 of the consultation document
[42] See for instance R(G) v London Borough of Southwark [2009] UKHL 26 (Secretary of State for Children, Schools and Families intervening), Birmingham City Council v Ali and others [2009] UKHL 36 (Secretary of State for Communities and Local Government intervening)
[43] *R v London Borough of Barking and Dagenham* [2010] EWCA Civ 1101

Appeal ruled in favour of the young person. A court of Appeal ruling becomes a precedent for lower and similar level courts to follow and so the decision interpreted the law in a way that is favourable for children. The judgment stated that local authorities have a general duty to provide a former relevant child with accommodation to the extent that his or her welfare requires it. It also decided that in considering whether a former relevant child's welfare requires the provision of accommodation, the local authority is not permitted to take account of whether or not that former relevant child might be eligible for accommodation and support from the Home Office pursuant to its asylum support functions. This had a significant impact in improving outcomes for young people leaving care who are now able to remain in the care of their local authority rather than being dispersed through the Home Office asylum support system[44].

42. It is unlikely The Children's Society would have intervened if we had the risk of costs to consider. This would have denied the court our knowledge about the broader impacts of this policy and possibly would have affected the courts understanding and potentially its decision.

43. As explained in point 24, the threat of judicial review can lead to a case settling early. Interventions can also play a role in this process. The Children's Society intervened in an application for judicial review brought by a claimant to challenge Plymouth City Council's failure under section 17 of the Children Act 1989 to carry out a lawful assessment of the claimant's and her 1 year-old son's needs, prepare a care plan and/or provide services that meet their lawfully assessed needs. We sought permission to intervene by way of written submissions in order to put the issues into their wider factual context by providing the Court with a broader understanding of the nature and scope of support provided to children and families under section 17. We were very well placed to fulfil this, given our role as a leading national children's charity working with some of the most vulnerable children around the country including providing specialist support to children from refugee, migrant and Black and Minority Ethnic backgrounds. From our direct practice with families in other local authorities across England, we know this practice is not limited to Plymouth and therefore we believed the matter merited the court's attention due to the wider issues at stake. This matter was settled, but it may not have settled, and so favourably for the claimant if we had not intervened even though the matter was not finally heard. We believe the threat of the challenge incentivised the local authority to act lawfully.

Question 32: *Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?*

44. We believe there is no evidence that interventions generally add much if at all to the overall costs of the case and that in fact they can sometimes save money. An intervener may provide evidence or legal argument the court or the parties would

[44] We remain concerned about 'appeal rights exhausted' care leavers being made destitute when they turn 18 and being provided with lower levels of support to other care leavers on the basis of their immigration status. This is due to how some local authorities are interpreting their obligations with respect to provisions under Schedule 3 Nationality, Immigration and Asylum Act 2002. This is detailed in our report *I don't feel human - Experiences of destitution among young refugees and migrants* (2012):
http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/thechildrenssociety_idontfeelhuman_final.pdf

otherwise have had to pay to obtain. By ensuring all relevant issues and information are before the court when it makes its decision, an intervention may save the costs of further litigation to clarify issues that would not otherwise have been raised. In cases where one of the parties is unrepresented, an intervention may save the court the cost of appointing an 'advocate to the court'.[45]

45. Courts have a wide discretion as to the terms on which they allow interventions and they only allow an intervention if it is not going to hugely increase costs. We believe this discretion should be maintained. For example, the court often confines interveners to making representations on the papers of a limited length and/or or to oral submissions of a limited length that do not significantly affect the time estimate for the hearing. The Supreme Court also has a comprehensive set of rules and practise directions governing interventions by third parties, including costs. We believe it is up to the courts and not the politicians to decide who gets to intervene in a case.

***Question 43**: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?*

46. We believe age and race, as protected characteristics, are of prime concern in relation to these proposals. As already indicated, for children and young people subject to immigration control, judicial review is the primary or only mechanism for challenging many areas in which public bodies make decisions about their lives. In addition, children and young people have particular vulnerabilities which make it harder for them to bring independent claims for judicial review where there is a clear public interest in the matter. The role of specialist organisations in acting as a claimant or intervener therefore becomes particularly important in instances where migrant children's and young people's rights and welfare are concerned.

47. Figures we have obtained from the Ministry of Justice through a freedom of information request[46] indicate that 23% of all judicial reviews[47] in 2011/12 were brought by young people between the ages of 18 and 25 years old. This is despite the fact that this group comprises only 11% of all people living in England and Wales.[48] We therefore believe this group would face a disproportionately negative impact from these proposals.

48. Any reforms to public law challenges must take full account of their potential impact on children. In these proposals, we do not feel the government has adequately considered children's access to justice and a child's opportunity to be heard in administrative and judicial proceedings affecting them.

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[45] See for instance Lassal C-162/09, a case raising an important point of EU law referred by the CA to the CJEU on appeal by the DWP against an Upper Tribunal decision. The claimant was unrepresented, CPAG intervened to represent the interests of claimants in general. Had CPAG not intervened, the CA may well have had to appoint an advocate to the court to represent the interests of the claimant.

[46] Obtained on 10th October 2013

[47] This includes in all areas of law including community care, immigration, education and housing.

[48] 2011 Census: Age by single year, local authorities in the United Kingdom (Table QS103UK)

Conclusion

49. In summary, we have serious concerns about the potential impact of these proposals for further reform of judicial review, particularly in relation to already marginalised children and young people who do not have a voice. We urge the government to reconsider its proposals. It is our opinion that these proposals:

- Are based on a mistaken and misleading analysis of the evidence base.
- Misunderstand and fail to take into account the purpose and nature of judicial review.
- Fail to recognise the existing adequate safeguards already built into the judicial system.
- Will have a disproportionate affect on vulnerable groups particularly children and young people.