Written evidence from Amnesty International UK (AET0034)

Introduction and executive summary

1. Amnesty International UK welcomes this opportunity to contribute to the work of the Joint Committee on Human Rights ('JCHR') in this inquiry into attitudes to enforcement of human rights. Amnesty International UK is concerned with all aspects of this inquiry. However, for reasons of space and capacity, this evidence is limited to five key issues, some dealt with more briefly than others.

2. First, questions around legal aid, access to justice and enforcement of rights, particularly salient as the government plans its long-awaited review of the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). Second, our concerns as to the lack of understanding and culture of misinformation and (perhaps deliberate) misrepresentation of human rights law in the media and even its treatment by government. Third, judicial independence and the importance of the 'living instrument' doctrine in any truly protective human rights framework. Fourth, the approach of the government to human rights cases brought against it. Finally, we look separately at the question of citizenship and immigration status, and its foundational nature to accessing and enforcing rights.

3. It is Amnesty International UK's assessment, in summary, that:

    i. The cuts to legal aid have significantly damaged the right of access to justice in this country, creating a two-tier system increasingly closed to those who need it most. Broadly, people's ability to access the court to enforce rights has been damaged.
    ii. The constant denigration of human rights in the public sphere is damaging to a positive human rights respecting culture and has the potential to damage enforcement, since it may result in individuals failing to appreciate their true scope and value.
    iii. The 'living instrument' doctrine is critical to the domestic human rights framework. As the understanding of society changes, so must the understanding of the rights of those within it if they are to remain relevant and useful.
    iv. The government has at times made it difficult for ability of legal professionals to bring cases against it on an even playing field.
    v. Rights to citizenship and immigration status are foundational in that many other entitlements are dependent on these statuses. Such entitlements engage human rights, and this has had insufficient attention.

4. We would ask that the Committee press the government to
    i. Conduct a truly independent, transparent and thorough review of the impact of LASPO, to include its impact on access to justice and protection of human rights, particularly for vulnerable and disadvantaged groups;

ii. Ensure better provision of public legal education to ensure people understand and can effectively claim their rights, and provide parallel education to practitioners;
iii. Speak out in support of human rights law generally, its progressive development and our Human Rights Act 1998 in particular;
iv. Commit long-term to retaining the Human Rights Act 1998 and remaining a member of the European Convention on Human Rights.
v. Ensure it does not erect barriers to individuals' ability to challenge its decisions, or act to the detriment of the Courts' ability to reach fair and just decisions in human rights cases against it.
vi. Law and policy is in urgent need of reform in relation to British citizenship and immigration status to ensure that people possessing these statuses or entitled to them are able to establish that possession or entitlement, and to remove or significantly reduce the range and risk of human rights violations arising from a real or perceived absence of such status.

Issue 1: Resources for rights enforcement

5. In 2016, Amnesty International published 'Cuts that Hurt', a report that was the outcome of a year-long research project looking at the impact on access to justice of the cuts to legal aid from LASPO. The focus of that research[1] was on the effect of the cuts on individuals and in particular on a range of disadvantaged and marginalised groups, primarily in the areas of family, immigration and welfare benefits law.

6. Its overall conclusion was that access to justice has been significantly damaged by the legal aid cuts, which amount to a regressive measure in human rights terms. The adjacent questions which the Committee states are of particular interest in this inquiry – whether there is access to justice to enforce human rights, and the impact LASPO has had on the ability of individuals to access the courts as a means of enforcing their human rights – raise issues that in part range broader than the scope of that report, and as a result are not addressed in detail in this submission. Such matters as the impact upon judicial review (the mechanism through which a large number of cases directly challenging alleged violations of rights protected by the HRA or EU Charter are generally raised) were not directly assessed as part of Amnesty International's research. However, it is our view that the findings of our research are nevertheless pertinent to the Committee's questions, and this inquiry.

7. First, there are direct issues, such as the impact of loss of specialist early advice and existence of advice deserts on the ability of individuals to access rights, the removal from scope of legal aid in immigration cases to enforce many rights, and the impact

[1] Carried out between October 2015 and June 2016, Amnesty conducted desk research drawing on substantial publicly available information and interviewed (i) 90 individuals or organisations who provide legal advice, information, representation, or other support to groups affected by the legal aid cuts and (ii) 30 individuals rendered ineligible for legal aid following the cuts. Behind these cases Amnesty International believes there are many more who have simply not been able to access free support. However, this silent, hidden majority is incredibly difficult to trace and access – hence the need for a thorough (ideally independent) impact review. We focussed that research on priority groups of those identified as particularly disadvantaged in the legal system, namely children and young people (24 years old and under), migrants and refugees, and people with specific vulnerabilities which can make accessing legal procedures more difficult, such as those with mental health problems or disabilities. More research of wider scope is needed.

of the removal of legal aid from family law on children's rights as well as those of their parents. Second, however, it appears very likely that issues such as the loss of early advice and uneven provision also affect the ability of individuals (particularly the most vulnerable) to access those legal experts who might identify a potential specific human rights claim in amongst their difficulties or cluster thereof. Moreover, in common with Briggs LJ[2], we consider the ECF scheme to be inherently unfair, and incapable of providing a safety net for vulnerable and disadvantaged people seeking to enforce their rights. In the evidence below we seek to expand on these concerns, and our view that an urgent far reaching review is needed if access to justice, and indeed all our rights, are to remain truly effective.

Access to Justice

8. As the Committee itself stated itself in 2013, there is a "*fundamental common law right of effective access to justice, including legal advice when necessar*y.[3]" That right is also reflected in numerous international human rights instruments. Access to justice is the bedrock of human rights protection. It is a core element of the right to an effect remedy, to a fair trial, and to equality before the law. Indeed, it is essential to the rule of law, Lord Reed JSC commenting in the UNISON case[4]:

> "[66] *The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other*"

9. The right to an effective remedy, enshrined in all major human rights treaties, including the European Convention on Human Rights ('ECHR')[5], serves as a procedural means to ensure individuals can enforce their rights and obtain redress. Remedies must not be ephemeral – they must be accessible in practice[6]. Legal aid is one way to ensure that is a reality for all, rather than the privilege of the wealthy and able. The availability of free legal advice, while not recognised as an absolute right, is intimately bound up with ensuring access to justice. Without timely and accessible legal advice, people cannot effectively claim and enforce their rights and problems can escalate and have profound consequences for individuals and their families.

10. The right to a fair trial includes respect for the principle of equality of arms and is rightly connected to the ability to secure appropriate legal assistance. While neither the ECHR nor EU Charter on Fundamental Rights (which extends beyond trials of civil rights and obligations to a guarantee of the right to an effective remedy before a court) provide an absolute entitlement to free legal aid, they do require provision be

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[2] See *I.S. v Director of Legal Aid Casework and Lord Chancellor* [2016] EWCA Civ 464

[3] See also, recently, *R(UNISON) v Lord Chancellor* [2017] UKSC 51 at [74], "*the right of access to the courts has long been recognised*"

[4] *As above*

[5] ECHR article 13 (not – regrettably – included in the Human Rights Act 1998 but no less important for that), see also the following, all of which have been ratified by the UK, Article 8, Universal Declaration of Human Rights; Article 2 (3), International Covenant on Civil and Political Rights; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 47, Charter of Fundamental Rights of the European Union

[6] See for example, UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the International Covenant on Civil and Political Rights, paras 14 and 15. See also the following European Court of Human Rights cases: *McFarlane v. Ireland*, App. No. 31333/06, 10 September 2010, para114*; Riccardi Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment, 29 March 2006, para 38; *El-Masri v. "the former Yugoslav Republic of Macedonia*", App. No. 39630/09, 13 December 2012, para 255*; Kudła v. Poland*, App. No. 30210/96, 26 October 2000, para 152

made for legal aid where it is indispensable for effective access to the courts and/or where the absence of such aid would make it impossible to ensure an effective remedy[7]. The state's responsibility to facilitate equal and effective access to justice means it must ensure that such aid is available for those with insufficient resources for legally complex disputes, concerning matters of fundamental importance.

11. In Amnesty's view, that should be interpreted widely, to ensure maximum protection and thus maximum efficacy of the human rights framework. Beyond the European regional human rights system, UN Special Rapporteurs, in accordance with the jurisprudence of existing UN human rights treaty bodies, have forcefully argued that the right to legal aid should be recognised, guaranteed and promoted in both criminal and civil cases, given its importance as an essential procedural guarantee for the right to an effective remedy, the right to equality before the courts and tribunals and the right to a fair trial[8].

12. Regrettably, the significant cuts made to legal aid by LASPO, driven by economic concerns, appear to have been made with wholly inadequate attention to the potential negative effects they would have on access to justice, particularly for disadvantaged and marginalised groups. No proper adequate research on this front was carried out before the cuts were made[9]. It is absolutely clear from the government's own statistics that fewer people can now access free legal help in a wide range of cases. It is also clear that those living in poverty not only face the most barriers in accessing justice, but are more likely to face legal problems in those areas now out of scope, such as welfare benefits, debt and immigration[10].

13. Such retrogressive austerity driven measures are required by international human rights law to be (broadly summarised) temporary during the crisis, necessary and proportionate, non-discriminatory in effect, to strive to mitigate inequalities arising

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[7] The European Court of Human Rights has found that the right to access to a court contained in Article 6 (1) encompasses the right to free legal assistance in civil matters when such assistance proves indispensable for effective access to the courts and a fair hearing (in particular for ensuring the equality of arms). In deciding whether free legal assistance is indispensable for effective access to the courts or fair hearing in a particular case, the European Court of Human Rights has stated it will consider the particular facts and circumstances of each case, taking into account several factors: (1) the importance of what is at stake for the applicant; (2) the complexity of the case or the procedure, particularly when legal representation is mandatory by law; (3) the capacity of the applicant to effectively exercise his or her right of access to court. See such cases as *Airey v. Ireland P,* C and *S v. United Kingdom,* Judgment of July 16, 2002*; Jordan v. United Kingdom*, 4 May 4 2001; *Benham v. United Kingdom*, Grand Chamber Judgment of 10 June 10 1996, and in this jurisdiction, *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA [2015] 1 WLR 2247 where in considering when legal aid is needed, Dyson MR explained "*Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity*."

[8] Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul 15 March 2013, UN Doc, A/HRC/23/43; Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc A/67/278

[9] For example, see government statements expressing a preference to "*conduct the research on the basis of what happened to people*", from the Public Accounts Committee, Oral evidence: Implementing reforms to civil legal aid, HC 808, 4 December 2014. Similarly in evidence to the Justice Committee, the Minister for Justice stated: "*we had to take very urgent action, and that we did do. In an ideal world, it would have been perfect to have a two-year research programme speaking to all the stakeholders and then come to a decision. Sadly, the economic situation that the Government inherited did not allow that luxury*", Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 12 March 2015 page 9.

[10] See the Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc: A/67/278; Legal Empowerment of the poor and eradication of poverty Report of the Secretary-General June 2009

from the crisis and protective of an identified minimum core content of rights or a social protection floor[11].

14. Numerous United Nations expert groups have expressed concern about the effect of these changes and their impact on human rights[12]. Amnesty concurs and further considers that the LASPO cuts fail to meet the test set out above.

Accessing justice to enforce rights – the human impact of the LASPO changes

15. One of the difficulties Amnesty International identified in assessing the impact of the cuts on access to justice (and particularly in considering the broader impact these detrimental changes have had upon individuals and their access to rights enforcement) is the difficulty in tracing and accessing those who have been simply unable to access any free support at all. Necessarily, interviews were conducted with those people we were able to meet, and those introductions came primarily through the not for profit sector. Amnesty International believes that behind those cases lie many stories that will go unheard, because those people have not been reached or helped at all. That 'weakness' of our research and conclusions below is symptomatic of a deeper problem in analysing the depth of the problem. It requires urgent attention.

Loss of specialist early intervention

James (interview 16 June 2016) lives in a housing association property and had been in and out of work. He told Amnesty International that his changing situation, combined with the stress he was under, meant he did not claim the housing benefits to which he was entitled. He fell into rent arrears amounting to thousands of pounds as a result. James was not eligible for free legal help to try and resolve these initial problems. He only sought help when he was facing eviction, for which he was entitled to legal aid. He told Amnesty International "*It was such a stressful time, I couldn't sleep with the eviction hanging over me. I was facing being made homeless*". After an initial struggle to find a solicitor to take the case at short notice, the case was adjourned giving him time to find legal representation. His solicitor was able to get the eviction halted. Had he been able to access early legal help to advise him on the underlying housing benefits problem this situation may well have been avoided altogether.

16. Without timely, appropriate legal advice, people's everyday problems can escalate, impacting their human rights in numerous ways. The loss of specialist advice at an early stage of individuals' difficulties to forestall this has had a serious detrimental

[11] See, inter alia, letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights. As to the further relevance of discrimination in the context, the decision of the ECtHR in *Anakomba Yula v Belgium*, which accepted the Belgian Government's argument that the conditions of entitlement to legal aid pursued a legitimate aim, but found that Belgium had failed in its obligations to provide for the right of access to a court, in a manner that was compatible with the requirements of Article 6(1) taken with Article 14 (the prohibition of discrimination).

[12] Including UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 3 June 2016, CRC/C/GBR/CO/5 addressing articles 2, 3, 6 and 12 of the Convention on the Rights of the Child [at 29], UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland 14 July 2016, E/C.12/GBR/CO/6 [at 20-21], UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, 3 October 2017, CRPD/C/GBR/CO/1 addressing Article 13 [at 32-33], UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland CERD, 3 October 2016, CERD/C/GBR/CO/21-23 addressing articles 5 and 6 [20-21].

impact. That is particularly the case in housing and family law. One practitioner told Amnesty International, "*If clients were able to access early advice that would make a huge difference across the board in all areas of law. It would help to stop things spiralling out of control and ending up in court when clients are in desperate situations and at breaking point. In the end court is good for nobody, so you need that early intervention*[13]." Another explained that "*It's a real problem that legal aid is only available for the very sharp end of a problem not earlier on. So in housing disrepair for example you only get help when it's really serious not when it would be easier and quicker to resolve. It's the same in welfare – funding is only there at appeal level, rather than initial help to try and resolve things quickly and effectively*[14]." The removal of legal aid for these kind of cases places people's rights at risk. Where problems of different types may cluster and require careful analysis and assessment, that is particularly salient.

17. Moreover, without early and specialist advice, it is reasonable to assume it is difficult for individuals themselves to identify those legal problems which might have potential judicial review and/or Human Rights Act 1998 ('HRA') points.

Inability to meet demand: overstretch and advice deserts

18. Another significant factor exacerbating the impact of the LASPO cuts to civil legal aid on individual's lives and access to rights protection is the geographically uneven patchwork by which the provision which does remain is distributed across England, and the fact that many of those not-for-profit providers stepping into the breach have seen their capacity stripped to the bone. Such providers should not be expected to fill the gaps. Nor are they able to do so.

19. One practitioner told Amnesty,

> "*The cases we take are just the tip of the iceberg. Demand is high and resources are low, so now we only take the people who are the most destitute, who face the most barriers. Ethically that is incredibly difficult for staff here, to think this person hasn't quite reached rock bottom so we turn them away. We try to signpost them to others who can help, but there aren't many places for them to go. In the last 12 months we have turned 2,000–4,000 people away. It's getting worse and worse*[15]."

20. There is growing evidence that the LASPO cuts have led to a reduction in service provision. That includes the closures of advice and not for profit legal aid providers, but also the fact that loss of funding from legal aid contracts leads to a reduction in services that can be provided by those which remain open[16]. That has a clear impact

[13] Rachel Francis, co-Chair Young Legal Aid Lawyers, 15 October 2015
[14] Clare Carter, Avon and Bristol Law Centre, 5 November 2015
[15] Clare Carter Director, Avon and Bristol Law Centre, interview 5 November 2015
[16] The exact number of closures is difficult to determine, not least because it was only in 2015 that an extensive survey of not-for-profit agencies providing legal help, advice and representation was carried out by the government (Ames, Dawes and Hitchcock, "Survey of Not for Profit Legal Advice Providers in England and Wales", Ministry of Justice Analytical Series 2015.) There is therefore no comparable data comparing not for profit providers before the introduction of LASPO and after. However, the Ministry of Justice itself documents that more than 50% of not for profit providers have closed in the past ten years. More detail as to the studies which are available is contained in 'Cuts that Hurt' [p.21]. Amnesty's findings on the reduction in service availability is supported by a large number of other sources detailed in out report, including the impact on the Mary Ward Centre, which stated in 2014 it had had to reduce its staff by 25%, withdraw welfare benefits advice from all but one London borough and turn away 25% of those seeking help.

on the rights of those in need of help. That is evident from the kind of cases described to Amnesty by practitioners where people are unable to secure help:

> "*We're stretched to capacity and we have to turn people away who need help, but that feels devastating. It feels wrong. Take young undocumented migrants, it means that they are sleeping in parks, on the streets, they are getting themselves into risky situations, relying on people they shouldn't, they are going without food and they can't challenge that, they can't challenge their situation because they have no access to legal advice and in turn no access to justice*[17]."

21. To have individuals left in this kind of crisis is clearly unacceptable. It demonstrates a failure to appreciate how without access to justice, many people cannot enforce their basic rights.

22. Provision is now uneven and irregular. In some areas, there are now 'advice deserts' with extremely limited provision for all types of free legal advice. That includes the South West, and parts of the Midlands and north of England. One woman in Oxford who is no longer eligible for legal aid for her private family case told Amnesty International:

> "*I've got nowhere to go for help now in Oxford. The organisation that used to give me advice on my case, as well as confidence that things would be OK, has gone. I've lost that support. I'm totally on my own and that terrifies me*.[18]"

23. Demand on those organisations providing free legal help is sky high. While other factors than LASPO have also contributed to this, it is clear that LASPO has resulted in more people seeking free legal help who are no longer eligible for legal aid[19].

24. In this picture of a vastly overstretched sector, it is again reasonable to infer that there will be a knock-on effect on the ability of individuals to access appropriate advice and bring human rights challenges that may merit the courts' attention.

Direct human rights impact

Migrants and refugees

25. Legal aid has been largely removed from non-asylum immigration matters.[20] It is not available for citizenship claims (registration or naturalisation). However, migrants and refugees experience a diverse range of problems owing to their immigration status. One of the most pressing areas, and one which has now been taken out of scope entirely, is the right to family and private life protected by article 8 of the ECHR. There is – quite simply – no proper access to justice to enforce these rights. That is despite the Court of Appeal confirming that in certain cases a refusal to provide legal aid will be unlawful because it violates the procedural aspects of article 8.

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[17] Immigration lawyer, 7 October 2015.
[18] Interview 19 January 2016
[19] Alongside interviews carried out by Amnesty International, there are a number of studies and reports documenting the increased demand since LASPO.
[20] Save for challenges concerning immigration detention and bail, non-asylum immigration legal aid is restricted to proceedings before the Special Immigration Appeals Commission (generally relating to national security) and certain victims of domestic violence, human trafficking or slavery: paragraphs 24 to 32A, Part 1 to Schedule 1 of LASPO

26. The government considers article 8 immigration cases to be accessible and straightforward without legal advice. That is simply untenable. Cases with *prima facie* article 8 claims are generally – as in many areas of immigration law – highly complex factually and legally. They are also procedurally complex, with providers stressing to Amnesty International the prohibitive nature of a lack of understanding of such matters as timeliness, disclosure obligations and forms. Moreover, the success of meritorious cases critically depends upon proper evidence gathering and presentation. That requires expertise in identifying what is needed as well as money for such important elements as independent social worker reports to examine the best interest of a child, or translators. Judges cannot repair the absence of such evidence. That results in obvious unfairness and also may well lead to violations of people's right to a family life.

27. Interviews carried out by Amnesty International also indicate that this group often has additional vulnerabilities, such as language barriers, mental health problems, literacy, destitution, homelessness and isolation. The outcome of this lack of access to justice may be devastating for their lives. It can result in wholesale separation of families, or removal of children from the UK against their best interests.

> **Victoria, interviewed 7 March 2016,** has been living in London since 2001. Her son was born in the UK in 2002. After overstaying her permission to remain in the UK, suffering precarious living situations with no access to funds and relying on charity she sought advice and finally submitted an application for leave to remain outside the immigration rules, based on her son's rights to private and family life under Article 8 of the European Convention of Human Rights. At the time, she was eligible for legal aid and was represented by a solicitor who lodged the application. In 2011 the Home Office granted her and her son permission to remain in the UK on a discretionary basis for three years. Before the end of that period Victoria had to apply for an extension of time. By then she was no longer eligible for legal aid and could not afford to pay for representation. She was referred to Islington Law Centre which was able to take the case on pro bono. Victoria, however, suffers from mental health problems and whilst the application was being made she became progressively mentally unstable and was placed under the care of her GP and hospital. An application was made by the law centre, including detailed evidence with regard to Victoria and her son's current situation in the UK. In 2014, the Home Office granted further leave to remain in the UK. Without the law centre's help she would not have been able to make the application herself. This pro bono support, however, is only available to a limited number of people. Many in a similar situation will have to face these challenges alone.

28. Such problems with accessing justice are worse when the individuals concerned are in immigration detention. Moreover, whereas legal aid is still available to assist with challenges to immigration detention itself, the value of this is fundamentally undermined because it is not available to challenge the primary basis on which a person may be detained – i.e. the decision, whether express or implied, that the person is not a British citizen or is not entitled to remain in the UK. A person who cannot establish their citizenship or immigration status is thereby prevented from providing a wholesale rebuttal to the lawfulness of their detention[21].

[21] The immigration power to detain may be exercised where necessary to determine whether a person should be admitted to the UK or to remove (or deport) a person from the UK. A person who is unable to establish their citizenship or immigration status (or entitlement to either) is consequently at risk of detention, yet if detained the legal aid that may be available to assist them to challenge that detention under e.g. paragraph 24, Part 1 of

29. LASPO has also removed legal aid from those seeking to enforce their right to family reunification. Amnesty considers this to be wholly unacceptable, given the obligations on the state in international human rights and refugee law to ensure refugee families are reunited[22] and the devastating impact on refugees' lives and health if this is not complied with. It is utterly unsustainable to suggest, as the government does, that such claims are straightforward legally or evidentially. Cases around adoption, siblings or similar are highly complex, as are even the most 'standard' cases. DNA testing, to substantiate links, is expensive, and legal advisors play a critical role in covering or explaining gaps in evidence. Without them, individuals cannot enforce this essential right. Such claims should be automatically in scope.

Ruth is from central Africa. A student helping her with a family reunification application relayed her story to Amnesty International on 2 November 2015:

"The case I'm helping with at the moment is really difficult. Ruth was living with her sister and her sister's kids. Her sister was then killed by soldiers and so she became the main carer for the children. They were at church one Sunday when soldiers came and they started to kill people. She ran, everyone ran but later she couldn't find the kids so thought they had been killed. So she fled. When she reached the UK she found out two of the kids had survived the attack. But she has no documents to prove that relationship. She has been diagnosed with PTSD. She wants the children to join her, to care for them, they were her dependants and all the family she has left, it's really the only hope she has. The judge in her asylum case made a positive determination and said she was credible and her story was credible. So we helped her make an application outside of the rules. That was refused by the Home Office. We've lodged notice of appeal of family reunification and wondering if we can get ECF for her. But there is no way she could do this alone, she wouldn't know where to start."

Children, young people and family life

30. The cuts have affected the ability of young people to enforce their rights, as well as impacting on their rights to be heard and have their best interests protected. Moreover, the cuts to family law can result in unfairness to one parents which then rebounds on to the disadvantage of the child, as Sir James Munby, President of the family division, articulated in a recent child contact case[23].

Schedule 1, LASPO would not extend to assisting them to establish citizenship or immigration status. Thus, they might secure bail on the basis that their removal from the UK was not imminent or their detention was not necessary to secure their removal, but could not directly address the basic matter that they were not properly subject to removal or, as a consequence, detention because of their being a British citizen, lawfully in the country or entitled to either status

[22] The right arises from the 1951 Refugee Convention, the Convention on the Rights of the Child and elsewhere. Both the UDHR and ICCPR emphasise that "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State*". Notably, in relation to Article 23 ICCPR, Human Rights Committee General Comment 19 outlines that, "*the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reason*." These rights are also recognised in the ICESCR, Article 10, outlining that; "*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children*." The principle of family reunification has been increasingly recognised under international humanitarian law through the 4th Geneva Convention and its Additional Protocols

[23] *Q v Q* [2014] EWFC 7 para. 19

31. The UN Convention on the Rights of the Child ('UNCRC') states that the best interests of the child must be the primary consideration of all decisions affecting them, a principle which has (to a somewhat less clear-cut extent) been recognised in domestic law. However, if parents have to appear as litigants in person because of the lack of legal aid, and if they are unable to present their case effectively or understand the law and legal processes properly, including evidence requirements, judges may lack the necessary information to ensure the outcome is in accordance with that principle. Amnesty International heard significant evidence to the effect that litigants in person often lack the skills to enforce their rights or those of their children. One woman with an ongoing case explained:

> "*I have to go to court on my own and I am so worried about them misinterpreting me. That I won't be able to explain the situation properly. It's so scary the idea that I have to go to court and face a barrister, face a judge, knowing what to say and when I should say it. The first time I went to court I had a barrister. He did it for free for me, but he can't do it again. He was really great. The judge thanked him for his help and said it was good he was there because I wouldn't have coped without it. But this time I don't have anyone. When I go to court I have to cross-examine my ex. That terrifies me. I have so many sleepless nights. If I lose I know I will blame myself, it's because I wasn't good enough, but then I think how can I be good enough when I'm up against a barrister. I just don't know if I can do it on my own and I have* looked and asked everywhere *for help but everything needs money and I don't have it. So what am I meant to do?*[24]*"*

32. Matters can be significantly more problematic for children where they may be conflicts between their and parents' interests, or simply because a parent is unable or unwilling to understand and advance a child's separate interest to their own (even if their interests are not in conflict). For example, where a family are the subject of immigration proceedings, a child may have distinct interests to one or other parent. A parent having to deal with these proceedings, which are likely to be complex and stressful, may simply not understand or recognise the child's interests. It may be assumed, including by the parent, that the child will simply follow the parent if she or he is required to leave the UK, yet this is not necessarily what the child would want or is in her or his interests. Such questions can arise in cases of children born in the UK with an entitlement to British citizenship, of which the parent is unaware or which entitlement the parent cannot afford to secure for the child due to the very high fee involved.

33. There are also serious concerns where children and young people are parties to proceedings. Article 12 UNCRC guarantees the child's right to be heard in all proceedings affecting them, yet there is not the access to justice to ensure that happens. There is no automatic entitlement to free legal aid for them, and as many as 6000 children a year[25], plus countless young people, do not have proper legal advice and support in their interactions with civil law. Young people (aged 24 and under) often find that their legal problems only become evident during the transition to adulthood, such as leaving home or education. The numbers of children needing to use the legal system includes almost 2,500 cases a year where children are the claimant and who would now have to represent themselves in immigration cases[26].

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[24] Interview 19 January 2016

[25] Figures supplied to JustRights by Ministry of Justice on 10/10/11 in response to a Freedom of Information request

[26] Children's Society, Cut Off From Justice The impact of excluding separated migrant children from legal aid June 2015

They require specialist support to engage with complex laws and legal systems. Even unaccompanied or separated children do not have a direct entitlement to legal aid. There is huge variation in local authority practice as to whether any support is offered.

34. In their Report on the UK's compliance with the UNCRC in 2016, the UN Committee observed that[27]:

> "[29]…(b)*The reforms concerning the reduction of legal aid in all four jurisdictions appear to have a negative impact on the right of children to be heard in judicial and administrative proceedings affecting them*"

> **Damian**: has been in the UK since he was three years old. When he tried to enrol into sixth form at the age of 16 he realised that his immigration status had not been regularised. He applied for indefinite leave to remain in 2013, which was turned down by the Home Office. Living in a hostel with his father, Damian was referred to the Project for the Registration of Children as British Citizens (PRCBC) who advised him to make a citizenship application. His father was unable to do this for Damian, and so PRCBC provided legal advice and support to do the application and successfully challenged the initial refusal. Damian now has British citizenship.
>
> Damian told Amnesty International on 10 May 2016: "I was totally unaware I could apply to register as British, until I was introduced to PRCBC, I could never have done that on my own. Getting the evidence for the application was actually very stressful. I had to leave school to go and seek evidence to prove I had been living in the UK all this time. People were asking me where I was going and what I was doing; that was hard. There is a lot of stigma behind being an immigrant. It's hard. Especially for young people that don't know they are undocumented and their parents also don't understand immigration law and how the system works."

Vulnerable people left without support

35. Amnesty International was given numerous examples of additional vulnerabilities that make the already challenging process of engaging effectively in legal processes without support even harder. Those include mental health, learning disabilities, low numeracy and literacy, language problems, medical conditions and alcohol and drug dependency. Those with extreme vulnerabilities have the possibility of accessing legal aid through the Exceptional Case Funding scheme ('ECF'). However, that is not, as outlined below, an effective safety net. These groups are also overrepresented users of civil legal aid, and more likely to encounter problems in the context of social welfare law, despite often being less equipped to navigate these processes to claim their rights. The government acknowledges the withdrawal of legal aid in this area would disproportionately impact upon the disabled.

36. As with immigration cases taken out of scope, the government claims that cases concerning welfare benefits are straightforward. Amnesty International UK does not agree. Again, such cases are complex. Though welfare tribunals are inquisitorial, people still need help to understand and argue their cases and obtain the correct evidence. One lawyer explained to Amnesty International that the process becomes 'interpretive' rather than inquisitorial without legal help: "*the Judge has to guess what the client means and what their concerns are*"[28]. When an individual is ill,

[27] As above

understanding how to advocate for their rights is even more challenging – the need for appropriate support to do so is recognised by human rights law in all cases, but in these, the right to non-discrimination in accessing rights is also relevant[29]. Removal of benefits can have additional serious rights implications depending on the individual's circumstances.

Ms S. has had a lifetime of mental health problems, including a diagnosis of schizophrenia and has suffered from delusions. She had been hospitalised for the past six months, but had received a notice that she had been found "Fit to Work", which put her Employment and Support Allowance at risk. She was not eligible for free legal aid that could advise her how to challenge the assessment. Her lawyer, who is representing her before the Mental Health Tribunal, told Amnesty International on 5 November 2016: "She will get no legal aid for advice as to how to deal with that and she can't manage it on her own. I can't help, I'm her representative for the mental health tribunal and that's legally aided. The other problems she might have to face alone. That's the key issue that people with serious mental health issues struggle to navigate the system. They often have a cluster of problems, debt, housing, relationship problems, and they struggle to access the advice they need."

Exceptional Case Funding – an inadequate human rights safety net

37. None of the problems identified above in accessing justice have their solution in the exceptional case funding scheme under section 10 of LASPO. That is despite the changes made since the successful legal challenge from the Public Law Project. In practice, it does not provide an effective safety net where the lack of legal aid would violate rights under the HRA 1998 or EU law.

38. Application numbers remain substantially lower than the Ministry of Justice's predicted 5000-7000 per year. There are numerous reasons for that, some of which were captured in the court's ruling in *I.S. v Director of Legal Aid Casework and Lord Chancellor.* One lies in the structure of the scheme, with structural distinctives for legal aid providers to submit ECF applications. Most organisations Amnesty International spoke to who support disadvantaged clients say they find it difficult to find solicitors willing or able to undertake them. Many people, of course, because of the problems outlined above, are simply unable to access overstretched or non-existent providers even to ask. Amnesty International's research strongly supports the view of Briggs LJ, the dissenting Judge in the case of *IS*, who concluded that the scheme as a whole was inherently unfair.

Issue 2: a culture of disrespect

[28] Interview 20 February 2016

[29] That the withdrawal of legal aid in this area engages human rights obligations has been recognised by the Committee on Economic Social and Cultural Rights, General Comment 19 Paragraph 78 "Before any action is carried out by the State party, or by any other third party, that interferes with the right of an individual to social security the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies"

Mendacious and unhelpful narratives on human rights

39. The Human Rights Act 1998 ('HRA') has brought enormous benefits to individuals, through individual cases and through the changes it has made in law-making and decision-taking by public authorities. Amnesty International UK highlighted just three of the positive deployments in its campaigning work to save the Act in 2015-16, after undertaking research into the different ways the Act has been used domestically: that of the Hillsborough families and their fight for justice; that of Celia Peachey, an ordinary woman who used the Act to hold the police to account after her mum was murdered by a violent ex-partner; and the Good Friday Agreement, with its shared emphasis on human rights playing a significant role in make the peace process credible. As Becky Shah, who lost her mother at Hillsborough told us, the Act was crucial to uncovering the truth of what happened that day, enabling the families to have a proper inquest and participate fully in it[30]:

    "*They couldn't keep us in the dark forever. Because of the determination of our campaign and because of the Human Rights Act… the light finally shone*"

40. Those stories, and the thousands of others like them, should not need to be placed on billboards and in newspaper advertisements (as Amnesty International UK felt compelled to do in 2015-16) to be appreciated and recognised. However, such has been the torrent of negative, and often disingenuous or even incorrect reporting on human rights laws and the HRA in particular over the years since its introduction, that the reality of the legislation and the positive changes it has made has been drowned out in the public narrative. This represents a significant barrier to achieving a culture which understands and respects rights, and to individuals appreciating the rights they are entitled to and how they can be enforced. When a leading newspaper runs a front-page headlined "*their rights…or yours*?" next to photos of '*terrorists and murderers*'[31], it cannot but encourage individuals to believe that rights are not for ordinary people.

41. Examples of media criticism of the HRA are too numerous to repeat. However, what needs to be underlined is first the sustained focus on reporting the 'negative' (unsympathetic claimants, controversial judgments) rulings as opposed to the vast number of un-newsworthy (or less useful to the narrative) positive cases, and second the distinction between 'criticism' and misreporting or misrepresentation. Regrettably, as research has shown[32], the overwhelming – and unrepresentative - weight of media stories are on 'negative' cases. And also regrettably, inaccurate or misleading stories (or elements of stories) are all too common. They are also commonly used as part of explicit calls to renege on the UK's human rights obligations internationally, or to repeal the HRA itself. In an article from the Daily Express in 2012, for example, it was said: "*Mr Munwar has been granted permission to remain here? Why? Because he plays cricket on Sundays*". In that same article, the ECHR was described as a "*cancer at the heart of British democracy*[33]". Any lawyer working in this field would know it is simply inconceivable that an individual could win a human rights based

[30] Interviews and information at Amnesty's microsite, www.Savetheact.uk
[31] The Sun, 27 May 2015
[32] For example, "'You Couldn't Make It Up": Some Narratives of the Media's Coverage of Human Rights' in E Wicks and K Ziegler (eds) The UK and European Human Rights: A Strained Relationship? (Hart 2015)
[33] "human rights law is undermining UK's democracy", Express, 3 January 2012 https://www.express.co.uk/comment/expresscomment/293281/Human-rights-law-is-undermining-UK-s-democracy

claim to remain in the UK based upon the fact they play cricket once a week. But to a less informed wider public, that is the kind of misrepresentation that is consistently drip-fed.

42. Perhaps the most well-known misrepresentation of human rights law in recent years became infamous not because of its being reported in the media, but from its being repeated two years later by the then Home Secretary, Theresa May MP. She claimed in a speech to Conservative party conference in October 2011 that a person had avoided deportation "*because, and I am not making this up, he had a pet cat*." At the time, her claim was refuted by the then Justice Secretary and the Judicial Office at the Royal Courts of Justice. Yet in an example of how government deployment of inaccuracies and misinformation can feed the public misperceptions, this has continued to surface time and time again as part of the media narrative – including in the same article above, where the Express asked, "*Remember Camilo Soria Avila, the gay Bolivian who was allowed to stay in Britain partly because he owned a cat with his partner*?"[34]. The simple addition of the word 'partly' does nothing to alleviate the clear misrepresentation, in an article whose misguided conclusion was that the "*only realistic option was withdrawal [from the ECHR*]" and to urge David Cameron, the then Prime Minister, to take that step.

43. It is precisely that deployment of misleading information and 'alternative facts' to bolster calls for withdrawal from the UK's human rights obligations or their watering down which is so damaging to the understanding of and appreciation for rights at home. There is a wide gulf between criticism of the principles at stake or their application, and repetition of inaccurate or misleading information to encourage abandonment of those principles.

44. Added to this narrative is the negative impact of repeated plans by this government, and other political actors across the spectrum, to scrap the HRA (now said to be on hold pending the EU withdrawal process). That has included, in 2014, a threat from the Conservative Party to withdraw from the European Convention on Human Rights altogether should the Council of Europe not accept an approach to compliance that would have significantly altered the proper understanding of that instrument[35]. Continual depictions of the HRA as a damaging instrument in need of reform are similarly damaging to the public understanding of rights in the UK. The limited proposals that have been made public for a British Bill of Rights would have watered down rights protections and enforcement at home. That is no doubt why a large number of countries raised concerns with the government during the Universal Periodic Review process at the United Nations Human Rights Committee last year, with twelve countries recommending the UK commit to ensuring its plans for a Bill of Rights did not weaken the existing framework[36].

45. It should also be noted, in this context, that the approach the government has taken to rights in the current EU Withdrawal Bill would have a significant damaging effect

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[34] as above

[35] see page 8 of 'Protecting Human Rights in the UK: conservatives' proposals for changing Britain's Human Rights Laws, October 2014: *"During the passage of the British Bill of Rights and Responsibilities, we will engage with the Council of Europe, and seek recognition that our approach is a legitimate way of applying the Convention. • In the event that we are unable to reach that agreement, the UK would be left with no alternative but to withdraw from the European Convention on Human Rights*"

[36] See Annex to the response to the recommendations received on 4 May 2017, 29 August 2017, available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBindex.aspx

on protections and enforcement in the UK. The singling out of the EU Charter on Fundamental Rights for exclusion from the rest of EU-derived law in its copy-and-paste approach to ensuring legal continuity is startling, as is the removal of the right of action based on the general principles of EU law, and the refusal to safeguard rights and equalities related EU retained law from the Ministerial pen of delegated powers under the Act. The combined effect of the first of these two will undoubtedly be to reduce rights protections in the UK, and the latter places some of what remains at risk[37]. This approach adds to the perception that rights protections are disposable.

Issue 3: judicial independence, and the importance of the ECHR as a 'living instrument'

Ensuring rights are practical and effective

46. Within the narrative of human rights as a negative concept, is a claim that they have 'gone mad', or rather, been developed and interpreted by the judiciary in ways that were not predicted when the UK signed up to the ECHR 1951.

47. That the understanding of what is protected in human life - and where rights apply - has developed since 1951 is hardly surprising. Amnesty International UK considers the living instrument principle, which allows jurisprudence to change as society changes, to be not only positive but essential. It is necessary in order for rights protection to be practical and effective.

48. Cases such as *Smith and Grady*[38], in 1999, represented the kind of progressive understanding which is so important to ensuring rights remain relevant to ordinary people. When the Convention was signed, homosexuality was illegal. The idea that article 8 ECHR would provide protections for those dismissed from the military purely on account of their sexual orientation would have thus been well outside the realm of possibility, at a time when there was significant police action against homosexual offences. Yet almost fifty years later, the Convention was used in precisely that way. It forced a change now understood to be necessary and positive, with the Ministry of Defence since apologising for their discriminatory policy at the time. A strict textual approach to rights and judicial interpretation would preclude this kind of development and (in a way that is anathema to the common law and 'always speaking' statutes) exclude critical protections for modern society and those within it.

Judicial encroachment?

49. The claim some judicial decisions have gone beyond purposive construction to change the law in ways which Parliament did not intend is essentially that made by the then Home Secretary in her February 2013 piece in *The Mail on Sunday,* and in her introduction of the Immigration Bill 2003 at Second Reading where she referred to an "*overly generous interpretation by the courts of article 8...*". The flaws in that

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[37] See Liberty and Amnesty International UK's Joint Briefing on the EU (Withdrawal) Bill for Second Reading in the House of Lords January 30/31, 2018 available at https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20and%20Amnesty%20-%20Joint%20Briefing%20on%20the%20EU%20%28Withdrawal%29%20Bill%20for%20Second%20Reading%20in%20the%20House%20of%20Lords.pdf

[38] Smith and Grady v UK App Nos. 33985/96 and 33986/96, 27 Septmeber 1999

allegation are succinctly set out in the speech of Lord Pannick in that debate[39] and are not repeated here.

Government criticism of the courts and judicial independence

50. Ready criticism has been a feature of successive administrations. It has been particularly prevalent in relation to asylum, deportation of people whose presence is deemed not conducive to the public good and consideration of private and family life in immigration decision-making.

51. In November 2006, this Committee published its report, *The Human Rights Act: the DCA and Home Office Reviews*.[40] The Committee concluded:"*...public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments (paragraphs 9-41).*" That conclusion followed from the Committee's enquiry into three matters that had sparked controversy, two in the area of immigration and asylum ('the Afghan hijackers' judgment' and 'the failure to consider foreign prisoners for deportation'). Particular public criticism of the courts and the Human Rights Act 1998, which the Committee described as being "*used as a convenient scapegoat for unrelated administrative failings within Government*", came in these two cases from the then Prime Minister and Home Secretary.

52. When considering the infamous 'cat' claim above, it is difficult to avoid arriving at the same conclusion of scapegoating as did the Committee in respect of the statements it reviewed in 2006, particularly having regard to the age of the allegation the then Home Secretary made and what followed after her conference speech: in particular, her February 2013 piece *The Mail on Sunday* ('It's MY job to deport foreigners who commit crime – and I'll fight any judge who stands in my way') and the legislation she thereafter introduced in the Immigration Act 2014 in respect of judicial assessment of proportionality where an immigration decision interferes with private or family life. Lord Pannick QC summarised this history and the malady at its heart in moving an amendment to the Bill.[41] In his speech, he quoted from a report of the Committee which described the relevant provision as "*a significant legislative trespass into the judicial function.*"

53. Similar encroachments on the role of the judiciary in this area, either attempted or implemented, include the notorious ouster clause in the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003 by which the Blair administration initially sought to exclude immigration and asylum decisions from the oversight of the higher courts; section 8 of the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004, which sought to constrain judicial capacity to treat the evidence of people seeking asylum as credible in specified circumstances;[42] section19 of the Immigration Act 2014 (Article 8 of the EHCR: public interest considerations)[43] and section 7 of the Immigration Act 2014, which seeks to restrict judicial powers to grant bail.

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[39] *Hansard* HL, 5 March 2014 : Col 1391 *et seq*
[40] Thirty-Second Report of Session 2005-06, HL Paper 278, HC 1716
[41] *Hansard* HL, 5 March 2014 : Col 1391 *et seq*
[42] *Hansard* HC, 22 October 2013 : Col 162
[43] See permission decisions of Court of Appeal in *NT (Togo) v Secretary of State for the Home Department* [2007] EWCA Civ 1431 and *ST (Libya) v Secretary of State for the Home Department* [2004] EWCA Civ 24

Issue 4: Legal independence and government interference with rights enforcement in the courts

54. Regrettably, over and above the above encroachments on the role of the judiciary, have been instances where the government's approach to meritorious litigation against it has been far from ideal.

55. Perhaps the most extreme example of this is at the centre of the judgments of the High Court in *N (Uganda) v Secretary of State for the Home Department* [2009] EWHC 873 (Admin) and *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) (upheld in [2011] EWCA Civ 1710). These cases concern policy and practice of removing people from the UK without giving them or their legal representatives notice of their removal, thereby denying the person an opportunity to consult their advisors and challenge her or his removal. In *N (Uganda),* the claimant's legal representatives were assisting him to pursue an asylum claim based on his sexual orientation. He was removed without warning to Uganda. Ultimately, he was able to renew contact with his legal representatives, and through judicial review proceedings the Home Office were required to facilitate his return to the UK where he was later recognised to be a refugee. Subsequent to these decisions, section 1 of the Immigration Act 2014 was introduced to permit the Home Office not to give notice of the specific date or time of removal. This avoidance approach to litigation to enforce rights is a particular problem for those who do not have current legal representation at the point at which they are notified of their liability to be removed since it cannot be clear to any legal representative from whom assistance is sought whether or how urgent may be any consideration of or challenge to the person's proposed removal.

56. Another egregious example relates to withholding relevant evidence or information from a claimant and the court; and related to this refusing to act on material in the Government's possession. The judgment of the High Court in *Abdi & Ors v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) revealed that the policy under which people had been detained pending deportation between April 2006 and September 2008 had not been published by the Home Office, despite internal warnings that this was likely unlawful. The policy being operated was neither disclosed to claimants seeking to challenge their detention nor courts considering such challenges. In *R (Muuse) v Secretary of State for the Home Department* [2010] EWCA Civ 453, the claimant was a Dutch national, whom the Home Office detained for several months for the purpose of deporting him to Somalia all the while refusing to consider and effectively ignoring the Dutch passport it held on his file. In *al-Sweady* v SSD [2009] EWHC 2387 (distinct from the later revealed problems on the claimants side during the public inquiry) the Court described the Secretary of State's approach to disclosure as *"lamentable*", with "*persistent and repeated*" failings to comply with his duties to the Court in a case raising article 3 concerns.

57. These concerns are not merely historical. For example, in evidence submitted to the Committee in October 2016 for a previous inquiry, the Project for the Registration of Children as British Citizens (PRCBC) highlight a failure or refusal to confirm relevant facts from Home Office files in children's registration cases.[44] The prospect of

[44] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-

person's suffering significant harms due to the Home Office refusing to disclose relevant material regarding their citizenship or immigration status is likely to be further exacerbated by the proposed immigration exemption included in the Data Protection Bill, currently before Parliament.[45]

Issue 5: the rule of law, citizenship, immigration status and access to rights

58. A key concern for Amnesty International UK is the degree to which Government, current and past administrations, manifest a lack of respect for the rule of law. This lack of respect is acutely demonstrated in relation to policy relating to citizenship and immigration, where the means to establish British citizenship or an immigration status have been fundamentally eroded at a time when the necessity of proving possession or entitlement to either has been extended into so much ordinary public and social life. Citizenship has been described as the fundamental civic right (see below), and whereas immigration status cannot lay such an exulted claim, its possession and recognition is in several ways vital to the dignity and respect of non-British citizens in the UK. If a person is impeded or prevented from proving possession or entitlement to either, this has profound human rights consequences

59. These statuses are intrinsically linked to human rights because so many protections, opportunities and privileges (for ease of reference we refer to these here collectively as 'entitlements') directly concerning respect for human rights are dependent on them. Government has failed or refused to appreciate this, what we have here referred to as 'foundational' aspect of these statuses, in introducing legislation and policy that has severely diminished people's capacity to establish their status (or entitlement to it) while equally severely expanding the harms to which they may be subjected if unable to do so.

60. Rights to citizenship and immigration status are foundational in that many other entitlements are dependent on these statuses[46]. Importantly, access to such entitlements are dependent both on having and proving the relevant status. These dependent entitlements can be categorised: First, protections from the exercise of certain state powers (e.g. immigration detention, removal and deportation); second, liberty to exercise certain rights (e.g. to work and rent accommodation); and third, eligibility to access certain state provisions (e.g. healthcare and social assistance). Immigration policy has, particularly over recent years, significantly extended the degree and range of these entitlements that are dependent on citizenship and immigration status.[47]

61. These categories all operate within the realm of human rights. The first category most immediately concerns civil and political rights, e.g. the right to liberty and security, the right to respect for private and family life and the prohibition of torture, inhuman and degrading treatment (such as where a person faces removal from the UK to a country where she or he is at risk of such treatment).

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committee/childrens-rights/written/40459.html

[45]

[46] As regards citizenship, Mitting J described it as "the fundamental civic right" in *Al Jedda* [2009] UKSIAC 66/2008

[47] This has most particularly been done through the introduction of what the Prime Minister termed a 'hostile environment' largely (though not exclusively) through measures in the Immigration Acts 2014 and 2016.

62. However, the second and third categories may concern such rights too – e.g. because the imminent consequences of not being able to support oneself, secure accommodation or access healthcare may either be so damaging to mental or physical health as to be inhuman or degrading[48] or create barriers to maintaining family life; or because these or related consequences, such as destitution, homelessness, isolation or dependency on others renders someone vulnerable to abuse and exploitation including violence, servitude or slavery. These categories also directly concern economic, social and cultural rights such as the right to work or to the highest attainable standard of mental and physical health.

63. The denial or obstruction of these entitlements on grounds relating to citizenship and immigration status also raises concerns of inequality – whether because there is no justification for discriminating on grounds of these specific statuses or because in doing or seeking to do so there is disproportionate impact on people on other grounds such as sex, race, colour or religion. Importantly, particularly as the degree and range of entitlements dependent on proving citizenship or immigration status has been greatly expanded, that disproportionate impact may be felt by people who are British citizens or settled in the UK.[49]

64. Denial or obstruction of these entitlements raises other human rights concerns particularly as regards the rights of certain protected persons including, in particular, children (e.g. whether their best interests are given primary consideration or considered at all, whether in decisions affecting individuals or in the setting of policy).

65. As we briefly describe below, the ability to access the right to possess citizenship or immigration status has been increasingly and seriously curtailed by various legislative and policy changes just as the harmful consequences of being unable to establish citizenship or immigration status have been gravely extended. In itself, this state of affairs raises profound human rights concerns.

66. The Immigration Act 2014 removed rights of appeal against many immigration decisions. Such rights are now restricted to decisions in asylum and human rights-based claims.[50] Since immigration status is foundational in the sense described here, the absence of an appeal right concerns access to justice in relation to human rights even though the relevant immigration decision is categorised as one concerning a non-human rights-based claim. This for example, includes where a person applies for permission to remain in the UK on the basis that the partner, on whose citizenship or immigration status their own status had been based, has died or has abused them. Such an application is not considered a human rights-based claim under the immigration rules.[51] There is, therefore, no right of appeal against a refusal of the application, despite the fact that a wrongful refusal of the relevant immigration status to the claimant leaves her or him at immediate risk of detention and removal, and barred from working, renting accommodation, accessing healthcare[52] or social assistance etc.

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[48] See *R v Secretary of State for the Home Department ex parte Limbuela & Ors* [2005] UKHL 66

[49] The Committee may, for example, consider the widely reported cases of Paulette Wilson and Anthony Bryan, see https://www.theguardian.com/uk-news/2017/dec/01/man-detained-threatened-with-removal-after-52-years-in-the-uk

[50] Section 82 of the Nationality, Immigration and Asylum Act 2002, as amended by section 15 of the Immigration Act 2014

[51] See Immigration Rules Appendix AR

67. The immigration rules have become so complex that despairing comments in the judgments of the senior judiciary are almost commonplace.[53] The problem of complexity is exacerbated for individuals by the frequency with which changes to rules are made, often with no effective notice for those affected. Changes can be radical. Importantly, they affect people already in the UK, many of whom must make successive applications within the rules for permission to remain temporarily. This includes people and families who are long resident in the UK, whose future, social and other ties clearly lie here, yet must successfully apply four times successively to stay for periods of 30 months before being permitted under the rules for permission to remain indefinitely. Prior to 2012, many of the people and families affected could have applied for indefinite permission to remain at the time they will now be making the first of these successive applications. Others would have been able to apply under policy outside the rules without such a protracted period of uncertainty. Changes to the rules have made far more uncertain the futures of these people, and the degree and frequency with which changes can and are made means that uncertainty continues. This is exacerbated by the high fees for each such application that must be made, fees that can be and are frequently increased with little or no effective notice.

68. There is no right of appeal against citizenship decisions, save for decisions to deprive someone of British citizenship.[54] There are, however, several legal, evidential and practical hurdles to children registering as British citizens, including where the British Nationality Act 1981 provides them a right to that status.[55] Those hurdles include very high fees.[56] It is estimated that tens of thousands of children in the UK, most of whom born in this country, are without British citizenship. Many of them are entitled to that citizenship, but unable to claim their entitlement. Yet without this status, they grow up at risk of detention and removal, and barred from working, renting accommodation, accessing healthcare or social assistance (including access to student loans and home fees for higher education) etc.

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[52] Whether because the provision of free healthcare is excluded by the National Health Service (Charges to Overseas Visitors) Regulations 2015, SI 2015/238 (as amended) or is deterred from accessing healthcare through the fear of being reported to the Home Office (a matter currently under consideration by the Health Committee in relation to NHS Digital data-sharing).

[53] An example, frequently cited in later judgments, is Jackson LJ's observation that the rules had "*now achieved a degree of complexity which even the Byzantine emperors would have envied*";*Pokhriyal* [2013] EWCA Civ 1568

[54] British Nationality Act 1981, section 40A

[55] See submission of the Project for the Registration of Children as British Citizens (PRCBC) to an earlier inquiry of the Committee (UK's record on children's rights): http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/childrens-rights/written/40459.html

[56] See joint briefing of PRCBC and Amnesty UK: https://prcbc.files.wordpress.com/2015/10/fees_briefing_revised_8_april_2017.pdf