Judicial Review: proposals for reform

Consultation Paper CP25/2012

Response from Medical Justice

About Medical Justice

1. Medical Justice is a charity that assists those in immigration detention to access specialist independent advice. We do this by referring immigration detainees to independent healthcare professionals who may visit them in the immigration removal centre. Such assistance is required for a variety of reasons, particularly in relation to the healthcare provision in immigration removal centres.

2. In addition to our main activity of putting those in immigration detention in contact with healthcare professionals, we also campaign for change in the immigration detention system. We seek to do this by engaging with the Home Office and the UK Border Agency. However, in recent years it has become necessary to explore other avenues as the UK Border Agency has closed down a number of regular stakeholder meetings and seems to be increasingly less willing to engage with non-governmental organisations that challenge its policies and decisions.

3. Accordingly, we have had to turn to the courts in order to have the policies and decisions of UKBA effectively scrutinised. For us this is a last resort. We would always prefer to use alternatives to litigation, which can be time consuming and uncertain for all involved.

4. Medical Justice's experiences of litigation have given us valuable insights into how the judicial review process works. We are concerned by any attempt of the government to restrict access to the courts, as judicial review is often the only avenue of legal redress for our clients who may have been unlawfully detained. Having read the consultation document and the accompanying impact assessment, we are concerned that the government's proposals are not made on a proper evidential basis.

The scope of this response

5. Medical Justice has a particular concern in relation to the government's proposals regarding time limits in cases where there is a continuing breach. Our response focuses on that issue, and accordingly focuses on Questions 5 and 6, whilst also addressing Question 16 concerning equality impacts.

<u>Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds</u>.

6. There may be a "continuing breach" in many public law contexts – such as a continuing breach not to provide an individual with a community care assessment, or a continuing breach not to treat an individual as homeless. Until such breaches

are remedied they are continuing.[1] This can provide a basis that any delay might be disregarded.

7. However, the experience of Medical Justice in this context relates to a specific form of continuing breach that arises from unlawful policies or practises.

8. Medical Justice has been involved in a number of cases challenging policies and practises by way of judicial review. These cases are:

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

        In this case Medical Justice challenged a policy that enabled certain categories of immigration detainees to be removed from the UK with less than the normal 72-hour notice period. We successfully argued that this "zero-notice" policy abrogated the constitutional right of access to justice because an individual subject to the policy would find it extremely difficult to mount an effective legal challenge with no notice of being removed.

        The policy under challenge was adopted on 11 January 2010.

        The claim was filed on 6 April 2010, i.e. just over 3 months from when the policy was adopted.

    b. *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ 1238

        In this case, Medical Justice intervened in a case that concerned the treatment of immigration detainees with HIV. Part of the case concerned whether there was an adequate system in place for the treatment of HIV in Immigration Removal Centres (IRCs). As interveners, part of our case was that the arrangements in IRCs for those with HIV was (and is) extremely poor, with missed medication being a occurring many times as well as failures to comply with the guidance of the British HIV Association (BHIVA) guidance.

        This part of the case therefore was a challenge to the overall practice of providing adequate healthcare in IRCs.

    c. *HA (Nigeria) v Secretary of State for the Home Department* (Court of Appeal proceedings ongoing).

        In this case, Medical Justice has jointly intervened with MIND. The case concerns an immigration detainee with severe mental health problems and his poor treatment whilst held in detention. The judge at first instance found that there was a violation of Article 3 ECHR and that relevant policy concerning the detention of those who are

[1] See for instance *R (H) v London Borough of Brent* [2002] EWHC 1105 (Admin)

mentally ill was unlawful. That policy was adopted in 26 August 2010.

Part of our submissions to the court relate to the unlawfulness of the policy as well as the general practises of IRCs to the treatment of those with mental illness.

d. *R (RAN and others) v Secretary of State for the Home Department* (Administrative Court proceedings ongoing)

In this case, Medical Justice is supporting several claimants who have been subject to mistreatment in their home countries. It is their case that they have independent evidence that they were victims of torture. Accordingly, the effect of the relevant rules and policy is that these individuals should not be detained. It is our case that systemic failure in how these rules are applied has created a continuing state of illegality.

Accordingly, an important part of our case relates to the systemic failures in the system and amounts to a continuing breach.

9. These cases have been set out to demonstrate that in the litigation in which Medical Justice is often engaged we are normally concerned with a continuing state of affairs brought about by (a) unlawful policies or (b) unlawful practices.

10. It is clear from paragraphs 61 – 65 of the consultation document that the government intends to prevent such cases from being heard because as in these cases of continuing breaches are "essentially frustrating the application of the three month time limit".

11. It is the view of Medical Justice, this would be a highly retrograde step for the following reasons:

e. Negotiations: Litigation is always a last resort for a small charity like Medical Justice. It is better to initially seek to negotiate improvements directly with the Home Office or the UK Border Agency. Occasionally, they are receptive to our input. Changes arrived through negotiation can be better in terms of outcomes and implementation. However, such negotiations can be extremely time consuming. The negotiations prior to the proceedings in *RAN and others* have occurred over several years. If we were forced to issue proceedings by reason of a change in approach to the time limits in CPR Part 54, we would lose the opportunity to meaningfully engage and may be forced to litigate unnecessarily.

f. Effective scrutiny: It is the experience of Medical Justice that consultation exercises with the Home Office or the UK Border Agency are often tokenistic exercises, where legitimate concerns are not taken on board or addressed. These concerns frequently concern the legality of changes in policy, such as in the *HA (Nigeria)* case. Recourse to the courts is often the only opportunity to have a policy change subject to effective and independent scrutiny.

g. Evidence necessary: The evidence necessary to bring an effective challenge to a policy or practise is often significant. This takes time to gather and compile. For instance, in the *MD (Angola)* and *RAN and others* Medical Justice's position was supported by dossiers that were created as the result of painstaking research and analysis. It would severely compromise our ability to construct a proper evidence base if we were limited in cases of continuing breaches to a 3 month time limit.

h. Efficiency: Furthermore, such test cases are a more efficient way of resolving commonly occurring issues. In *RAN and others* it is our hope that our client group would benefit from an authoritative judicial ruling which will prevent an ongoing wave litigation which concerns the failures to properly implement Rule 35 of the Detention Centre Rules 2001. A single test case can obviate the need for other would-be claimants to pursue proceedings. On this basis, the proposal may increase costs overall.

i. Impact on client group: The issues we choose to litigate are chosen carefully and typically have a wide impact on our client group, immigration detainees. Our cases highlight the systemic failings in respect of the immigration detention system. For instance in *Medical Justice* we were able to vindicate the constitutional right of access to justice for a number of vulnerable groups including those at risk of suicide and unaccompanied minors. We seek to shine a light into dark and remote corners of the state's control over vulnerable individuals. In principle, we would object to any proposal that sought to prevent this.

j. Rule of law: The notion that such cases might be prevented from being heard on the basis of a technicality is objectionable to the constitutional role of the court in supervising the actions of the executive.[2]

k. Artificiality: Finally, there is a degree of artificiality in requiring a particular date to be identified in cases where such a date does not exist. In cases where there is a challenge to certain practises, these often develop over time – there is no single point where the practise suddenly "appears". In *RAN and others* and *MD (Angola)* there was no point where the practises in question could be said to have simply begun. In these cases, there is no attempt to frustrate the time limit in CPR 54.5 – instead, these cases simply illustrate that in cases of continuing breaches, the wording of CPR 54.5 does not accommodate the issues raised.

12. These factors demonstrate that if there is a problem with the wording of CPR 54.5, this problem is because it does not sufficiently take into account cases where there are continuing breaches. Accordingly, it is the view of Medical Justice that if CPR 54.5 is to be amended, any change takes account of this problem.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

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[2] By analogy see: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644E-G

13. The factors noted above represent the possible risks of taking forward the proposal regarding continuing breaches.

14. In summary:

    l. Premature claims are more likely as organisations may be forced to issue proceedings rather than engage in negotiations. These claims may also suffer from an impoverished evidence base.

    m. It would be inefficient to prevent test case litigation that obviates the need for numerous claims raising similar issues. In this way, resources may be needlessly expended.

    n. There is a risk that vulnerable client groups that rely on the strategic litigation of organisations like Medical Justice may suffer the effects of unlawful policies or practises that may not be challenged by way of judicial review.

Equality Impacts

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

15. Medical Justice's principal area of experience is with those who have come from outside the UK and are challenging their treatment within the immigration system. There is no doubt that this group would be negatively affected by these proposals to tighten access to judicial review.

16. Accordingly, it is the view of Medical Justice that the protected characteristic of "race" will need to be given particular due regard as the proposals in the consultation paper are developed.

17. Of course, given that some of the proposals in the consultation paper would apply to all categories of judicial review, other protected characteristics are vulnerable to the affects of the proposals. This would include "age" and "disability", such as in the context of decisions made regarding community care, social security and housing.

18. The government must be careful not to further disenfranchise groups of individuals that already find it difficult to assert their rights against public bodies.

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