REPRIEVE

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***Reprieve's Response to Consultation Paper CP25/2012 "Judicial Review: Proposals for Reform"***

1. Introduction

1.1 Reprieve is a legal action charity which uses the law to protect the human rights of prisoners around the world and those impacted by the US's counter-terror programme. We carry out field investigation and support our clients in bringing legal cases around the world, including in the UK. Much of our work focuses on assisting clients in various jurisdictions who face the death penalty. We also strive to expose the gravest instances of torture, rendition and secret detention, and to ensure accountability for human rights violations emanating from the US's use of weaponised drones.

1.2 Judicial review is the most important single remedy in Reprieve's legal work, as it is often the only means of ensuring that public authorities are held accountable for their role in violations of the rights of these most vulnerable members of society. Our past and ongoing judicial review cases have been crucial in exposing the most serious incidences of executive wrongdoing.

1.3 Examples of applications brought by Reprieve include the case of Samantha Orobator, who was convicted of drugs offences in Laos. She became pregnant whilst in custody and was given a life sentence and repatriated to the UK under the terms of a prisoner transfer agreement. She judicially reviewed her conviction on the basis that she had suffered a flagrant denial of justice in her trial in Laos by reason of the lack of independence and impartiality of the court. Although the judicial review was not ultimately successful, the High Court set Ms Orobator's life sentence tariff at 18 months.

1.4 A judicial review application was also brought on behalf of death row inmate, Edmund Zagorski, in 2010. The action, a challenge to the UK government's export control policy, led to a new control being placed on the anaesthetic, sodium thiopental (used in lethal injections in the US and elsewhere) which has prevented the use of British drugs in executions. The export control was later replicated in a European Commission Regulation which has blocked the flow of European medicines to execution chambers around the world.

1.5 Reprieve is also supporting a judicial review of the government's counter-narcotics strategy brought on behalf of Khadija Shah, on death row in Pakistan charged with drug offences and the judicial review of the government's policy not to provide legal defence of indigent Brits on death row abroad. Both of these judicial reviews are ongoing.

1.6 It was through a judicial review application that our client Yunus Rahmatullah, a Pakistani citizen wrongfully arrested by British forces in Iraq in February 2004 and handed over to US forces for rendition to Bagram, was formally identified. As has been widely reported, Mr Rahmatullah's writ of habeas relief was recently upheld by the UK Supreme Court, reaffirming the importance of the UK's obligations towards those it takes into its custody.

1.7 Reprieve is also supporting judicial review proceedings initiated in March 2012 on behalf of Serdar Mohammed, to examine a number of actions by the Defence Secretary in connection with his detention in Afghanistan in April 2010. These include Mr Mohammed's apparent mistreatment by UK forces, his subsequent transfer to Afghan custody where he was tortured, and the ongoing practice of transferring individuals detained by UK forces to the Afghan authorities. Following service of the claim, the government introduced a moratorium on transfers of detainees to Afghan custody. In November, it attempted to lift that moratorium, and was only prevented from doing so by the grant of an interim injunction.

1.8 We have also sought to use judicial review as a means of clarifying UK policies on cooperation with US counter-terror strategies, for instance in relation to the sharing of intelligence for use in drone strikes outside war zones. It is evident that in this particular area, in which there are already monumental difficulties in obtaining information due to its sensitivity, judicial review is of fundamental importance in protecting our clients' and the wider public interests.

1.9 In the following sections, we set out several general submissions questioning the evidence base and assumptions on which the proposals for reform are based. We also address certain specific questions posed in the consultation. As not every proposal is of direct relevance to Reprieve, we have not attempted to comment on every aspect. However, we have had the opportunity to review a draft of the response to be submitted by the Public Law Project, and wholeheartedly support the comments contained therein.

## 2. Executive summary

2.1 Reprieve considers this to be an ill-conceived set of proposals, based on inadequate evidence, which will disproportionately affect the most vulnerable members of society and endanger the bringing of cases of the highest public importance.

2.2 The consultation is premised on the assertion that the number of judicial review applications has increased exponentially, and that this represents a "substantial cost to public finances", both in the costs of defending the proceedings and apparent additional costs resulting from delays to the services affected. It is suggested that judicial review is therefore creating an impediment to growth and economic recovery.

2.3 Even if this were the case (which, as we highlight below, is far from established), judicial review is a necessary cost to secure the fulfilment of an essential check-and-balance function by the courts, ensuring the accountability of the executive for its decisions and allowing for the protection of the rights of the most vulnerable members of society. To restrict the availability of the remedy in the ways proposed, which bear no relation to the merits or public significance of any given case, would be

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hugely disproportionate to any possible benefit and would have a discriminatory effect on certain sections of the population, including many of Reprieve's clients.

2.4 The consultation document intimates (again, without any evidence) that the number of frivolous or unmeritorious judicial review applications is a cause for concern, and that these need to be filtered out in order to allow 'genuine' claims to proceed. However, it fails to recognise that the oral permission stage in judicial review already (uniquely) operates to prevent these cases from proceeding to full hearing, and, prior to that, the 'paper' stage operates to prevent many applications from being renewed. In reality, the effect of the specific proposals would be to disallow on arbitrary, ill-defined factors many claims of enormous significance to the claimant and the wider public.

2.5 Reprieve has additional concerns in relation to the specific proposals themselves. We are opposed to any reduction in the time limit for the submission of judicial review applications, which would have a discriminatory effect on the most vulnerable in society. As the consultation recognises, it takes a reasonable length of time to prepare a judicial review claim. Parties may need to seek legal advice, obtain evidence, give statements and secure legal aid. All of these processes are likely to take longer where the claimant is, for instance, in custody, located overseas, illiterate or does not have English as their first language (as with many of Reprieve's clients). For these claimants, the requirement to bring a judicial review 'promptly' and in any event within three months of the grounds first arising, is already onerous. Any reduction of this period runs the risk of preventing claims of the type Reprieve supports from being brought. It is already within the power of the judge considering the claim at the permission stage, to refuse to grant permission on the basis that, although it was submitted within 3 months, it was not submitted promptly. In these circumstances, no further reduction of the time limit is necessary.

2.6 We also consider it would be extremely dangerous to require challenges to ongoing or multiple breaches to be brought within three months of the first instance of the breach. This might exclude, for instance, applications challenging ongoing practices and policies – cases which in Reprieve's experience expose issues of the most far-reaching public importance and reduce the number of subsequent cases flowing from lower administrative decisions on the same issue.

2.7 The proposal to remove the right to an oral renewal in certain cases also causes us great concern. For many of Reprieve's clients, particularly in the context of our death penalty work, this has proved to be an immensely important stage in their judicial review claim. Any attempt to restrict this risks causing severe injustice, again disproportionately affecting some of the most vulnerable members of society. It also risks breaching fundamental fair trial rights. Furthermore, the terminology employed in the proposals is extremely ambiguous and, if implemented into the Civil Procedure Rules, would provide insufficient certainty for claimants (thus generating further litigation and costs). Due to the importance of the right, we also oppose the proposal to introduce a fee for oral renewal, which risks preventing many middle-income claimants from exercising this right.

3. <u>General submissions</u>

*The evidence base for the 'case for change' is fundamentally flawed.*

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3.1 Section 3 of the consultation asserts that there has been a significant rise in the use of the judicial review mechanism to challenge decision-making by public authorities. In particular, it is suggested that since 2005, the numbers of judicial review applications have dramatically increased. However, as the proposal repeatedly acknowledges, there is little evidence available to the MoJ to support this assertion – rather, the figures appear to be drawn from a variety of different sources, providing no assurance of consistency. It therefore appears at least uncertain that the suggested overall increase in judicial review applications has occurred.

3.2 What is clear, as the consultation recognises, is that if there has been an increase the main area of growth in judicial review has been in immigration and asylum matters (which are not specifically targeted by the proposals). Any rise in the use of judicial review in this area is almost certainly as a consequence of the abolition in 2005 of the Immigration Appellate Authority and its replacement by the Asylum and Immigration Tribunal, in respect of which appeals to the High Court can only be made on the grounds of error of law. As the graph at page 10 of the consultation shows, when immigration and asylum matters are excluded the volume of judicial review cases has remained largely stable since 2005, and other empirical studies demonstrate this has also been the case since the mid 1990s[1]. The basis for the underlying aim of the proposals (to stabilise or reduce the apparent overall increase in judicial reviews) is therefore inherently questionable.

3.3 Further, although the consultation states that judicial review represents a "substantial cost to public finance", both in relation to "the effort of defending the legal proceedings" and also "additional costs incurred as a result of the delays to the services affected" (para. 34), no details are provided about the statistics or information on which the assertion is based. We assume, therefore, that no comprehensive study has been carried out. We are, however, aware of ongoing research which questions the assertion that the administration is overwhelmed by judicial review applications or that it creates a significant impediment to economic progress.[2]

*Even if there had been an increase in judicial review applications, this is not attributable to a rise in unmeritorious claims*

3.4 If there has been an increase in the overall number of judicial review applications, this should not be automatically attributed to any rise in unmeritorious claims, or 'abuse' of the judicial review mechanism, which needs to be combated. Such an increase in applications would be more likely to stem from other factors.

3.5 This may include a decline in the quality of decision making by public bodies. Public sector funding cuts in recent years render it probable that bodies lower in the administrative framework, such as local councils or planning authorities, are unable to devote the same resources to individual decisions as in previous years, with the inevitable consequence that more decisions will be susceptible to challenge. Efforts should be made to identify shortfalls in these areas and take steps to ensure public authorities are adequately informed and resourced, rather than attempting to restrict the availability of judicial review.

[1] E.g. Christopher Hood and Ruth Dixon, Department of Politics and International Relations, University of Oxford, 1 January 2011: http://www.guardian.co.uk/news/datablog/2012/nov/19/judicial-review-statistics#data
[2] Bondy and Sunkin: http://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/

*The proposals are disproportionate and will not distinguish cases on merit*

3.6 The proposals fail to recognise that judicial review applications are already unique, in that claimants are required to obtain permission to proceed. This means that a member of the judiciary presently acts as a "gate keeper" to unmeritorious cases. There is already therefore a filter in place to eliminate cases which do not merit the time and expense that proceeding to a full hearing would involve. To put this into context, oral permission hearings often last no more than 10 or 20 minutes meaning that a judge may hear 15 or 20 in a day. The court listing officer has the power to limit the time available for a case. Further, the unavoidable reality is that judicial review is a means of resolving some of the most complex cases in our legal system, involving highly technical issues around the limits of executive power, which require at least some substantive consideration of the issues before they can be dismissed. To attempt to carry out a wholesale reduction in the number of cases would be to disregard the purpose of the permission stage already in place and jeopardise challenges to decisions of great public importance, curtailing access to justice and accountability.

3.7 Even if the overall aim is to reduce the number of judicial review applications, the current specific proposals are ill-conceived in that access is not to be restricted on any merit-based criterion. Rather, cases will be excluded on the basis that they fall foul of other (often arbitrary) considerations (such as the period within which they are brought). In essence, the proposals are a cull on quantity of cases without any reference to their quality or likely public value, and are disproportionate.

*The equality impact assessment is inadequate*

3.8 The consultation expressly recognises that there is not "comprehensive information about court users generally, and specifically those involved in judicial review proceedings in relation to protected characteristics" (para. 110). The government's understanding of the potential equality impacts of the proposals for reform is therefore obviously limited. Further, the impact assessment itself notes at various points the lack of specific information available about, for instance, the volume of applications, the extent of potential behavioural responses and detailed financial information. Reprieve has concerns about the impact of specific proposals on members of society with protected characteristics under the Equality Act, which are detailed below. We would also point out that any wholesale restrictions introduced to a remedy which operates to protect the rights of the vulnerable vis-à-vis state entities are likely to have a greater impact upon those with protected characteristics, and should not be considered without a detailed assessment of the likely consequences in this regard.

*The proposals are ambiguous and ill-defined*

3.9 In addition, the proposals are not sufficiently precise to provide any real certainty to claimants. The consultation is permeated with loose terms which if transcribed into formal proposals and incorporated into the Civil Procedure Rules would cause significant confusion (with consequent litigation and costs). Examples of the type of language which causes us concern are:

- "weak or hopeless cases" (para. 33);
- "frivolous" or "vexatious" cases (para. 69);

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- "misconceived cases" (para. 76);
- "prior judicial process"; "substantially the same matter" and "totally without merit" in the context of the proposal to remove the right to oral renewal.

Further submissions on the ambiguity of certain proposals are set out below.

4. Submissions on specific proposals

*Q.4 Are there any types of case in which a shorter time limit might be appropriate?*

4.1 We do not agree that the time limit for bringing a judicial review should be shortened in any type of case. The current requirement to bring an application 'promptly' and in any event within three months of the grounds for the claim first arising, is already very short and presents a challenge in many cases brought by Reprieve.

4.2 The consultation explicitly recognises that an applicant for judicial review requires a "reasonable amount of time to consider their position, and to take legal advice on the strength of their position and the merits of the case" (para. 42). The types of cases brought by Reprieve's clients by their nature tend to require a significant period of preparation time. This is due to the particular circumstances in which our clients often find themselves, namely abroad (often in very far-away or isolated locations) and/or in custody, meaning their communications and opportunities for consultation are obviously restricted.

4.3 As such, a significant period inevitably elapses between the time when the grounds for claim arise and the affected client even becomes known to Reprieve. There are then often further delays in obtaining instructions (due to the difficulties with access to our clients), and with obtaining evidence, which often has to be gathered abroad, with the cooperation of foreign public authorities. In addition, most of Reprieve's clients rely on legal aid to fund their cases. Securing legal aid can be a slow process, and is often complicated by factors such as the nationality of the client, difficulties in obtaining their financial records and problems completing the requisite forms.

4.4 It would therefore be extremely dangerous to consider any reduction in the current limitation period, as this would heighten the (already very real) risk of depriving some of Reprieve's clients of the opportunity to apply for judicial review, due to a combination of circumstances outside their control.

4.5 Further, it is quite clear that any reduction of the limitation period would have a disproportionate and discriminatory impact on the most vulnerable members of society, who for many reasons (including those outlined above) often require additional time to prepare legal cases. Certain groups would be disproportionately impacted due to protected characteristics under the Equality Act 2010, and as such the proposal would breach that Act.

4.6 A stark example of a client who would be disproportionately affected is one who is suffering from severe trauma or post-traumatic stress disorder (a mental impairment which undoubtedly has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities). In Reprieve's experience, these clients almost inevitably require longer periods to recount their

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experiences and give instructions (for obvious reasons). Further, clients whose native language is not English often require more time to prepare a case due to the slower speed of communication (and possible need for interpreters and/or translation of documents). They would also therefore be disproportionately impacted by any reduction of the limitation period.

*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.*

4.7 Reprieve is opposed to any suggestion that an application for judicial review of a continuing breach must be made within three months of the first instance of the grounds. Such an amendment would seriously endanger our clients' ability to challenge ongoing breaches, and policies which have been in existence for more than three months. These are cases of the utmost importance, since they address serious abuses of executive power at the highest level, in relation to which judicial review is often the only available remedy. Such ongoing policies are by their nature likely to have a wider public impact, creating a heightened interest in protecting access to judicial review in respect of these decisions. Scrutiny of unlawful policy, or the unlawful application of policy, is a crucial part of judicial review and of our democratic system, and must not be restricted in any way.

4.8 A good example of the type of application that could be affected by this proposal is the case brought by Reprieve's client Noor Khan, whose father was killed in a US drone strike in Pakistan. The application sought clarification of the UK's policy on sharing 'locational' intelligence obtained by GCHQ with the US, for use in drone strikes. This was in light of an apparent statement by a GCHQ official that such intelligence sharing was "in accordance with the law". As was argued in the claim, such a policy could render GCHQ officers guilty of both domestic and international crimes. The case proceeded directly to a two-day oral permission hearing (evidencing the seriousness of the issues it raised), and the refusal to grant permission is the subject of an appeal.

4.9 Another issue of significant concern to Reprieve is the apparently inadequate enforcement of the UK's export licensing regime in relation to components which may be used in US weaponised drones. Any challenge by way of judicial review might well relate to an ongoing state of affairs, namely the repeated failure by the authorities to properly apply the statutory regime – a claim which may be prevented should it have to be brought within three months of the grounds first arising.

4.10 Reprieve's judicial review challenges to government policy in relation to the export controls around lethal injection drugs and its counter-narcotics strategy (referred to above) would also risk being disallowed under this proposed change.

4.11 Challenges to unlawful policies or the wrongful application of policies are also likely to save costs in the long term, as by enabling a thorough and early examination of an underlying policy, the number of subsequent unlawful decisions will be reduced. This should result in fewer smaller scale judicial review applications or civil actions in relation to the same issue.

*Questions 7-12: Removal of the right to an oral renewal in certain circumstances*

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4.12 We disagree with the proposal to remove the right to an oral renewal at the permission stage in any circumstances. The right to request an oral renewal provides an essential safeguard against unjust refusals of permission on the papers, which may arise for a multitude of reasons including judicial oversight or even administrative error. We consider it would be very dangerous to exclude even the possibility of an oral renewal in any case.

4.13 Moreover, the terminology proposed to govern the circumstances in which there will be no right to oral renewal is extremely vague, providing no certainty to clients. This lack of clarity would inevitably cause increased litigation and associated costs to the system. For example, the phrase "whether the issue raised in the judicial review is substantially the same matter as in a prior judicial hearing" is vague and unclear, and likely to have the effect of creating further litigation, with all of the costs implications.

*Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?*

4.14 We are opposed to the introduction of a fee for an oral renewal hearing. Such a fee is likely to create an unfair obstacle for members of the middle classes who wish to apply for oral renewal, since it would not impact upon those who are legally aided (who would receive legal aid to cover the fee) nor deter the very affluent.

4.15 Similarly to other proposals, the fee would operate to cull certain judicial review applications (where the applicant is unable to pay a fee for oral renewal) without reference to the merits of the case. If the government believes a deterrent is required to prevent requests for oral renewal in unmeritorious cases (and there is no evidence that this is the case), a more equitable and effective solution would be to use after-the-event costs provisions, which are already designed to discourage parties from wasting court time.

4.16 The consultation notes that the proposed fee would initially be set at the same level as for a full judicial review hearing (currently £215, but proposed to rise to £235), and that this is "below the full estimated costs of the proceedings to which it relates". However, it makes clear that the government "will consider the scope for adjusting fees further over time so that they reflect the full costs of providing the service". Clearly this possibility is a cause for further concern, as if a fee for oral renewal were to be introduced, any increase in this would risk putting the mechanism beyond the reach of a greater number of claimants, and excluding even more cases of potential importance.

## 5. Conclusion

5.1 The judicial review procedure is of paramount importance to Reprieve's clients, who are by definition in positions of extreme vulnerability. Moreover, it serves as an essential (and often the only) means of ensuring that public bodies are held accountable for their actions, a founding principle of democracy as a whole. For these reasons, it is severely troubling that any restrictions on the availability of this essential remedy are being considered at all. It is of still greater concern that the current proposals have been put forward without any comprehensive underlying data, but rather on the basis of questionable assumptions and a general desire to save costs.

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5.2 As we have made clear, the specific ways in which the government proposes to restrict the availability of judicial review bear no relation to the chances of success or overall importance of any given case. Rather, they represent an attempt at a wholesale reduction in the number of applications being granted permission, which is arbitrary and unjust. Moreover, the specific proposals will have a disproportionate and discriminatory effect on some of the most vulnerable members of society, rendering them unlawful as well as endangering the exposure of the most serious examples of executive wrongdoing. We would urge the rejection of these proposals and the retention of this crucial remedy in its current form.

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