LIBERTY

LIBERTY'S RESPONSE TO THE NEW PLAN FOR IMMIGRATION CONSULTATION

MAY 2021

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at https://www.libertyhumanrights.org.uk/policy.

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INTRODUCTION

Liberty has answered only those questions that directly relate to our remit of work. The lack of response to any specific question should not be taken as support by Liberty for any of the proposed changes.

CHAPTER 5: STREAMLINING ASYLUM CLAIMS AND APPEALS

Question 30: Please use the space below to give further feedback on the proposals in chapter 5. In particular, the Government is keen to understand: (a) If there are any ways in which these proposals could be improved to make sure the asylum and appeals system is faster, fairer, and concludes cases more effectively; (b) Whether there are any potential challenges that you can foresee in the approach the Government are taking around streamlining appeals. Please provide as much detail as you can.

1. We do not accept that these proposals will make the asylum and appeals system faster, fairer, or more effective; therefore, we have no opinion on improvements that can be made to them.

2. In response to question (b), Liberty is concerned that the Government's approach to "streamlining appeals" will have a detrimental impact on migrants' rights and access to justice as a whole. Liberty has also had the benefit of reading the Immigration Law Practitioners' Association's (ILPA) and the Public Law Project's (PLP) responses to Chapter 5 of the New Plan and reiterates ILPA's and PLP's concerns.

WIDER CONTEXT

3. Before addressing the substantive proposals in the Chapter, several preliminary points bear mentioning. Throughout the past few years, the public debate about human rights and judicial review has tended to focus on 'controversial' cases and topics. One such 'controversial' topic is deportation in asylum and immigration contexts. Government Ministers have regularly sought to use cases where the courts have prevented the

Government from deporting people due to failure to take into account their rights, as proof that the judicial review system is in need of reform.[12]

4. In parallel to this public discourse, since coming into power, the Government has continually reinforced the vilification of certain groups and highlighted the ways that human rights law and the courts ensure the Government acts in line with human rights. In doing so, it has successfully created a "culture war" along stark divisions.

5. In this context, the Government set up the Independent Review of Administrative Law (IRAL), which sought written evidence in respect of the role of judicial review in the UK at the end of 2020. The broader background of IRAL was the Conservative Party's 2019 manifesto commitment to *"guarantee that judicial review is available to protect the rights of individuals against an overbearing state, while ensuring that it is not used to conduct politics by other means or to create needless delays"*.[3]

6. In Liberty's Written Evidence to IRAL we highlighted our concern that the Terms of Reference of IRAL situated judicial review as antithetical to effective government and good administration. We identified five key principles which underpin the constitutional role of judicial review: the rule of law, access to justice, parliamentary sovereignty, good governance, and the enforcement of rights. We submitted that judicial review is an essential avenue of redress for ordinary people whose lives are adversely affected by poor public body decision-making, and an essential check on power, so that good, fair and lawful decisions underpin the "carrying on" of the business of government. In March 2021, Liberty agreed with the IRAL panel's affirmation that "[j]udicial review is an essential element of access to justice, which is a constitutional right and also a right protected by the European Convention."[4]

7. Shortly after the IRAL report was published, the Ministry of Justice (MoJ) announced a six-week consultation on its proposed reforms to judicial review. While the IRAL report was broadly supportive of maintaining the *status quo* in respect of judicial review, one of its key recommendations was to discontinue *Cart* judicial reviews on the basis that they

[1] Diane Taylor, *Jamaicans who came to UK as children will be left off deportation flight*, The Guardian, 29 November 2020, available at: https://www.theguardian.com/politics/2020/nov/29/jamaicans-came-to-uk-children-left-off-deportation-flight

[2] Detention Action, *Press release: Jamaica deportation flight included Windrush descendant and trafficking victims,* 2 December 2020, available at: https://detentionaction.org.uk/2020/12/02/press-release-jamaica-deportation-flight-included-windrush-descendant-and-trafficking-victims/

[3] Pg. 48, Conservative Party Manifesto 2019, available from: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

[4] Paragraph 1.43, The Independent Review of Administrative Law, March 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

are a disproportionate expenditure of judicial resources. The MoJ's consultation on reforms to judicial review subsequently asked how best the aims of IRAL in relation to *Cart* judicial reviews could be best achieved.

8. The IRAL panel's findings in respect of *Cart* judicial reviews have been criticised for their flawed evidence base and lack of understanding of the specific procedure for such applications.[5] Liberty has furthermore expressed concern over the failure of the IRAL panel and the Government to recognise the important safeguard provided by *Cart* judicial reviews in our submission to the MoJ's consultation.[6]

9. More broadly, the MoJ's reforms go way beyond IRAL's terms of reference, and have the potential to drastically alter the role of judicial review as an essential constitutional safeguard.

10. Apart from IRAL and the MoJ's proposed reforms, the Government also launched its Independent Human Rights Act Review (IHRAR) in January 2021. In Liberty's submission to IHRAR, we expressed deep concern that many proposals in the Review would limit the ability of courts to provide direct remedies where they find a human rights violation has taken place. We strongly urged the IHRAR panel to affirm the importance of retaining the Human Rights Act in its current form.[7]

NEW PLAN FOR IMMIGRATION

11. The subject of the present consultation is the New Plan for Immigration. The New Plan is the Government's answer to the issues of asylum and immigration in post-Brexit Britain. But it is important to highlight the common thread that runs through the New Plan, IRAL, the MoJ's proposed reforms to judicial review, and IHRAR. Fundamentally, the Government is seeking to reduce people's ability to hold the state to account—starting with people who are already marginalised.

12. Nowhere is this clearer than in Chapter 5 of the New Plan. Chapter 5 of the New Plan is a potent combination of longstanding racism and xenophobia against migrants with Government-manufactured antipathy against judicial review and human rights

[5] Joe Tomlinson and Alison Pickup, *Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews*, UK Constitutional Law Association, 29 March 2021, available at: https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/

[6] *Liberty's written evidence to the Ministry of Justice (Judicial review reform)*, April 2021, available at: https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/04/Libertys-JR-reform-submissions-FINAL.pdf

[7] *Liberty's written evidence to the Independent Human Rights Act Review Call for Evidence*, March 2021, available at: https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-response-to-the-IHRAR-call-for-evidence-March-2021.pdf

frameworks more broadly. It frames judicial review primarily as a financial burden for the taxpayer that exists only so that migrants can challenge their removal decisions. It introduces a raft of policies, some of which have been historically discredited (i.e. the Detained Fast Track system), that will erode migrants' ability to challenge state decisions. It completely ignores the ways that judicial review allows migrants to challenge incorrect and harmful decisions that touch on their most fundamental rights, while also improving decision-making and administration.

13. Reading the New Plan in conjunction with IRAL and the MoJ's proposed reforms to judicial review reveals a startling picture of the Government's intentions to reduce migrants' and all our ability to hold the state to account by attacking our ability to engage in judicial review. The Public Law Project has highlighted broader concerns over the Government's failure to acknowledge any interrelationship between the Independent Human Rights Act Review, the New Plan for Immigration, and the MoJ consultation, its "haphazard and inconsistent" approach to reform, and the cumulative consequences of all of these developments for the rule of law and justice for individuals.[8]

14. Immigration and asylum decisions will always involve a complex balancing of issues which may have serious impacts on the fundamental rights of individuals—including the right to private and family life, the right to liberty, and the absolute right against torture, inhuman and degrading treatment. The fact that these decisions have a special importance was recognised directly by both the Court of Appeal in *Sivasubramaniam* [9] and the Supreme Court in *Cart*.[10]

15. Liberty objects to the New Plan, its framing, and what it stands for—it is neither firm nor fair, and will have detrimental, long-term implications for all.

GOOD FAITH REQUIREMENT

16. The New Plan states that "anyone bringing a claim or a challenge in the courts and their representatives will be required to act in good faith at all times." It goes on to state that "[t]his means bringing any claims as soon as possible, telling the truth and leaving the UK when they have no right to remain".

17. The Home Office's definition of what constitutes "act[ing] in good faith" is highly problematic. The first requirement, to "bring any claim as soon as possible" will be dealt

[8] https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf
[9] Paragraph 52, R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475.
[10] Paragraph 112, R (Cart) v Upper Tribunal [2011] UKSC 28.

with in our response to the "one-stop process" proposal below. The introduction of the second and third requirements for claimants to "act in good faith"—to "tell the truth" and to "leave the UK when they have no right to remain"—implies that asylum seekers are inherently deceitful and that they are intentionally frustrating their own removal. The New Plan presents these assumptions as fact. No mention is made of the fact that adverse credibility is already always considered in the adjudication of any asylum claim.[11] Nor are there any mentions of the well-documented flaws in the Home Office's current methods of adjudicating credibility.[12]

18. In respect of legal representatives, it is unclear what this new good faith requirement would mean in practice. Legal representatives are already subject to strict regulation by professional bodies. The case of *R (Hamid) v Secretary of State for the Home Department*—which dealt with applications by people who face removal or deportation—affirmed the High Court's right to scrutinise the conduct of lawyers in immigration cases, including through referring them to the Solicitors' Regulation Authority for failing to follow procedural requirements.[13][14] In *Awuku (No 2) v Secretary of State for the Home Department*, the High Court stated that "it has always been the professional obligation of solicitors and counsel, when renewing applications or making applications on an *ex parte* basis, to satisfy themselves that the claim being advanced is one that they can properly make."[15] The New Plan does not include any evidence as to why the existing regulatory frameworks and the *Hamid* jurisdiction are insufficient to ensure high standards in the legal profession.

19. Given the well-documented nature of the "culture of disbelief" that exists in respect of Home Office decision-making,[16] and the wealth of guidance from international

[11] Pg. 14, Home Office, *Asylum Policy Instruction: Assessing credibility and refugee status,* 6 January 2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf

[12] Freedom from Torture, *Lessons not learned: The failure of asylum decision-making in the UK,* September 2019, available at: https://www.freedomfromtorture.org/sites/default/files/2019-09/FFT_LessonsNotLearned_Report_A4_FINAL_LOWRES_1.pdf

[13] CJ McKinney, *"Hamid" disciplinary hearings in the High Court,* Free Movement, 23 April 2019, available at: https://www.freemovement.org.uk/hamid-hearings/

[14] Hamid, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 3070.

[15] Awuku (No 2) & Ors v Secretary of State for the Home Department [2012] EWHC 3690.

[16] Freedom from Torture, *Lessons not learned: The failure of asylum decision-making in the UK,* September 2019, available at: https://www.freedomfromtorture.org/sites/default/files/2019-09/FFT_LessonsNotLearned_Report_A4_FINAL_LOWRES_1.pdf

Amnesty International and Still Human Still Here, *A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK*, April 2013, available at: https://www.amnesty.org.uk/files/a_question_of_credibility_final_0.pdf.

Jessica Anderson, Jeannine Hollaus, Annelisa Lindsay, Colin Williamson, *The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system*, July 2014, available at: https://www.rsc.ox.ac.uk/files/files-1/wp102-culture-of-disbelief-2014.pdf

organisations[17] as well as domestic courts[18] regarding the need to take a more flexible approach to assessing credibility, this proposal risks reaffirming dangerous falsehoods about asylum seekers and their legal representatives.

ONE-STOP PROCESS

20. The Home Office's proposal will require people to raise all protection-related issues up front in order to "tackle the practice of making multiple and sequential (often last minute and unmeritorious) claims and appeals which frequently frustrate removal from the UK". This includes asylum, human rights claims, referrals as potential survivors of human trafficking, and other protection matters. Claims made after this initial stage will only be considered to a minimal extent in the adjudicator's decision. This appears to be related to the above proposal regarding introducing a "good faith requirement" for the appeals process.

21. As highlighted in ILPA's submission to the consultation, the UK already operates a one-stop process for protection claims. Upon being served a s.120 Nationality, Immigration and Asylum Act (NIAA) 2002 notice by the Home Office, an applicant will be required to raise all the reasons they wish to remain in the UK. If an applicant's claim is refused, they will only have a right to appeal in certain circumstances set out in s.82 NIAA. The First Tier Tribunal will not consider any new matters raised by the applicant unless the Secretary of State has given the Tribunal consent to do so.[19] The Home Office also has the power to certify a claim which has no prospect of succeeding as "clearly unfounded".[20]

22. In respect of "repeated" claims, the Home Office already has the power to dismiss claims without granting applicants a second right of appeal, and will only give applicants a second right of appeal if it is satisfied that there is a realistic prospect of the appeal succeeding.[21] Contrary to the Home Office's statement in the introduction of Chapter 5, when an asylum claim arrives back at the First Tier Tribunal, the whole appeal process does not "start again"—in fact, the previous determination will form the starting point of the second

Lucy Mayblin, *Imagining asylum, governing asylum seekers: complexity reduction and policy making in the UK home Office,* Migration Studies, 2019, available at: https://eprints.whiterose.ac.uk/152506/1/Migration%20Studies%202017%20published%20version.pdf

[17] UNHCR and European Refugee Fund of the European Commission, *Beyond proof: Credibility assessment in EU asylum systems,* May 2013, available at: https://www.unhcr.org/51a8a08a9.pdf

[18] KB & AH (credibility-structured approach: Pakistan) [2017] UKUT 491

[19] S.85(5), Nationality, Immigration and Asylum Act 2002.

[20] S.94(1) Nationality, Immigration and Asylum Act 2002. Appeals against such claims can only be made from outside the UK. The only way to challenge this certification decision can be made via judicial review.

[21] Paragraph 353, Immigration Rules HC 396 and s.82 NIAA. If the Home Office

judge's analysis unless there is a good reason to displace it. In *Devaseelan*, the tribunal further held that "facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection."[22] The Home Office has failed to provide evidence as to why these various safeguards on judicial time are insufficient.

23. More broadly, Liberty is concerned that the framing of this proposal places the blame for multiple and sequential claims and appeals on claimants without interrogating the reasons why claims are made in this way. Immigration and asylum cases are often highly procedurally and substantively complex, requiring navigation of convoluted and constantly evolving rules.[23][24] Claimants face many difficulties in engaging with the process, including but not limited to language barriers and lack of understanding of the legal system. Experiences of trauma and violence, including sexual and gender-based violence, may compound these difficulties and make it difficult for people to disclose information about their cases on-demand.

24. Asylum matters are in scope of legal aid, however, factors such as restrictive financial eligibility criteria[25] and the low rates of remuneration for legal aid providers[26] mean that there are areas in the country where there is inadequate, and in some cases, no support available, for people in need of advice on asylum and immigration matters.[27] Many claimants are litigants in person, with little or no access to legal advice. There are also well-documented problems with claimants accessing low-quality advice.[28] All of this is of course occurring against a backdrop of significant cuts to legal aid since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012.

25. The 'one-stop' process in combination with a lack of assurance that claimants will be able to access adequate representation may result in violations of the right to a fair trial (protected under Article 6 of the ECHR). In *Gudanaviciene,* which concerned five claimants who had immigration cases and who were refused Exceptional Case Funding

[22] Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT.
[23] Paragraph 353, Immigration Rules HC 396.
[24] Singh v Secretary of State for the Home Department and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74
[25] Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013
[26] For High Court work, preparation and attendance are paid at a basic rate of £71.55 per hour in London and £67.50 per hour outside of London, and advocacy at £67.50 per hour. See: Civil Legal Aid (Remuneration) Regulations 2013, available at: https://www.legislation.gov.uk/uksi/2013/422/contents/made
[27] Jo Wilding, *Droughts and deserts: A report on the immigration legal aid market,* April 2019, available at: https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf
[28] Ibid.

(ECF) to assist them in the court action they were involved in under LASPOA 2012, the Court of Appeal accepted in respect of access to the courts that "simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair". The Court of Appeal further provided, "the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test)."[29]

26. Within the New Plan, the Home Office has acknowledged that it will need to "consider how access to advice can be improved at different points in the process".[30] It plans to "[p]rovide more generous access to advice, including legal advice, to support people to raise issues, provide evidence as early as possible and avoid last minute claims." But with no concrete solutions as to how it will seek to resolve the longstanding systemic issues that preclude claimants from being able to access good quality advice, and its proposed introduction of the 'one-stop' process, the Home Office looks set to entrench further unfairness in the asylum system.

MODERN SLAVERY

27. It is unclear how the Home Office's proposed incorporation of modern slavery issues within the "one-stop" process will work. We refer the Home Office to ILPA's submission to the consultation, which provides additional detail as to the flaws of any attempted combination of the asylum appeals and modern slavery frameworks.[31]

28. From Liberty's perspective, we are concerned that the Home Office appears to be reversing course on its own claim to be "leading the fight"[32] against modern slavery by introducing a presumption that people who do not disclose their trafficking status in the first instance are somehow acting dishonestly and intentionally frustrating their own removal. The Court of Appeal recognised in *MN v The Secretary of State for the Home Department* that credibility in the context of modern slavery cases cannot be assessed

[29] Gudanaviciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Or [2014] EWCA Civ 1622.
[30] Pg. 28, Home Office, New Plan for Immigration, March 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf
[31] ILPA, *ILPA's response to the New Plan for Immigration,* 5 May 2021, available at: https://ilpa.org.uk/wp-content/uploads/2021/05/New-Plan-for-Immigration-ILPA-response.pdf
[32] Home Office, Modern slavery: How the UK is leading the fight, July 2014, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/328096/Modern_slavery_booklet_v12_WEB__2_.pdf

over-mechanistically.[33] For example, experiences of trauma may lead trafficking survivors to be unable to articulate their experiences of exploitation. Frontline anti-trafficking organisations have previously highlighted how "[l]ack of self-identification is compounded because victims are often unaware there is a system to protect people who have experienced exploitation."[34] The Government's own guidance notes on the National Referral Mechanism provide that "victims may not be aware that they are being trafficked or exploited, and may have consented to elements of their exploitation, or accepted their situation."[35]

29. A "one-stop process", without sufficient and clear guarantees of good quality legal advice (as highlighted above), would effectively punish survivors of trafficking for not knowing, or being unable to articulate their experiences of exploitation.

EXPEDITED APPEALS

30. For all of the Government's rhetoric on the need to "fix" the asylum system, the New Plan's proposals in respect of expediting appeals are worryingly unclear and imprecise. For one thing, it is unclear what the Home Office is hoping to "expedite": on pg.28, the New Plan mentions a proposal to introduce a new "fast-track appeal process" for "cases that are deemed to be manifestly unfounded or new claims, made late". Yet on pg.29, under the heading "Expedited Appeals", the implication is that this policy will apply to all appeals generally. As mentioned previously, the Home Office already has the power to certify a claim which has no prospect of succeeding as "clearly unfounded".[36] ILPA's submission to the New Plan consultation also outlines the ways that repeat claims are already subject to a truncated procedure.[37]

31. It is widely recognised among practitioners that there needs to be reform of the asylum appeals system, given that there remain significant barriers to people's ability to access good quality advice for immigration and asylum matters that prevent them from

[33] MN v The Secretary of State For The Home Department [2020] EWCA Civ 1746 and R (MN and IXU) v SSHD (AIRE Centre and Anti-Slavery International intervening) [2020] EWCA Civ 1746
[34] *Joint submission to the group of experts on action against trafficking in human beings,* Anti-Slavery International, 28 February 2020, available at: https://www.antislavery.org/wp-content/uploads/2020/03/GRETA_submission_Final-Feb20.pdf
[35] Home Office, National referral mechanism guidance: adult (England and Wales), 30 April 2021, available at: https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales
[36] S.94(1) Nationality, Immigration and Asylum Act 2002. Appeals against such claims can only be made from outside the UK.[36] The only way to challenge this certification decision can be made via judicial review.
[37] ILPA, *ILPA's response to the New Plan for Immigration,* 5 May 2021, available at: https://ilpa.org.uk/wp-content/uploads/2021/05/New-Plan-for-Immigration-ILPA-response.pdf

presenting the best case for themselves at the first instance,[38] alongside other endemic issues such as long waits for hearing dates and unfocussed hearings that can exacerbate claimants' mental health issues and in some cases be traumatic.[39] The paramount value in any reforms must be fairness. Rather than addressing the real reasons for inefficiencies in the asylum system and their detrimental effect on *all* claimants, and the continued lack of availability of good legal advice for applicants, however, the Home Office appears instead to be singularly focused on propounding a hierarchy of "unmeritorious" versus "genuine" claimants.

32. Liberty is concerned that the ultimate effect of these proposals will be to exacerbate unfairness in the asylum system by reaffirming the idea that people are "abusing" the legal system by exercising their right to ask for decisions to be reviewed by a court of law, and using that as a justification for further reducing appeal rights altogether.

33. This is particularly concerning, given that appeal rights in the context of asylum and immigration law often concern people's fundamental rights. To take one example, "fresh claims" provide applicants with an opportunity to present new evidence to the Home Office for consideration, for example if the circumstances in their country of origin have changed which mean that they might be subject to torture, inhumane or degrading treatment if they are removed to that country, which would violate the UK's obligations under the 1951 Refugee Convention and Article 3 of the ECHR.[40]

EXPEDITED APPEALS FROM DETENTION

34. Liberty is highly concerned about the Home Office's apparent desire to reintroduce a 'detained fast track' (DFT) system for appeals from detention. We believe this will have seriously detrimental impacts on access to justice for people in detention. We are disturbed by the Home Office's apparent disregard for the many challenges and criticisms of this scheme that have been lodged since before 2015.

35. We would like to remind the Home Office of Lord Nichol's findings in *Detention Action v First Tier Tribunal (IAC), Upper Tribunal (IAC) and the Lord Chancellor,* concerning the "structurally unfair" nature of the-then detained fast-track system which put the applicant at a "serious procedural disadvantage". In the same case, the court emphasised that

[38] Bail for Immigration Detainees, *Lack of legal aid advice for immigration detainees held in prisons ruled unlawful* , 25 February 2021, available at: https://www.biduk.org/articles/800-lack-of-legal-aid-advice-for-immigration-detainees-held-in-prisons-ruled-unlawful
[39] ILPA, *ILPA's response to the New Plan for Immigration,* 5 May 2021, available at: https://ilpa.org.uk/wp-content/uploads/2021/05/New-Plan-for-Immigration-ILPA-response.pdf
[40] Chahal v United Kingdom (Application no. 22414/93).

"speed and efficiency must not trump justice and fairness."[41] We would also like to highlight the conclusion of the Tribunal Procedural Committee (TPC) in 2019 that fast-tracked immigration appeals should not be reintroduced.[42]

36. The New Plan does not mention *Detention Action*, the findings of the TPC, or any justifications for why such a widely-discredited practice, the most recent iteration of which was found to be unlawful, needs to be reintroduced. It provides no details as to how the proposed system would address the problems raised in *Detention Action,* the Shaw review,[43] and continuously by frontline organisations concerning the difficulty of accessing legal advice within immigration detention settings.[44]

37. In proposing this policy, the Home Office has relied on the statistic that 83% of appeal claims from detention in 2017 were unsuccessful—which means, of course, that 17% of these claims were successful. ILPA has highlighted the flaws in the 83% figure, specifically, the difficulty of ascertaining exactly whether it includes cases that succeeded following appeal or other challenge, or whether it only refers to first-instance decisions; and the problematic nature of relying on one year's worth of data to base a policy change of this level and extent of impact.

38. Even if the 83% figure was correct, what this statistic effectively means is that almost 1 in 5 people were found to have had a right to remain in the UK, because of an issue relating to their human rights, including fear of persecution or private and family life. To deprive people in detention of their ability to appeal state decisions could potentially put many people in danger of having their human rights further violated.

[41] Lord Chancellor v. Detention Action [2015] EWCA Civ 840.
[42] Tribunal Procedure Committee, *Response to the consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants (12 July to 04 October 2018): Reply from the Tribunal Procedure Committee*, March 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf
[43] Stephen Shaw, *Review into the welfare in detention of vulnerable persons: A report to the Home Office by Stephen* Shaw, January 2016, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf
[44] Bail for Immigration Detainees, *Research paper: Autumn 2019 Legal Advice Survey*, February 2020, available at: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1140/BID_Legal_Advice_Survey_.pdf
Tom Nunn, *Over 1250 victims of trafficking detained last year*, 15 February 2020, available at: https://atleu.org.uk/news/2020/2/13/over-1250-victims-of-trafficking-detained

39. This is a particularly stark issue when considering the statistics for success rates of appeals of foreign national offenders (FNOs) in detention. According to the Home Office, for appeals lodged by FNOs who left detention in 2017, 24% were allowed.[45]

40. We are disappointed to have to repeat our submission from the 2016 MoJ consultation and the 2018 TPC consultation: "Liberty believes that the present proposals would simply repackage, in some respects exacerbating, unjust and unlawful features of the old regime. In doing so they demonstrate a lack of respect for judgement of the Court of Appeal in the Detention Action case and invite a finding that any new fast track system is manifestly unfair and, therefore, unlawful."

FIXED RECOVERABLE COSTS

41. The fixed recoverable costs (FRC) regime allows for there to be a cap on the amount of costs that a winning party can claim back from the losing party. The Home Office is considering extending FRCs to apply to immigration-related judicial reviews on the basis that the high number of immigration-related judicial reviews have involved "considerable legal costs for the parties and the taxpayer."

42. Liberty is concerned that the Home Office has not provided sufficient and adequate evidence for the need to introduce FRCs to immigration judicial reviews. We refer the Home Office to the Public Law Project's (PLP) submission to the consultation, which sets out the problematic aspects of the Home Office's presentation of data within the New Plan. Apart from the general lack of evidence and justification provided for this proposal, we are concerned about the impact of the FRC proposal on access to justice. This is particularly significant given that the New Plan for Immigration introduces a raft of policies that will likely give rise to satellite litigation, for example, the proposals pertaining to the DFT system, age assessments, and expert evidence panels.

43. First, it is important to refer back to the IRAL report. In its submission to IRAL, the Administrative Law Bar Association (ALBA) stated that "any reforms [to costs in judicial review] should only be adopted on the strength of clear and robust empirical evidence as to: (a) the effect of the current costs rules on litigant behaviour, and (b) the effect the proposed reforms are likely to have in practice." PLP also argued in its submission to IRAL that "any proposal to reform costs for judicial review must be cognisant of the

[45] Home Office, *Issues raised by people facing return in immigration detention,* 16 March 2021, available at: https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention

fragility of the claimant public law supplier base".[46] In response to ALBA and PLP, the IRAL panel readily responded that it had not been able to undertake the necessary empirical research to make any recommendations as to reforming the costs system in respect of judicial review. [47]

44. Published just one week after the IRAL report, however, the New Plan appears to have ignored the IRAL panel's findings altogether in its proposal to introduce FRCs to immigration-related judicial review, which is not accompanied by any evidence or justification.

45. Absent any evidence to the contrary—or indeed of the need to introduce FRCs in judicial review cases—Liberty is concerned that this proposal will adversely impact people's ability to challenge immigration and asylum decisions. Here, we have focused our attention on represented claimants, though we are also concerned that the Home Office has failed to consider the impact that introducing FRCs may have on litigants in person who already face multiple barriers to bringing judicial review claims.[48]

46. It is important to note that judicial review cases are often highly complex, involving many legal issues.[49] Given the extent of work usually involved, many practitioners have argued that it is inappropriate for fixed recoverable costs to be applied to judicial review, even though they may be effective at achieving access to justice in a narrow set of environmental cases. [5051]

47. Although legal aid is available for judicial review in immigration, the majority of immigration-related judicial reviews are self-funded due to restrictions specific to asylum and immigration cases. Often, law firms that engage in significant amounts of legal aid

[46] Public Law Project, *Submission to the Independent Review of Administrative Law,* October 2020, available at: https://publiclawproject.org.uk/content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf
[47] Paragraph 4.10, The Independent Review of Administrative Law, March 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf
[48] Robert Thomas and Joe Tomlinson, *How immigration judicial review works,* 31 July 2019, available at: https://ukconstitutionallaw.org/2019/07/31/robert-thomas-and-joe-tomlinson-how-immigration-judicial-review-works/
[49] Robert Thomas and Joe Tomlinson, *Immigration judicial reviews: An empirical study*, 2019, available at: https://drive.google.com/file/d/1lsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view
[50] Garden Court Chambers, *Garden Court Chambers responds to the Jackson review of fixed recoverable costs,* 4 August 2017, available at: https://www.gardencourtchambers.co.uk/news/garden-court-chambers-responds-to-the-jackson-review-of-fixed-recoverable-costs
[51] Garden Court Chambers Public Law Team, *The Jackson Review of Fixed Recoverable Costs*, 4 August 2017, available at: https://www.gardencourtchambers.co.uk/wp-content/uploads/2017/08/Garden-Court-Chambers-Written-subs-and-case-studies-from-the-Public-Law-Team-Jackson-Review-FRC.pdf

work rely on judicial review costs recovered at *inter partes* rates to subsidise other work done at legal aid rates (which are widely recognised to be unsustainable).[52]

48. Liberty is worried that if FRCs are extended to immigration judicial reviews, and law firms become no longer able to recover costs for judicial review at *inter partes* rates, this will mean that such firms are no longer able to rely on judicial review costs to subsidise work done at legal aid rates.[53] This will lead to the further gutting of the immigration and asylum legal aid sector, which will in turn reduce the availability of practitioners who can assist people in judicial review cases. An analogous proposal to extend the FRC regime to the housing legal aid sector was met with widespread criticism from practitioners, who criticised them for potentially putting the housing legal aid sector out of business and thereby reducing access to justice.[54][55] No consideration appears to have been given to these concerns by the Home Office in the New Plan.

49. The New Plan's apparent justification for introducing FRCs to immigration judicial reviews appears to be that it will deter potential claimants and their legal representatives from making "unmeritorious claims", which will also reduce the financial burden on the taxpayer. But the Home Office has failed to provide any evidence to back up these claims. In respect of the number of "unmeritorious claims", the New Plan itself provides that only 57% of First Tier Tribunal asylum appeals were dismissed between 2016 and 2018. This figure dropped to 52% in 2019/2020.[56] The New Plan also fails to mention that the number of judicial review applications of decisions made in the Upper Tribunal Immigration and Asylum Chamber (UTIAC) has steadily fallen since 2015/2016.[57]

50. Also ignored within the New Plan is the fact that there already exist safeguards against "frivolous" judicial review litigation. In his Review of Civil Litigation Costs: Final Report, Jackson LJ affirmed in respect of judicial review that "the permission requirement is an

[52] Jo Wilding, *Droughts and deserts: A report on the immigration legal aid market,* April 2019, available at: https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf
[53] R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others, [2009] UKSC 15
Liberty supported the suggestion that judicial review applications should be subject to one-way costs shifting once permission is granted, i.e. the claimant should be at no risk of paying the defendant's costs, while there would be a presumption that the defendant should pay the claimant's costs if the latter Is successful. See: *Liberty's Response to the Civil Costs Review* (31 July 2019)
[54] The Community Law Partnership, *A response to extending fixed recoverable costs in civil cases: Implementing Sir Rupert Jackson's proposals,* 11 June 2019, available at: http://www.communitylawpartnership.co.uk/news/a-response-to-extending-fixed-recoverable-costs-in-civil-cases-implementing-sir-rupert-jacksons-proposals
[55] Islington Law Centre, *Written Evidence from Islington Law Centre (housing)*, available at: https://committees.parliament.uk/writtenevidence/12879/pdf/
[56] Ministry of Justice, *Tribunal Statistics Quarterly Q4 2020, Table FIA 3*, available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020
[57] There were 15,272 cases in 2015/2016, 13,372 in 2016/2017, 10,011 in 2017/2018, 7,850 in 2018/2019, and 5,679 in 2019/2020- UTIAC judicial reviews, available at: https://data.justice.gov.uk/courts/tribunals

effective filter to weed out unmeritorious cases".[58] In addition, where a claimant is legally aided, their representatives conduct all work pre-permission "at risk", meaning that if permission is not granted, they will not be paid. An empirical study of immigration judicial reviews found that the proportion of oral renewals granted permission is around 20%, whereas around 10% of paper permission claims are granted permission.[59]

51. Fundamentally, Liberty is concerned that the New Plan primarily positions judicial review as a financial burden, rather than an essential avenue of redress for individuals. By counterposing claimants in immigration-related judicial reviews with the proverbial "taxpayer", the New Plan perpetuates the idea that judicial review is only used by "them" in order to extort money from "us". What this framing reinforces is the idea that judicial review is something only used by certain groups of people, rather than an essential mechanism for everyone to have recourse to in the face of public body decision-making.

52. In reality, any mechanism of accountability is going to involve resource and some practical burden. That is the necessary cost of ensuring that public bodies act lawfully. The best way for the Home Office to reduce the number of challenges to its decisions is to avoid incorrect decision making in the first place, not to try and remove people's ability to undertake judicial review claims through the backdoor.

53. Additionally, the Government should focus its energies on improving access to good quality legal advice and expanding people's ability to appeal their asylum decisions on their substantive merits—these are the real structural factors that lead to people having to make repeated claims.[60][61]

WASTED COST ORDERS

54. The Home Office is considering "introducing a duty on the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal to consider applying a WCO [Wasted Cost Order] in response to specified events or behaviours, including failure to follow the directions of the court, or promoting a case that is bound to fail." It is furthermore proposing "a presumption in favour of making [a WCO]".

[58] Paragraph 4.1(iii), Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final report,* December 2009, available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf
[59] Robert Thomas and Joe Tomlinson, *How immigration judicial review works,* 31 July 2019, available at: https://ukconstitutionallaw.org/2019/07/31/robert-thomas-and-joe-tomlinson-how-immigration-judicial-review-works/
[60] JUSTICE, *Immigration and asylum appeals – a fresh* look, 2018, available at: https://files.justice.org.uk/wp-content/uploads/2018/06/06170402/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf
[61] Robert Thomas and Joe Tomlinson, *Immigration judicial reviews: An empirical study*, 2019, available at: https://drive.google.com/file/d/1lsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view

55. As a preliminary point, it is important to note that the New Plan for Immigration is again simply restating aspects of the existing law. WCOs against an appellant's representatives for improper, unreasonable, or negligent acts or omissions are already available under s.29(4) of the Tribunal, Courts and Enforcement Act 2007. Rule 9 of The Tribunal Procedure (First-tier Tribunal (Immigration and Asylum Chamber)) (Immigration and Asylum Chamber) Rules 2014 and Rule 10(3)(c)-(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 allows the Tribunal to order costs against a person who has unreasonably brought, defended or conducted proceedings.[62] A detailed Presidential Guidance Note has also been issued to assist judges in deciding applications for wasted costs and unreasonable costs in proceedings before the First-tier Tribunal.[63] WCOs are available in the Administrative Court under s.51(6) of the Senior Courts Act 1981 and CPR 46.8.

56. The New Plan does not include any evidence for why these existing rules are insufficient or inadequate so as to require reform. The term "specified events or behaviours" is so amorphous that it is impossible to comment on or engage with, apart from to say that the behaviours listed are already capable of being sanctioned under the existing regime.

57. The crux of the Home Office's proposal, then, appears to be the addition of a presumption in favour of a WCO. Liberty is concerned that such a presumption would be highly punitive both for claimants and their legal representatives, because it would establish an adverse cost risk that would deter people from proceeding with their claims. It is worth noting that there already exist many structural factors that hinder claimants from engaging in asylum and immigration-related litigation. For example, Rule 9.12.1 of the Immigration Rules provides that the failure to pay litigation costs awarded to the Home Office can be grounds for refusing someone's application for entry clearance, permission to enter, or permission to stay.[64]

58. In respect of claimants, the creation of an adverse cost risks for failing to follow the court's directions would be highly punitive, given that there are many reasons why someone is unable to do so. Experiences of trauma, lack of understanding of the UK legal system, and language barriers are all factors that may contribute to someone's inability

[62] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, available at: https://www.legislation.gov.uk/uksi/2014/2604/made
Rule 10(3)(c)-(d), The Tribunal Procedure (Upper Tribunal) Rules 2008, available at: https://www.legislation.gov.uk/uksi/2008/2698/article/10
[63] Presidential guidance note no. 2 of 2018: Further guidance on wasted costs and unreasonable costs and on the correct approach to applications for costs made in proceedings before the First-tier Tribunal (IAC), available at: https://www.judiciary.uk/wp-content/uploads/2018/07/costs-guidance-2018.pdf
[64] Rule 9.12.1, Immigration Rules part 9: grounds for refusal, available at: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal

to follow directions. These difficulties will be exacerbated for litigants in person, who have little to no access to legal advice. In *Cancino*, the Court of Appeal explained why it did not feel that a prescriptive approach to wasted costs orders in immigration contexts was appropriate: "[T]he conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot generally be applied."[65]

59. In respect of legal representatives, establishing a presumption in favour of making a wasted cost order will likely deter law firms and lawyers from taking on cases. In *Cancino,* the Court of Appeal established that, in making a WCO, the court has a duty to balance two considerations: "The first, in summary, is that lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's adversary. The second is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their adversary or their adversary's lawyers."[66] In that case, the Court of Appeal drew the crucial distinction between cases where a legal representative has knowingly promoted and encouraged the pursuit of a hopeless appeal, and cases where a client has insisted that a claim is litigated in spite of advice from their legal representative. It found that cases that fall into the former category are "likely to be rare". Indeed, the Secretary of State already has a duty to certify appeals which are "clearly unfounded" under s.94 NIAA. In spite of this, the Home Office's proposal appears squarely aimed at punishing representatives from engaging in any and all immigration-related litigation because of the potential costs risk.

60. The formulation of this proposal as one that could ostensibly be used against either party in a case is belied by the fact that WCOs cannot be issued against Home Office Presenting Officers (HOPOs) due to the Carltona principle, though they can be made against the Home Office and the Secretary of State for the Home Department.[67][68] Given that neither the Secretary of State nor the Home Office bring cases in the tribunals (meaning that they can never be said to "promote a case that is bound to fail"), and that there is little adverse costs risk for the Home Office whose costs are paid for by the taxpayer, it appears that this proposal is squarely aimed at deterring claimants and their representatives from pursuing cases.

[65] Cancino [2015] UKFTT 59.
[66] Cancino [2015] UKFTT 59.
[67] Colin Yeo, Tribunal decides wasted costs orders cannot be made against Home Office representatives, Free Movement, 19 July 2021, available at: https://www.freemovement.org.uk/tribunal-decides-wasted-costs-orders-cannot-be-made-against-home-office-representatives/
[68] Presidential guidance note no. 2 of 2018: Further guidance on wasted costs and unreasonable costs and on the correct approach to applications for costs made in proceedings before the First-tier Tribunal (IAC), available at: https://www.judiciary.uk/wp-content/uploads/2018/07/costs-guidance-2018.pdf

61. Ultimately, rights are illusory if those seeking to enforce them through the courts are unable to find suitable legal representation due to a decreasing number of lawyers being willing to undertake unsustainably funded work, or if the costs risk that a claimant (or their legal representative) faces is so significant as to discourage them from even making a claim. The practical effect of the above proposals will be to reduce the ability of claimants to bring, appeal, or apply for judicial review of their cases, via the backdoor of threatened costs.

CHAPTER 9: PUBLIC SECTOR EQUALITY DUTY (AND OTHER GENERAL QUESTIONS)

Question 42: Below is a list of protected characteristics under the Equalities Act: Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. From the list of areas below, please select any areas where you feel intended reforms present disproportionate impacts on individuals protected by the Equalities Act. Please expand on your answer for any areas you have selected, providing data (where applicable), further information and detailed reasons.

Answer: Chapter 2, Chapter 4, Chapter 5, Chapter 6, Chapter 7, Chapter 8.

Question 43: And in which areas, if any, of the intended reforms do you feel there are likely to be the greatest potential equalities considerations against the listed protected characteristics? Please expand on your answer, providing data (where applicable) and further information.

Answer: Chapter 2, Chapter 4, Chapter 5, Chapter 6, Chapter 7, Chapter 8.

1. We are highly concerned that many of the proposals in the New Plan for Immigration will disproportionately affect people with protected characteristics. We echo concerns raised by the refugee and migrants' rights sector that the New Plan's proposed creation of a two-tier system based on one's method of entry and its undermining of the Refugee Convention is in many ways a wholesale attack on equalities and equal treatment in the realm of asylum. In our response, we refer to our concerns regarding some of the proposals in Chapter 5, though many of them will apply to other proposals in the New Plan.

2. In respect of the Home Office's proposed "one-stop process", asylum seekers who have certain protected characteristics may find it more difficult to disclose their experiences of persecution on demand. For example, people who have experienced sexual and gender-based violence may find it particularly difficult to disclose information about their experiences. The Home Office itself acknowledges the particular difficulties that LGBTQI+

asylum seekers may have in substantiating their claim or providing full disclosure, including experiences of discrimination, hatred, violence, and stigma.[69]

3. Under the Home Office's proposal, the act of "bringing evidence late where it was reasonable to do so earlier" may have an adverse impact on the credibility of an applicant. The Home Office does not appear to have taken into consideration the need to be sensitive to barriers that certain communities experience in advocating for their cases. This is despite the fact that its own guidance on assessing credibility provides that factors such as "age; gender; variations in the capacity of human memory; physical and mental health; emotional trauma; lack of education; social status and cultural traditions; feelings of shame; painful memories, particularly those of a sexual nature" should be taken into consideration by caseworkers when assessing an applicant's account of their experiences.[70]

4. The Home Office's proposal to "introduce a duty on the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal (FtTIAC) to consider applying a Wasted Cost Order in response to specified events or behaviours" will also affect people with protected characteristics. For example, asylum seekers with mental health issues and/or other complex health problems may find it difficult to engage in the legal process and follow court directions. The Home Office's proposals to establish this duty combined with the presumption in favour of a WCO, will ultimately punish applicants for factors beyond their control that impact their ability to follow court directions.

5. All of the above concerns will be further compounded for claimants who do not have access to good legal advice. The lack of consideration for the situational vulnerability of litigants in person, combined with a system premised on the assumption of the "abusive" claimant, will inevitably adversely affect everyone, with the most vulnerable being hardest hit.

[69] Pg. 14, Home Office, *Asylum Policy instruction: Sexual orientation in asylum claims*, 3 August 2016, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf

[70] Pg. 14, Home Office, *Asylum Policy Instruction: Assessing credibility and refugee status,* 6 January 2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf

Question 45: Please use the space below to share any other feedback on the New Plan for Immigration that you would like to submit as part of this consultation.

1. Liberty echoes the concerns voiced by nearly 200 organisations that the New Plan for Immigration consultation is vague, unworkable, cruel, and potentially unlawful.[71] Given the scale and extent of the proposed changes to the asylum and immigration system, the way that the entire consultation has been undertaken is highly concerning. In our response, we focus on four issues: the lack of time given to respondents to submit to the consultation; the lack of evidence provided as to the necessity for the proposals; the lack of any avenue for involvement for experts by experience; and the lack of transparency regarding the details of the proposals.

2. Liberty is concerned that the six-week window to respond to the New Plan consultation is insufficient to enable effective participation, considering the extent and degree of the proposed "overhaul" of the asylum and immigration system.[72] The window includes school holidays, significantly limiting the time that people with childcare responsibilities will have to respond to the consultation. The Government's own consultation principles provide that "the amount of time required will depend on the nature and impact of the proposal" and that "for a new and contentious policy, 12 weeks or more may still be appropriate."[73] While we do not work in Scotland and Wales, we are also concerned that the consultation on the New Plan has taken place during purdah for elections in Scotland and Wales (between 25 March to 6 May 2021), which goes against the Cabinet Office's guidance that consultations should generally not take place during the election period.[74]

3. The New Plan for Immigration includes many proposals that raise complex and technical questions about the operation of asylum and immigration law in this country. Many of these proposals are based on evidence that has not been disclosed to the public. The New Plan will have a fundamental impact on the lives of migrants, including asylum seekers, refugees, and survivors of torture and trafficking in this country. It is the interest of all who are involved in the asylum and immigration system, including the Home Office,

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[71] Diane Taylor, *'Sham': 200 groups criticise UK government consultation on refugee policy,* The Guardian, 30 April 2021, available at: https://www.theguardian.com/world/2021/apr/30/sham-200-groups-criticise-uk-government-consultation-on-refugee-policy

[72] Pg. 18, New Plan for Immigration, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf

[73] *Consultation principles*, October 2013, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

[74] Cabinet Office, *May 2021 elections: Guidance on conduct,* March 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970989/May_2021_Elections_-_Guidance_on_Conduct_.pdf

that these proposals receive detailed scrutiny from lawyers, academics, citizens, expert organisations, and experts by experience. A six-week consultation is simply not adequate to achieve this.

4. Liberty is concerned that the Government is proceeding at speed with multiple consultations over proposals that will have a significant impact on human rights, paying little regard for the need to ensure effective participation and scrutiny. We have previously written to the Lord Chancellor expressing our concerns regarding the Ministry of Justice's rushed judicial review reform consultation.[75] We believe that the Government's failure to facilitate meaningful and effective participation in what are supposed to be open and public consultations demonstrates an increasing propensity to evade scrutiny and accountability.

5. In respect of evidence, we echo ILPA's and the Public Law Project's concerns that many of the Home Office's proposals, including in respect of judicial review, are not made out according to clear evidence demonstrating need. In some cases, decontextualised evidence has been presented in misleading ways. We are furthermore concerned that a Freedom of Information Access request to access the unpublished evidential annex to the New Plan published in March 2021 was rejected.[76] It is of great concern that the public has not been given the full evidence on which proposals in the New Plan are based. It is unclear how anyone is expected to give an informed response to the consultation in the absence of such information.

6. We echo the concern raised by organisations including Refugee Action, JCWI, Asylum Matters, the Scottish Refugee Council, Detention Action, and Freedom from Torture that the New Plan for Immigration consultation does not include any questions asking people about their personal experiences of fleeing persecution to seek safety in the UK.[77] This omission goes against the Windrush Lessons Learned Review undertaken by Wendy Williams, that recommended: "The Home Office should take steps to understand the groups and communities that its policies affect through improved engagement, social research, and by involving service users in designing its services."[78] The proposals in the

[75] *Letter to Rt Hon Robert Buckland QC* MP, 21 April 2021, available at: https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/04/Joint-letter-to-Lord-Chancellor.pdf
[76] WhatDoTheyKnow, *Freedom of Information request 'Evidential Annex to New Plan for Immigration,* 13 April 2021, available at: https://www.whatdotheyknow.com/request/evidential_annex_to_new_plan_for
[77] Diane Taylor, *'Sham': 200 groups criticise UK government consultation on refugee policy,* The Guardian, 30 April 2021, available at: https://www.theguardian.com/world/2021/apr/30/sham-200-groups-criticise-uk-government-consultation-on-refugee-policy
[78] Pg. 16, Wendy Williams, *Windrush Lessons Learned Review,* March 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf

New Plan will have a direct impact on migrants, including asylum seekers and refugees. It is unclear why these communities have been given no opportunity to input on their specific experiences in the consultation.

7. Finally, we are highly concerned by the lack of transparency regarding the details of the New Plan for Immigration. Liberty attended one roundtable, on "Streamlining the asylum appeals process" hosted by Britain Thinks. We are aware that other organisations have attended roundtables with the Ministry of Justice and the Home Office. During these sessions, additional details regarding some of the proposals in the New Plan were revealed. These details were not made public. It is difficult to see how the public could make informed responses to proposals, the details of which were not revealed in the first instance. It also shows bad faith on the part of the Home Office that it has already determined the specific details of certain policies prior to the consultation period being completed.

CONCLUSION

8. While we have chosen to robustly answer select questions within this consultation, we do not believe it is a legitimate exercise. The lack of detail, flawed (or in most cases absence of) evidence, and skewed argumentation, the highly leading nature of the consultation questions, and the Home Office's failure to enable effective participation (including of experts by experience) leaves us with no illusions as to its actual unwillingness to engage with any meaningful reform of the asylum and immigration system that will better uphold human rights. In broader context, the New Plan paints a stark picture of the Government's antipathy towards both migrants' rights and the ability of everyone to stand up to power. For this reason, we oppose the New Plan and everything it stands for.

JUN PANG
Policy and Campaigns Officer