New Plan for Immigration

Consultation Response

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Background

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom. It is the UK branch of the International Commission of Jurists. JUSTICE's vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law. In 2015, JUSTICE launched a dedicated programme of work on administrative justice, focusing on initial decision-making, complaints and redress, including appeals and judicial review.

2. A particular focus of that programme has been immigration and asylum appeals and in 2017 we convened a Working Party, chaired by Sir Ross Cranston, looking into the fairness, accessibility and efficiency of immigration and asylum procedures. During the process, the Working Party benefitted from being joined by observers from the Home Office, Her Majesty's Courts & Tribunals Service (HMCTS), the Ministry of Justice (MoJ) and the judiciary, with whom the members of the Working Party worked to formulate practical recommendations for change. The resulting report, *Immigration and Asylum Appeals – a Fresh Look,*[1] was published in 2018 and its 48 recommendations can be summarised into four key themes:

    a. improving Home Office decision-making processes;

    b. ensuring the HMCTS Digital Reform Programme enhances rather than reduces access to justice;

    c. increasing Tribunal efficiency and compliance with Tribunal rules and directions;

    d. addressing issues of poor-quality immigration and asylum advice and representation.

3. Since 2018, we have worked with Government, the judiciary and other stakeholders to help implement our recommendations. Of particular note has been our continued involvement in the HMCTS design of the online pilots, including the imminent appellant in person service. JUSTICE also convened three roundtables – in 2018, 2019 and 2020 – to discuss the issue of poor quality advice and representation in the sector with practitioner organisations, the Home Office, the judiciary and the various professional regulators.

[1] 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

4. Meanwhile, our work in other areas of administrative justice has continued. We are currently working with the Administrative Justice Council on a joint project – *Reforming Benefits Decision Making*[2] – and we have pro-actively participated in recent reviews of the constitutional role of administrative justice. This has included responses to:
    a. the Independent Review of Administrative Law (IRAL), shaped by our advisory group chaired by Lord Dyson;[3]
    b. the Independent Human Rights Act Review, shaped by our advisory group chaired by Sir Michel Tugendhat;[4] and
    c. recently the Government's review of Administrative Law, shaped by our advisory group chaired by Prof Alison Young.[5]
5. Our response to the Home Office's New Plan for Immigration ("the Consultation") is informed by this work and is focused on our expertise in the fair administration of justice according to human rights principles and the rule of law.

Summary

6. JUSTICE is aware that the current consultation is high level policy. As with many aspects of justice policy, the devil is in the detail. As such JUSTICE looks forward to seeing further, more detailed proposals in due course.
7. However, on the basis of the available information, the following key themes emerge from our response:
    a. There is a need for clarity on the evidence base for any reforms;
    b. We would caution against siloed-reform efforts, which can risk undermining progress already made/being made within existing reforms. There is a need for any new measures to be informed by evaluation of current reforms which are already in train;

[2] Chaired by Lord Low. More information available at: https://justice.org.uk/our-work/civil-justice-system/current-work-civil-justice-system/reforming-benefits-decision-making/
[3] JUSTICE, *Response to the Independent Review of Administrative Law* (October 2020). Available at: https://files.justice.org.uk/wp-content/uploads/2020/10/06165905/JUSTICE-response-to-IRAL-October-2020.pdf
[4] JUSTICE, *Response to the Independent Human Rights Act Review* (March 2021). Available at: https://files.justice.org.uk/wp-content/uploads/2021/03/08164531/Response-to-IHRAR-March-2021.pdf
[5] JUSTICE, *Response to the Ministry of Justice's "Judicial Review Reform: The Government Response to the Independent Review of Administrative Law" Consultation* (April 2021). Available at: https://files.justice.org.uk/wp-content/uploads/2021/05/04133514/JUSTICE-MoJ-JR-Consultation-response-FINAL.pdf

c. The needs of the most vulnerable should inform the design of processes, with a particular need to incorporate a trauma-informed approach into any reform;

d. Recognition that the constitutional importance of an independent judicial check on executive decision-making, both through appeal and judicial review, must be central to any reform.

8. Our responses to the consultation proposals are set out below.

Chapter 2: Protecting those Fleeing Persecution, Oppression and Tyranny

9. Whilst this substantive policy is beyond JUSTICE's remit, we note that it is vital that any new policies be evaluated for human rights impact, their compliance with the UK's other international legal obligations,[6] their impact on Equality Act 2010 protected characteristics, and their impact on other vulnerabilities, both inherent and situational. JUSTICE would particularly urge meaningful and extensive consultation with individuals and organisations who work with those fleeing persecution, oppression and tyranny, to ensure that the new policy helps those it is intended to help and does not unintentionally cause disadvantage or discrimination. JUSTICE would stress that the legitimacy of any new executive decision-making powers depends on there being maintained an accessible, fair and efficient system of redress, including internal review, appeals and judicial review.

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

10. When areas of law have been identified as leading to unfairness and anomalous outcomes in practice, JUSTICE supports, in principle, amendments which will rectify those issues.

11. Any new procedures, or changes to existing procedures, should be accompanied by training and close supervision for caseworkers to ensure consistent decision-making from the outset, and should be clearly explained in publicly accessible information. All

[6] Such as those under the Refugee Convention 1951, the Council of Europe Convention on Action against Trafficking in Human Beings 2005, and matters which are customary international law, such as *non-refoulement.*

paper options for processes should be maintained alongside any online processes to ensure accessibility for those who are digitally excluded.[7]

12. Consideration should be given to proactively contacting individuals who may have been refused relief based on an anomalous provision which is due to be corrected, informing them directly of the change in provision, the next steps required, contact details for someone within the Home Office who can assist with the rectification of their application, and the timescales.
13. Finally, we note the use of the word "exceptional" in relation to two additional routes to relief in Chapter 3:
    - a "new discretionary adult registration route to give the Home Secretary an ability to grant citizenship in compelling and exceptional circumstances where there has been historical unfairness beyond a person's control" and
    - "further flexibility to waive residence requirements for naturalisation in exceptional cases [which will mean] Windrush victims are not prevented from qualifying for British Citizenship because they were not able to return to the UK to meet the residence requirements through no fault of their own.".
14. JUSTICE supports both policies in principle. To ensure they help who they are intended to help in practice, JUSTICE considers it to be critical that the use of the word "exceptional" is not misunderstood to mean exceptional in number, but rather exceptional in the *nature* of the unfairness caused, should the discretion not be granted. The case of *R (Gudanaviciene & Ors) v The Director of Legal Aid Casework & Ors* [2014] EWCA Civ 1622 allows for a useful comparison which JUSTICE would recommend be taken into account in the development of any guidance. The case concerned the interpretation of the word "exceptional" elsewhere in Government policy – within the Legal Aid Agency's Guidance in relation to "exceptional case funding", which was to be made available when failure to do so would be a breach of the individual's Convention or EU rights. It was held that the approach of interpreting "exceptionality" to necessarily mean "rare", was wrong. Instead it was the gravity of the circumstance – that an individual's rights would be breached – that made it "exceptional".[8]
15. JUSTICE suggests that a similar approach should be taken to the drafting of guidance for these two discretionary routes. This would mean that individuals who have the misfortune to be one of a number of individuals to fall victim to such unfairness would not risk falling outside the provision because the unfairness they have suffered is not rare

[7] See further JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018) chaired by Amanda Finlay CBE, available at: https://files.justice.org.uk/wp-content/uploads/2018/06/06170424/Preventing-Digital-Exclusion-from-Online-Justice.pdf
[8] See para. 29 onwards.

enough. This then guards from double disadvantage – when unfair consequences are prevalent, that prevalence should not block relief.

16. Comprehensive guidance for decision-makers on the nature of the unfairness caused and the best practice approach to such cases should be developed in collaboration with frontline organisations and those with lived experience, in order for the provisions to be successful in providing fair, accessible and effective relief.

Chapter 4: Disrupting Criminal Networks and Reforming the Asylum System

17. Whilst the substantive policy change proposed in Chapter 4 is beyond JUSTICE's procedural justice remit, we take this opportunity to highlight the risks to access to justice for particularly vulnerable people who will be affected by its provisions.
18. JUSTICE notes the proposal that "how somebody arrives in the UK [will] impact how their asylum claim progresses".[9] The reasoning for this policy is given as follows: it is unfair for "genuinely vulnerable people who have played by the rules and accessed the asylum system via legal routes to find themselves in the same position as those who have entered the UK illegally."[10]
19. JUSTICE's concern is the assumption within this policy that genuine and deserving refugees enter the country through resettlement routes, whilst those who do not are "economic migrants" who are "gaming" the asylum system.[11] JUSTICE is concerned for those who do not fit into one of these two camps, and who instead are extremely vulnerable, and/or have valid asylum claims, but who arrive in the UK outside of legal routes. Many victims of human trafficking and asylum seekers do not decide how they move between countries. Their movements are a result of coercion, threat, exploitation, or necessity to escape dangerous situations. As such, a person's illegal entry may be a *symptom* of their vulnerability.
20. Furthermore, the proposed scheme describes an aspiration to "make asylum decisions quickly", whilst also providing for "rapid removal" of inadmissible cases, admissibility seemingly being something which will be determined upon arrival. Whilst efficient processes are always desirable, this should never be at the expense of accuracy or due process. JUSTICE is concerned that focusing on the speed of decision making will lead

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[9] Home Office, New Plan for Immigration: Policy Statement ("the Consultation") (March 2021), p.19, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf
[10] The Consultation, p.17.
[11] The Consultation, p.4.

to fewer decisions being right first time, and ultimately create more, rather than less, inefficiency. We make further comment on this point below in relation to other matters in Chapter 4 and in Chapter 5.

Test for “well-founded fear of persecution”

21. JUSTICE notes that the proposals to “strengthen” the “well-founded fear of persecution” test by imposing “a more rigorous standard”.[12] This is elsewhere described as “improv[ing] decision-making by setting a clearer and higher standard for testing whether an individual has a well-founded fear of persecution, consistent with the Refugee Convention”.[13]
22. JUSTICE will always support the objective of improving the clarity and consistency of decision-making. However, a test should not necessarily be reformulated to achieve greater clarity. We consider the primary way for clarity to be achieved is by adequate resourcing of monitoring, evaluation, feedback and learning processes, including training for decision-makers.[14]
23. JUSTICE notes that the clear purpose of this reformulation is “to make it harder for unmeritorious claims to succeed”.[15] However no evidence has been presented of unmeritorious claims wrongly succeeding due to there being *too low a test.*
24. The risks for those in need of international protection are extreme and the obligation of *non-refoulement*, in accordance with customary international law, the Refugee Convention, and Articles 3 and/or 4 of the European Convention of Human Rights are non-derogable. In such a context, **JUSTICE considers that the appropriate response is not to heighten the legal test so that it is in line with practice, but to improve practice so that it is in line with the legal test.**
25. JUSTICE further notes that the test seeks to separate out the notion of subjective fear (within a credibility assessment) and the objective “well-foundedness” of their fear. This is directly contrary to the UNHCR note on the Burden and Standard of Proof in Refugee claims, which states that “Although the expression “well-founded fear” contains two

[12] The Consultation, p.22.
[13] The Consultation, p.18.
[14] Consistent with the recommendations of the *Windrush Lessons Learned Review* of the need for a major cultural change towards a “learning culture” within the Home Office. Wendy Williams, *Windrush Lessons Learned Review*, March 2020, see particularly recommendation 15. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf
[15] The Consultation, p.22.

elements, one subjective (fear) and one objective (well-founded), both elements must be evaluated together."[16]

26. JUSTICE is furthermore concerned by the way the consultation briefly discusses the issue of credibility which it suggests should form the first limb of a new test, and should be decided according to a civil standard of "the balance of probabilities" rather than "reasonable likelihood".[17] On what will be relevant to this initial credibility assessment, the Consultation specifically mentions the impact of "previous opportunities to make a claim [which] have not been taken, or if a claim is contradictory".[18] Whilst of course the assessment of credibility may sometimes appropriately include consideration of contradiction or delay, JUSTICE is concerned at the absence of any acknowledgement or reference within this section to trauma, particularly the effect trauma can have on the individual's ability to recall consistent information or to make a claim at the first available opportunity.
27. The previously referenced UNCHR note makes this matter a central consideration in its discussion of the burden and standard of proof:

    Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.[19]

28. Since this note was published in 1998, there has been an increasing awareness within society at large of trauma as a public health issue, and JUSTICE is disappointed to see no mention of what trauma-informed process should look like and how it impacts any interview process and assessment of credibility.
29. For example, the VITA Network, an advisory network of health professionals which promotes a public health approach to Modern Slavery and Human Trafficking, has noted that asking victims to recount traumatic events repeatedly "will create possible inconsistencies as the memory is not held in linear order and is likely to be slightly different every time they recall it. This is more of an indicator of validity to a psychologist,

[16] UN High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998. Available at: https://www.refworld.org/docid/3ae6b3338.html.
[17] The Consultation, p.22.
[18] Ibid.
[19] UNHCR note, para 9.

as we do change how we view events each time we recall them."[20] Furthermore, the environment and manner in which questioning takes places is known to affect the ability of victims to disclose trauma.[21]

30. In a criminal context, the Achieving Best Evidence (ABE) framework is used in police interviews to allow vulnerable and intimidated witnesses to give their best evidence.[22] This includes trauma-informed questioning techniques, such as cognitive interviewing, which emphasises open questioning through a series of structured steps (free recall; varied free recall; focussed questions; review) within which the witness dictates the agenda. Such interviewing techniques are designed to help unlock memories and recall detailed information and tend to elicit fuller witness statements covering a variety of angles.[23]
31. Unfortunately, despite Home Office policy recognising the need for caseworkers to create "a positive and secure environment" for those claiming asylum, in which claimants are treated with "respect and humanity, dignity and fairness",[24] a recent report by *Freedom from Torture* suggests there are still significant improvements which need to be made for the Home Office to succeed in this regard. Issues identified included:
    a. poor questioning technique,
    b. prejudgment of the claimant's credibility,
    c. failure by caseworkers to maintain a sensitive and professional approach,
    d. failure to follow up a disclosure of torture appropriately, to find out more and to inform claimants of the option to seek support or treatment as well as medical evidence documenting their experience,
    e. failure to accommodate needs and vulnerabilities of torture survivors in the interview.[25]

[20] VITA Network Response to the New Plan for Immigration, 13 April 2021, available at https://mailchi.mp/6002ef41f21d/vita-network-welcome-newsletter-6267666?e=fe3194a297&utm_medium=email&_hsmi=122366664&_hsenc=p2ANqtz-_8hya9LljKP2OHmmoiedkGSG0mZi5WbMrgdvtroGfI-JU-VMPTyj3K6XDSmeIshrggZTI2dTaPImRIWfU4o96rHsYMUJhHynoF3Ka7DIIK4TPWCMo&utm_content=122366664&utm_source=hs_email

[21] Dr Jane Hunt, "Identifying human trafficking in adults", BMJ 2020, 371:m4683, available at https://www.bmj.com/content/371/bmj.m4683

[22] See fuller discussion within JUSTICE, *When Thing Go Wrong: the Response of the Justice System* (2020) pp45-46 available at https://files.justice.org.uk/wp-content/uploads/2020/08/06165913/When-Things-Go-Wrong.pdf

[23] Geoff Coughlin, *Unlocking Memories: Cognitive Interviewing for Lawyers* (Ark Group 2015)

[24] Home Office, *Asylum Policy Instruction on Asylum Interviews*, available at https://www.gov.uk/government/publications/conducting-the-asylum-interview-process

[25] Freedom from Torture, *Beyond Belief*, (2020) Available at:https://freedomfromtorturestories.contentfiles.net/media/documents/Beyond_Belief_report.pdf

32. Aside from the risk of such failures resulting in the dehumanising and retraumatising of interviewees through the questioning process itself,[26] the primary risk of a non-trauma-informed approach is that the vulnerability, protection needs and victim status of the individuals is less likely to be elicited. As such, there is an increased risk of Home Office decisions on credibility falling into error, causing inefficiencies within the appeals process, risking contravention of the United Kingdom's international *non-refoulement* obligations, and most importantly risking the freedom and safety of extremely vulnerable people.
33. JUSTICE considers that the priority area of reform, therefore, is ensuring initial decision-makers have all the evidence they need to get the decisions right first time for refugees, including a well-conducted, trauma-informed interview. A change to the test for protection as proposed could at best obfuscate opportunities to monitor learning and progress in interview conduct, and at worst mask further failure and poor practice.

Expanding the Asylum Estate

34. In relation to any expansion of the asylum estate, JUSTICE is deeply troubled by the findings of the Independent Chief Inspector of Borders and Immigration's visit in February 2021 to Penally Camp and Napier Barracks.[27] The report criticises the impoverished, run-down and in some areas "filthy" environment, which it concluded was "unsuitable for long-term accommodation." Furthermore, the report had serious safeguarding concerns due to the inadequate support provided for people who had self-harmed and who were being housed in a "decrepit" isolation block considered unfit for habitation.
35. Whilst residents were ostensibly free to come and go, residents described feeling "trapped", fearing moving out would jeopardise their asylum claims, whilst also experiencing intimidation by protestors outside the camps. The additional detention-like conditions listed in the report raise further, substantial concerns: poor Wifi, little to do to fill their time, a lack of privacy, a lack of control over their day-to-day lives, and limited information about what would happen to them. The Consultation's mention of greater use of "residence conditions, reporting arrangements and monitoring"[28] suggest greater restrictions on liberty are envisaged in future reception centres and accommodation.

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[26] As reported in ibid.
[27] Independent Chief Inspector of Borders and Immigration, *An inspection of the use of contingency asylum accommodation – key findings from site visits to Penally Camp and Napier Barracks*, 8 March 2021, available at https://www.gov.uk/government/news/an-inspection-of-the-use-of-contingency-asylum-accommodation-key-findings-from-site-visits-to-penally-camp-and-napier-barracks
[28] The Consultation, p.20

36. JUSTICE considers the legitimacy of any reception centre model will be illusory if such conditions are not improved substantially. It is imperative that any expansion of the asylum accommodation estate prioritises the safety, liberty, health and access to information and legal assistance for residents.[29]

Extraterritorial Processing of claims and appeals

37. JUSTICE considers that Parliament can only properly scrutinise proposals to amend sections 77 and 78 of the Nationality Immigration and Asylum Act 2002, to make it possible for removals take place whilst asylum claims or appeals are pending, if the details of how such arrangements will work in practice are made available.
38. Further, if there are to be arrangements for extraterritorial processing of protection claims, or appeals, JUSTICE stresses that State responsibility for the human rights of the individuals being processed will need to be a matter of utmost clarity. Furthermore, the accessibility of fair and efficient processes from other countries, including access to effective legal advice, suitable technology and additional support, will need to be ensured and prioritised.

Age Assessments

39. The judicial review of age assessment decisions is an essential check on an executive power to ensure children are not unlawfully declared to be adults and thereby prevented from accessing care and support from local authorities.
40. However, the process for the judicial review of these decisions was a matter which concerned the JUSTICE 2018 Working party in their report *Immigration and Asylum Appeals – a Fresh Look.* Whilst the number of cases is small, they account for a disproportionate amount of time, with cases usually lasting three to five days.
41. The Working Party recommended that consideration be given to 1) a specialist fact-finding forum being better placed to deal with the cases than the Upper Tribunal (Immigration and Asylum Chamber); 2) allocating the cases straight to the Upper Tribunal (Immigration and Asylum Chamber), or other fact-finding forum, as opposed to them being initially allocated to the Administrative Court; and 3) the expert evidence being dealt with on the papers unless the tribunal directs to the contrary.[30] JUSTICE would welcome consideration of its recommendations and would participate in any further consultation, alongside practitioners and the judiciary.

[29] JUSTICE's *Immigration and asylum appeals: A Fresh* Look specifically recommended there be IT facilities available in all NASS accommodation and detention, p.32.
[30] *Immigration and Asylum Appeals – a Fresh Look*, p.73

42. With particular reference to expert evidence, JUSTICE notes the intention to introduce a "robust approach" to age assessments alongside a stated intention to use new scientific methods to assess age. JUSTICE recommends extreme caution in relation to the "new scientific" methods adopted, and considers a "robust" approach should robustly scrutinise the reliability of new scientific methods before their use. Our caution reflects the history in age assessment of methods being proposed which have subsequently been found to be unreliable.[31]
43. Furthermore, JUSTICE notes that the Home Office policy of treating someone as an adult where their physical appearance and demeanour strongly suggests that they are significantly over 18 years of age is included within the consultation. This is despite the fact that the Government is currently awaiting judgment on this matter by the Supreme Court, after having been unsuccessful in the Court of Appeal.[32] JUSTICE considers that this particular point should await and incorporate the result of the Supreme Court's ruling.

Chapter 5 Streamlining Asylum Claims and Appeals

The One-Stop Process

44. JUSTICE understands and supports the importance of efficiency within justice processes. However, a quick process and an efficient process are of course different, primarily distinguished by the quality and sustainability of the outcome, especially when poor outcomes then require remedial action and resource.
45. Furthermore, the constitutional importance of an independent judicial check on the exercise of the executive power of the Secretary of State for the Home Department must be central to the consideration of any reform. Whilst the number of executive decisions in which that judicial check is primarily by way of statutory appeal was reduced in 2014, for all other matters there exists only one independent judicial route of redress of last resort: judicial review.
46. Judicial review is a crucial check on the abuse of power, ensuring that the Government and other public authorities act in accordance with the law. Access to judicial review is a

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[31] Such as dental age assessments, see Alan Travis, 'Home Office rules out "unethical" dental checks for Calais refugees', *The Guardian*, 19 October 2016, available at https://www.theguardian.com/world/2016/oct/19/home-office-rules-out-unethical-dental-checks-for-calais-refugees

[32] *BF (Eritrea) v Secretary of State for the Home Department* UKSC 2019/0147

key element of our unwritten constitutional arrangements for the protection of the rule of law.[33]

47. This was previously recognised by then Lord Chancellor the Rt. Hon. Michael Gove MP in the most recent consultation on judicial review prior to that currently being conducted by Government:

    Without the rule of law power can be abused. Judicial review is an essential foundation of the rule of law, ensuring that what may be unlawful administration can be challenged, potentially found wanting and where necessary be remedied by the courts.[34]

48. The Consultation asserts that the current volumes of judicial reviews are wasting court resources, whilst the generosity of the taxpayer is being exploited.[35] However, whilst numbers of cases brought and heard are given, there is no evidence cited of the extent of judicial resource which unmeritorious immigration judicial reviews are currently taking up. The current judicial review procedure is already significantly streamlined through its initial permission stage being paper-based. Given the importance of judicial review when there is no other check on Home Office decision-making, JUSTICE considers that judicial resource spent reviewing such applications, even on the basis of the stated success rates, is not *prima facie* a waste of judicial resource.
49. In addition, the consultation does not acknowledge the impact of judicial review on the settlement of claims. An empirical study of immigration judicial review in 2019 found that just under 20% of the judicial reviews examined were settled by consent and/or withdrawn following a consent order.[36] This is a significant number of cases for the Home Office to be choosing not to pursue a defence that their conduct was lawful.
50. Furthermore, the consultation suggests repeat applications are evidence of unmeritorious or abusive claimant conduct. However, the 2019 empirical study noted there are repeat judicial reviews being brought to *enforce Home Office compliance* with

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[33] Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, 'Judicial Review and the Rule of Law: an introduction to the Criminal Justice and Courts Act 2015, Part 4' (JUSTICE, October 2015), available at:
https://justice.org.uk/wp-content/uploads/2015/11/Judicial-Review-and-the-Rule-of-Law-NGO-Summary-
FINAL.pdf.

[34] Ministry of Justice, Reform of Judicial Review: Proposals for the provision and use of financial information (Cm
9117, July 2015) 3 Ministerial Foreword, available at: https://consult.justice.gov.uk/digital-communications/reformof-
judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf.

[35] The Consultation, pp.24-26.

[36] Professor Robert Thomas and Dr Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (2019), p82. Available at https://www.nuffieldfoundation.org/project/immigration-judicial-reviews

a consent order.[37] The authors recommended improved communication throughout the processes, and specifically recommended:

> *Home Office need[ed] to exercise greater care when re-taking a decision so as to prevent further litigation. Fresh Home Office decision letters following a successful or conceded judicial review should be checked, if necessary, by senior case-workers, to ensure compliance with the consent order or a ruling from the Upper Tribunal. Furthermore, when a consent order is agreed, then both parties need to fulfil their obligations. Further judicial reviews against the Home Office to ensure compliance with consent orders are wasteful and should be unnecessary.*[38]

51. As such, JUSTICE considers the policy incentives included within the Consultation for the one stop shop process paint an incomplete picture, omitting not only the constitutional importance of the processes involved but also of the ways in which judicial review is necessarily employed to hold the Government to account for unlawful actions which include failure to comply with its own settlements.
52. Further and in addition to the observations about Home Office learning and improvement which may be possible in the context of appeal, JUSTICE considers that internal improvements within the Home Office's decision-making processes are an essential part of any efficiencies which this Government seeks to achieve. They should be considered a priority over any restriction of access to judicial oversight mechanisms for individuals.
53. On the specifics of the process, JUSTICE awaits further detail, especially in relation to how any new process would differ from current requirements.[39] However we would highlight the importance, again, of such processes incorporating trauma-informed practice. Whilst some individuals will be able to recount all their experiences at once, include all relevant details and mount all possible legal courses of action simultaneously, to design a system around that expectation would be unfair. It would not effectively "catch" only the fraudulently delayed claims, but would also catch many *bone fide* applicants. These include those who have experienced traumatic events and for whom the disclosure of those events is not a linear or simple process, those who do not recognise themselves as being, or understand the protections of being, refugees or victims of modern slavery, and those whose need for international protection accrues or changes for reasons outside of their control.
54. Furthermore, the timing, quality and quantity of legal advice and representation, alongside other available support, is critical if there is a proposal for "late" evidence to

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[37] Ibid, pp.87-92.
[38] Ibid, p.92.
[39] For example, the "one stop" notice which exists currently under s.120 of the Nationality, Immigration and Asylum Act 2002.

attract a presumption of "minimal weight".[40] The consultation proposes the presumption to be applied "by decision-makers and judges" which suggests that the presumption would not only apply within the appeals process but also before it. We are especially troubled by the idea that such a presumption would apply after inadequate or no legal advice had been available, and we note the inherent disadvantage for an appellant in person in such circumstances. So fundamental is the impact of the presumption on a claim, and the stakes so high, that JUSTICE would consider it essential for the provision of legal advice and representation alongside such a process to be reviewed and consulted on to ensure the compliance of any process with Article 6 ECHR as well as non-refoulement and other human rights obligations.

Expedited Appeals

55. JUSTICE notes that the case for a new expedited appeal process is mounted upon appeal statistics from a study of the First Tier Tribunal (Immigration and Asylum Chamber) (FTTIAC) in 2016-18.[41] However, the reality of the FTTIAC workload in 2021 has moved on significantly. This is primarily because HMCTS's online reform pilots have been taking place in the FTTIAC *since* 2018, and now – party due to the success of the pilot and partly accelerated by the Coronavirus pandemic – such online reform cases make up a substantial proportion of the appeals.
56. When the JUSTICE 2018 Working Party considered such reform, it was particularly concerned with the high proportion of appeals being defended by the Home Office, given that around half of appeals were successful. As a result, our report was very clear that whilst the Tribunal could make amendments to improve efficiencies in its appeal processes, the most efficient model was one in which more decisions were right first time.[42]
57. Furthermore, it recognised that better and more front-loaded preparation of appeals could be beneficial even if this meant a delayed first hearing. This would be time well spent if issues were identified and, in some cases, conceded, leading to increased withdrawal by the Home Office and the granting of the application.
58. The Working Party therefore recommended that a mandatory reconsideration stage be incorporated into the new appeal process *before* any tribunal hearing.[43] Such a stage

[40] The Consultation, p.28.
[41] The Consultation, p.9.
[42] *Immigration and Asylum Appeals – a Fresh Look*, particularly p.19 onwards. See further, Administrative Justice and Tribunals Council, *Right First Time* (2011).
[43] In line with HMCTS's recommendation in *The Fundamental Review of the First-tier Tribunal Immigration and Asylum Chamber* (2014). See discussion within *Immigration and Asylum Appeals – a Fresh Look*, at pp.43-45.

was indeed incorporated into the HMCTS reform pilot, in which the Home Office have to reconsider the matter once they receive a particularised "Appeal Skeleton Argument" and supporting evidence. They then decide whether to continue to oppose the appeal, narrow the issues by conceding in part, or concede in full.

59. Whilst the pilot is yet to be subject to a thorough evaluation, current management information is very promising. Of the total number of Home Office mandatory reconsiderations undertaken, c. 20% are leading to a withdrawal to grant the relief.[44] This is currently equating to 27% of the total number of disposals in the FTTIAC.[45] The significance of this outcome is considerable; not only does such Home Office reconsideration save tribunal resource, it also saves appellants the stress, anxiety and cost of having to litigate an appeal when the relief should, rightly, be granted by the Home Office without recourse to the tribunal.
60. In light of these outcomes, JUSTICE suggests that the current reform should be analysed and its outcomes evaluated to better understand how to maximise the learning available from that process. For example, JUSTICE considers the appeal reconsideration teams who are conceding the appeals can reveal a lot of what is going wrong within the initial decision-making process. JUSTICE is pleased to learn that the intention is to employ such a learning process, to which we lend our full support. This should be prioritised, rather than new processes overlaying them before the improvements have been fully realised.

Good Faith requirement

61. The good faith requirement proposed relates to both people and their representatives.
62. In relation to the lay person, JUSTICE seeks further clarity of this new requirement and how it would differ and/or interact with the existing duties on parties' conduct. There is already engrained within the system an expectation of telling the truth and cooperating. Behaviour designed to conceal, mislead, obstruct or delay is already a matter that the Home Office and First Tier Tribunal judges can take into account.[46] Such judicial discretion will be exercised in accordance with the Overriding Objective and allows judges to consider the conduct of the appellant alongside other relevant matters on a

[44] Provided by Home Office.
[45] MoJ, *Tribunal Statistics Quarterly, October to December 2020*, Published 11 March 2021, available at https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020/tribunal-statistics-quarterly-october-to-december-2020#immigration-and-asylum
[46] Section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2004.

case-by-case basis.[47] There is also within the overriding objective a requirement for the parties to "help the Tribunal to further the overriding objective; and co-operate with the Tribunal generally".[48] JUSTICE seeks further information specifically on how any "good faith" requirement would differ from the expectations, requirements and obligations on individuals currently, and furthermore what the practical impact would be of that additional good faith requirement in the processing of appeals, both currently and in any new processes.

63. In relation to professional conduct, JUSTICE acknowledges that the majority of representatives and advisors do an exceptionally difficult job to a good standard. However, a small minority are providing poor advice and/or representation, within which small minority do so in bad faith. These individuals do pose a risk to the most vulnerable and desperate lay person, especially when pursuing bad faith unmeritorious claims for high amounts of money within privately paying arrangements. JUSTICE agrees that professionals should be acting in good faith in light of their professional standards and duties.
64. JUSTICE is however conscious that there already exists a web of regulatory frameworks and mechanisms to review and hold professionals accountable for their conduct in the provision of immigration advice and representation, through the courts themselves, Solicitors Regulatory Authority (SRA), the Bar Standards Board (BSB), the Chartered Institute of Legal Executives (CILEX) and of course the Office of the Immigration Services Commissioner (OISC). These mechanisms include the Upper Tribunal's internal reporting system; deeming claims to be Totally Without Merit; *Hamid* hearings; and regulatory processes within each regulatory body, to which the courts can refer representatives. JUSTICE seeks further information about how any good faith requirement would overlay such existing obligations and mechanisms in practice.
65. JUSTICE's 2018 *Immigration and Asylum Appeals – a Fresh Look* report considered the issue of poor immigration advice and representation and made four key recommendations to improve the efficacy of the regulatory frameworks and mechanisms:
    a. the SRA's and the OISC's efforts to investigate cases of incompetent and dishonest legal assistance should be bolstered by legal representatives reporting such cases to the regulatory body;

[47] The overriding objective stipulates that cases must be dealt with "fairly and justly […] in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; [and] avoiding delay, so far as compatible with proper consideration of the issues". Section 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2014 No. 2604 (L. 31), available at https://www.legislation.gov.uk/uksi/2014/2604/article/2/made

[48] Ibid

b. there should be greater use of the *Hamid* procedure alongside which the Immigration and Asylum Chambers should collect and record information on a systematic basis about i) practitioners considered to provide poor quality service, ii) the outcome of cases and iii) cases certified as totally without merit;
c. following the introduction of the Reform Programme, HMCTS should investigate the idea of providing easily accessible information on immigration and asylum legal practitioners; and
d. the requirements for training and supervision of unqualified caseworkers and immigration advisers be tightened.[49]

66. The last issue is of particular note ahead of any Sovereign Borders Bill being drafted. The problem is rooted in a legislative provision – section 84(2)(e) Immigration Act 1999 – which permits immigration advice/services to be provided by persons acting on behalf of, and under the supervision of, a qualified person. This therefore allows unqualified persons to provide immigration advice and services, for example as part of their supervised training towards becoming a qualified person. However, the Working Party was concerned by the use of this provision outside of adequate supervisory arrangements, which allows for suspended and disqualified persons to act in immigration and asylum matters outside of any effective regulatory oversight.
67. Whilst training and supervision ahead of full qualification is essential, there is clearly room for improvement in the wording of the provision to prevent this section's misuse. Whilst regulators have sought to improve their ability to regulate under this provision since our report was published,[50] there is nothing within the legislation which *requires* supervision be adequate. JUSTICE considers it may be desirable for a "minimum standard" of acceptable supervision to be stipulated or a regulatory power to determine if supervision is adequate, outside of which s.84(2)(e) will not be deemed to apply. **JUSTICE recommends therefore that such an amendment to s.84(2)(e) Immigration Act 1999 be considered as part of any legislative agenda, and regulators and practitioner associations consulted on such a proposal.**
68. In terms of future consultation on this and related matters, JUSTICE convened cross-sector roundtables specifically on the issue of poor quality advice and representation within immigration and asylum matters in 2018, 2019 and 2020. These roundtables

[49] *Immigration and Asylum Appeals – a Fresh Look,* see recommendations 26-29 at p.83.
[50] For example the Bar Standards Board, in consultation with the OISC, has tightened the requirements for supervision within its Code of Conduct (see Rule C85A of the BSB Handbook) and now requires all barristers when renewing their practising certificate to declare anyone they purport to supervise under section 84(2)(e) IA 1999. See their guidance document, available at: https://www.barstandardsboard.org.uk/resources/supervising-immigration-advisers-pdf.html . Whilst the Solicitors Regulatory Authority has not followed suit, JUSTICE understands that supervision will be considered as part of its Immigration Thematic Review in 2021.

included the judiciary, Home Office, Government Legal Department, SRA, BSB, OISC, CILEX and practitioner groups. The format proved successful in improving communication and providing opportunities for collaboration. JUSTICE considers this collaborative approach to be essential to the ongoing work to improve the regulation of poor quality advice and representation, and would be happy to assist further.

69. Finally, JUSTICE notes that the good faith requirement is suggested to apply to "people and their representatives when dealing with public authorities and the courts". Omitted here is the way in which public authorities deal with people and the courts, which suggests the proposed new requirement would not apply to the Home Office or its representatives.

70. JUSTICE does not consider any double standards of conduct to be desirable. As such there should be commensurate consideration of the oversight and regulatory requirements of state actors within the tribunal system. This should include consideration of a code of conduct and training plan for Home Office Presenting Officers, in light of the Independent Chief Inspector of Borders and Immigration's report last year.[51]

Fixed Recoverable costs

71. JUSTICE agrees that the current costs regime in judicial review is inadequate. However JUSTICE's principal concern is in the potential stifling effect costs can have on access to justice.

72. The costs of bringing a judicial review may already limit the ability of some claimants to pursue judicial reviews, with the strict means tests and difficulties with exceptional case funding restricting many from accessing legally-aided representation.[52] Within a process designed for lawyers, JUSTICE is concerned about the ability of litigants in person, who are often desperate and find the litigation process stressful, to navigate the system effectively.[53]

73. JUSTICE does not consider fixed recoverable costs to be the answer to these problems; on the contrary we consider the risk of fixed recoverable costs deterring meritorious claims to be too high. This was also the conclusion of Sir Rupert Jackson after his

[51] Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office Presenting Officer function, November 2019 – October 2020, p.10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951120/An_inspection_of_the_Home_Office_Presenting_Officer_function__November_2019_to_October_2020.pdf

[52] See *Immigration and Asylum Appeals – a Fresh Look,* p.72 at fn 139, and R. Low-Beer and J. Tomlinson, Financial Barriers to Accessing Judicial Review: An Initial Assessment (Public Law Project, 2018).

[53] *Immigration Judicial Reviews: An Empirical Study* (2019), p.10.

substantial review of the matter in 2010.[54] The original proposed solution by his review was Qualified One-way Cost-Shifting (QOCS) however this was not taken forward. It was subsequently acknowledged in Sir Rupert's supplemental report in 2017 that "if QOCS in JR are not acceptable, the Aarhus Rules should be extended to all JR claims. This is necessary in order (a) to increase access to justice and (b) to promote the public interest."[55]

74. The Arhaus Rules impose costs caps on claimants and defendants at the permission stage and JUSTICE does not consider them to be without issue in terms of access to justice*.* However*,* on balance we do consider that they are worth further consideration, piloting and evaluation.[56]

75. JUSTICE considers further data is needed on the actual costs of judicial review claims and the impact of those costs on the behaviour of claimants and putative claimants.[57] Indeed this was the recommendation of the recent Independent Review of Administrative Law (IRAL) report, chaired by Lord Faulks QC. The report did not make any recommendations on costs for judicial review because it concluded that impact of the costs regime needs further, "careful study by a body equipped to carry out the kind of research and evaluation".[58]

76. JUSTICE observes the large overlap between the content of this consultation, the IRAL, which has now reported, and the MoJ response to the IRAL report, the consultation for which has just closed. JUSTICE cautions against any siloed-reform in this area, and hopes the IRAL report's recommendation of careful study of the costs regime in judicial review will be adopted.

Wasted costs

[54] Review of Civil Litigation Costs: Final Report, published in January 2010 (https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Reports/jackson-final-report140110.pdf).

[55] The Right Honourable Lord Justice Jackson, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (July 2017), p129, available at: https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf

[56] JUSTICE, *Response to the Independent Review of Administrative Law,* pp.42-43.

[57] Ibid.

[58] *The Independent Review of Administrative Law* (March 2021), para. 4.11. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf . This echoes the recommendation of the 2019 Empirical Study of Judicial Review which also highlighted the "need for a detailed review of how costs operate in practice drawing upon data from the Home Office and the Government Legal Department. This review could examine more detailed information as to costs with a view to reaching a better understanding of costs in this area and how costs influence behaviours."

77. JUSTICE considers wasted costs may sometimes be a useful tool to assist and ensure compliance with tribunal rules and directions. However we are also aware from other jurisdictions that that they can be time-consuming, necessitating an additional hearing, and perhaps giving rise to satellite litigation.[59] Furthermore, wasted costs can only play a part in improving compliance with tribunal rules and procedures alongside joined-up efforts by the judiciary and regulators to take action against incompetent and dishonest practitioners.[60]

78. JUSTICE would support detailed consideration of the role of wasted costs alongside other regulatory mechanisms, such as regulatory investigation and judicial processes such as *Hamid* hearings. JUSTICE further considers that any additional wasted costs provisions should be available to be exercised even-handedly against either side of the litigation.[61]

Access to legal advice

79. JUSTICE, of course, supports the provision of accessible, quality, independent and timely legal advice.

80. However, JUSTICE notes that the Consultation offer is specifically for those who are prioritised for removal, and JUSTICE understands those individuals will be served with a priority removal notice and be subject to an expedited process. JUSTICE stresses the importance of making adequate funding available for any proposed new processes and recommends detailed consultation with practitioners.

81. JUSTICE further considers that, as mentioned above, one of the key ways in which efficiency can be improved is to get the decisions right first time. Where the Home Office is falling into error in some cases will be clearer with the analysis of the feedback mechanisms from the mandatory reconsideration teams within the reform pilot. Since this pilot is exclusively for represented appeals, this can provide a crucial understanding of those cases in which involvement of a legal representative is converting a Home Office refusal into a withdrawal to grant. Whilst JUSTICE is aware that previous early advice pilots within the Home Office were unsuccessful, JUSTICE suggests that the learning from the mandatory reconsideration teams within the reform pilot could provide evidence for its targeted use.

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[59] *Immigration and Asylum Appeals – a Fresh Look,* p.54.
[60] Ibid.
[61] *Immigration and Asylum Appeals – a Fresh Look,* p.84, recommendation 87.

82. JUSTICE further notes the current restrictions on early legal aid provision mean many lawyers do not have capacity to attend the substantive asylum interview with their clients. This is starkly different, for example, to access to legal representation within a criminal context – in which any suspect being questioned by police has the right to a lawyer present during questioning. Should the pilot feedback show that the interview process itself is failing to illicit legally relevant information, which is then being elicited through the appeals process, this would suggest not only legal advice but also legal representation should be piloted earlier in the process.

An expedited process for claims and appeals made from detention

83. JUSTICE seeks clarification on how any new expedited process from detention differs from the "Detained Fast-Track" Process which was held to be unlawful in 2015.[62] JUSTICE further notes that the Tribunal Procedure Committee considered expedited appeals processes for detainees in 2019 and concluded that:

    The speed at which these cases are being dealt with both limits the scope for further expedition and means that introducing a new case management stage is likely to delay the resolution of appeals in many cases.[… As such] a set of specific rules would not lead to the results sought by the Government. If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired. [63]

84. As a result, JUSTICE seeks further information about how the proposal will differ from the Detained Fast Trask process and/or the proposals which were dismissed by the Tribunal Procedure Committee.

Pre-approved experts and/or single joint expert

85. JUSTICE is grateful to the Home Office for clarifying at the roundtable held on 27th April 2021 that the policy intention is to no longer to create a panel of pre-approved experts, and instead the focus is on a single joint expert process. JUSTICE supports the move away from a panel of experts being subject to Home Office approval. JUSTICE is clear

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[62] *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber), Upper Tribunal (Immigration and Asylum Chamber), Lord Chancellor & Secretary of State for the Home Department* [2015] EWHC 1689 (Admin)

[63] 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: 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

that whilst it is a matter for the parties to bring any application for the admission of any evidence, including expert evidence, before the tribunal for its consideration, it is a judicial matter to decide on the relevance and admissibility of that evidence within an independent tribunal process. JUSTICE would not support any state pre-approval of individual experts on whose evidence the appellant or claimant may seek the Tribunal's permission to rely upon. JUSTICE considers that admissibility of expert evidence should properly be preserved as a judicial function.

86. In relation to a single joint expert procedure, this is a procedure commonly used in civil and family matters. However, it is only a relevant procedure if both parties seek to adduce expert evidence, the purpose being to deal with the case more efficiently by one expert being instructed rather than two or more. As such, the power within the Civil Procedure Rules and the Family Procedure Rules to direct a single joint expert is premised as follows: "*Where two or more parties wish to submit expert evidence on a particular issue*, the court may direct that the evidence on that issue is to be given by a single joint expert." [emphasis added][64]

87. JUSTICE is only aware of the Home Office routinely calling experts in Country Guidance cases in the Upper Tribunal. Otherwise, we understand the Home Office very rarely to rely on expert evidence. As such, whilst JUSTICE does not object to a single joint expert procedure being adopted for cases in which the Home Office is also seeking to adduce expert evidence on an issue, such as Country Guidance cases, JUSTICE does not see the relevance of a single joint expert procedure in the majority of cases.

88. If a single joint expert procedure will be different to its current use in civil and family, JUSTICE would seek further detail. However, we express provisional concern at any proposal which would reduce the appellant or claimant's free access to expert evidence for their own use and/or reduce the judicial discretion over what expert evidence can be relied upon within tribunal proceedings.

Chapter 6 Supporting Victims of Modern Slavery

89. JUSTICE notes that speed is again a key objective within Chapter 6 in relation to the modern slavery referral system. JUSTCE stresses that the National Referral Mechanism (NRM) is a protective mechanism for victims of serious crimes, including trafficking, torture, forced labour and exploitation. The submissions made in relation to earlier chapters about the necessity of trauma-informed processes apply just as strongly, even

[64] Identical drafting in both The Civil Procedure Rules 1998, SI No. 3132, Rule 35.7; and The Family Procedure Rules 2010 SI No. 2955, Rule 25.7.

more so, to this chapter. Specifically, the desire to make the NRM more efficient by identifying victims "quickly" while distinguishing more effectively between genuine and vexatious claims, appears to JUSTICE to be potentially contradictory. As discussed above, disclosure of trauma is often not a quick process; it therefore follows that a late claim and a genuine claim are not mutually exclusive.

90. JUSTICE supports increasing training available to frontline workers responsible for referring victims, and JUSTICE considers that the Slavery and Trafficking Survivor Care Standards 2018,[65] which contain a Trauma Informed Code of Conduct,[66] should be a starting point for any proposed improvements to the processes for victims of slavery and trafficking.

Public Order Grounds Exemption

91. In relation to the definition of "public order" within Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings 2005, JUSTICE awaits the separate consultation referred to for further detail. Given the high stakes involved for those individuals affected, JUSTICE considers it critical that such consultation should involve those with lived experience as well as support organisations and practitioners. JUSTICE further considers it essential for the Independent Anti-Slavery Commissioner to be involved and would additionally invite involvement of the Independent Victims' Commissioner.

Reasonable Grounds Test

92. On the proposed clarification of the "reasonable grounds" test within the Modern Slavery Act 2015 and the Statutory Guidance, JUSTICE is unclear on the interpretative difficulties which currently exist for those decision-makers applying the Modern Slavery Act 2015 and the Statutory Guidance. Without seeing evidence of the problems with the current drafting JUSTICE is unable to support any proposals to amend the legislation nor the Guidance.
93. Pending such evidence, however, JUSTICE does express preliminary concern about the use of the phrase "conclusive proof". JUSTICE understands that the second decision within the NRM is referred to as the "conclusive grounds decision" and the use of the civil standard of balance of probabilities has been confirmed by the Court of Appeal as being

[65] Human Trafficking Foundation, *The Slavery and Trafficking Survivor Care Standards* (2018). Available at: https://www.antislaverycommissioner.co.uk/media/1235/slavery-and-trafficking-survivor-care-standards.pdf

[66] Developed by Rachel Witkin and Dr. Katy Robjant, Helen Bamber Foundation (2018).

appropriate.[67] However, “conclusive proof” and “conclusive evidence” are phrases found elsewhere in legislative drafting in relation to the use of *criminal* convictions in civil proceedings, i.e. the criminal conviction and any finding of fact therein being “conclusive proof” of a matter having happened.[68] In secondary legislation, findings of fact from civil proceedings are *admissible* as proof, but explicitly *not* to be taken as *conclusive* proof.[69]

94. JUSTICE is therefore concerned that use of the phrase “conclusive proof” would incorrectly suggest a higher standard than the balance of probabilities. JUSTICE would caution against its use in this context as a result.

Chapter 7: Disrupting Criminal Networks Behind People Smuggling

95. Whilst this substantive policy is beyond JUSTICE’s remit, JUSTICE notes the legitimacy of any additional criminal offence of “seeking to enter the UK illegally” will depend on the proper evaluation of its human rights impact, its impact on the UK’s other international legal obligations, its impact on Equality Act 2010 protected characteristics, and its impact on other vulnerabilities, both inherent and situational. The UK has a very low minimum age of criminal responsibility – 10 years of age – and JUSTICE suggests that the application of the new offence to children should be a matter of particular concern.
96. JUSTICE would furthermore particularly urge meaningful and extensive consultation with individuals and organisations who work with people who are victims of trafficking, to ensure provisions intended to disrupt criminal networks behind the smuggling of persons do not in reality, punish the most vulnerable people who have been exploited by those networks.

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

97. Whilst the majority of this chapter’s proposals are beyond JUSTICE’s remit, JUSTICE does note the proposal to further enforce returns within a “firm but fair” system through a “single, standardised minimum notice period for migrants to access justice prior to removal”. JUSTICE would consider the legitimacy of any such system to depend on the maintenance of accessible, fair and effective procedural safeguards. For access to justice prior to removal to be achieved, JUSTICE considers this will necessitate accessible, quality, independent and timely legal advice and representation, and

[67] *MN v The Secretary of State For The Home Department* [2020] EWCA Civ 1746
[68] The Civil Evidence Act 1984, ss 11-13.
[69] The Solicitors (Disciplinary Proceedings) Rules 2019, reg 32.

incorporate potential delays which are out of the individual's control. JUSTICE recommends detailed consultation with practitioners on the timings of any such notice period and the period for response.

98. JUSTICE concurs with the Public Law Project on this matter, who have highlighted the relevant authority of *R (Medical Justice) v SSHD* [2010] EWCA Civ 1710 at [19], in which Sullivan LJ explained:

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

JUSTICE

6th May 2021