Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

Article 39 submission to the Independent Review of Administrative Law Panel's call for evidence, October 2020

Introduction

Article 39 fights for the rights of children living in state and privately-run institutions (children's homes, boarding and residential schools, mental health inpatient units, prisons and immigration detention). We take our name from Article 39 of the UN Convention on the Rights of the Child (UNCRC), which entitles children who have suffered rights violations to recover in environments where their health, self-respect and dignity are nurtured.

Judicial review allows children, and those representing their rights and interests, to challenge the decisions or actions of public bodies which potentially breach their rights. Its importance cannot be overestimated for vulnerable children who are often extremely powerless via-a-vis public authorities and those performing public functions. We see judicial review as integral to child protection and safeguarding. It is a fundamental part of ensuring the rule of law in this country, of ensuring that public bodies of all kinds act in accordance with the law – in fulfilling their obligations towards children, when developing new law and policy and in everyday decision-making. This submission is based on Article 39's experience of supporting children who have relied on judicial review to ensure their rights are protected and upheld, and of bringing these cases ourselves as a charity. Please note, we have only answered the questions below where we have sufficient evidence from our work to inform our contribution to this review.

Section 1 – Questionnaire to Government Departments

1. **Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?**

The call for evidence asks government departments whether judicial review 'seriously impedes' the function of their work and, additionally, whether particular grounds of challenge are particularly burdensome. Article 39 disputes the suggestion that judicial review 'impedes' the work of government departments. Rather, it is our view and our experience that judicial review is a vital tool for ensuring that public bodies, including government departments, act in accordance with the law, both in policy and in practice, and that due process is followed when developing law and policy. It has helped secure a number of significant positive developments in the protection of children's rights.

For example, the case of *R (C) v Secretary of State for Justice* in 2008,[1] which came before the Court of Appeal, involved a challenge to the introduction of regulations by the government that expanded the use of physical restraint on children as young as 12 detained in secure training centres (STCs), then operated by G4S and Serco. Following the appalling deaths of two children following use of restraint, Gareth Myatt and Adam Rickwood, parliament's Joint Committee on Human Rights, serious case reviews and other investigations demonstrated that restraint was being used frequently when the law did not authorise it and that techniques were being used that were inappropriate, excessive, or positively forbidden. Instead of the government ensuring that the two private companies running the STCs complied with the existing law, new rules were introduced, with very limited consultation and with no race equality impact assessment, which broadened the context in which restraint could be used on children. The Court quashed the new rules as they were introduced without proper consultation, in particular with the Children's Commissioner for England (the statutory body for children's rights), and assessment of their impact, race equality impact assessment, as required by the Race Relations Act 1976. It also held that they should be quashed because they breached Article 3 of the European Convention on Human Rights, which prohibits torture and other ill-treatment.

This was not a case of 'seriously impeding' the work of government but of ensuring the fundamental rights of very vulnerable children in closed institutions were given proper consideration, and that the government was acting in accordance with international and domestic law, both in terms of protecting children, but also in how it develops new legislation. Judicial review will only be successful if the government is found to have acted unlawfully.

This process of accountability is ongoing – law, policy and practice does not remain consistent over time. More than a decade ago in the *C* case (above), the Court of Appeal affirmed that if new legislation reflects a significant change of policy in relation to children there should be wider consultation prior to its introduction, in particular with the Children's Commissioner for England. Yet, this was one of the grounds to a judicial review brought this summer by Article 39 against the Secretary of State for Education in response to regulations introduced in light of COVID-19. On 23 April 2020, The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (known as Statutory Instrument 445)[2] were published without any form of public consultation or time given for Parliamentary debate. They came into force the very next day. In the High Court, Mrs Justice Lieven found that Article 39 was correct to warn that vital safeguards for children in care were removed or diluted overnight in April and that these were not just "administrative burdens", as the Department for Education had described them.[3] Documents released by the Department for Education in fulfilment of the duty of candour revealed that its engagement with a select number of local authorities and organisations about removing legal protections had been deliberately conducted privately, which raises significant concerns about public policy-making in the future. We were also able to see the limitations of information and advice given to government ministers by officials concerning legal protections protection and child safeguarding. At the time of writing the Court of Appeal has yet to hand down its judgment.

Furthermore, our interpretation of human rights must be constantly evolving, must respond to changing societal contexts, changes in technology and changes in awareness of who is vulnerable to

[1] [2008] EWCA Civ 882 (28 July 2008) at https://www.bailii.org/ew/cases/EWCA/Civ/2008/882.html
[2] https://www.legislation.gov.uk/uksi/2020/445/contents/made
[3] *Article 39 v Secretary of State for Education*, [2020] EWHC 2184 (Admin) at https://www.bailii.org/ew/cases/EWHC/Admin/2020/2184.html

human rights abuses and to new risks. Judicial review plays a key part in ensuring that successive governments continue to review existing law, policy and practice.

To return to the issue of restraint – 10 years after the case above, Article 39 lodged a judicial review application with the High Court challenging the Government's decision to allow escort officers working for the private contractor GEOAmey to inflict pain on children during their journeys to and from secure children's homes. Staff working *within* secure children's homes are prohibited from using such techniques, which Department for Education statutory guidance states can never be proportionate.[4] Following the application, the Justice Minister announced that Charlie Taylor, the then Chair of the Youth Justice Board, had been appointed to lead a review of the authorisation of pain-inducing restraint techniques on children detained in young offender institutions and secure training centres, and during escort to these prisons and secure children's homes. The Charlie Taylor Review was the first time Ministers had commissioned a stand-alone investigation of the deliberate infliction of pain on vulnerable children as a form of restraint, and this only happened as a direct result of our legal challenge. The Taylor Review found the use of pain-inducing restraint in child prisons to be "an acceptable and normal response rather than what [it] should be, the absolute exception".[5] The government accepted the review's recommendation that pain-inducing techniques no longer be part of the core restraint syllabus – within the institutions themselves as well as during the secure escorting process. But this unlawful and abusive treatment of children has been continuing for decades and it took the threat of legal action to prompt the review.

Judicial review is also not simply about ascertaining whether or not a body has acted unlawfully, but can help clarify the law and assist authorities in carrying out their duties more effectively.

A clear example of this evolving protection can be seen in cases concerning the age of children and young people in the asylum system. Many children seeking protection in the UK are unable to show how old they are as they do not have the required identification documents. It is also very challenging to assess a child's age as within different ethnic and national groups there are wide variations in children's growth and the onset of puberty, and young people may look and act older as a result of their experiences in their country of origin, or harrowing journeys to the UK. Judgements on age might be made by Home Office officials or social workers, but if detailed assessments are not carried out appropriately, children can spend years without care, access to education or appropriate support, or end up at risk in unsupervised accommodation with adults or in adult immigration detention centres with many cases going unchallenged.

At present, the only effective way to dispute an age assessment carried out by a local authority is to apply for permission to the High Court to bring a judicial review to challenge the local authority for failing to undertake its statutory duties fully and correctly. Prior to 2009, if the court found that the assessment had not complied with the necessary criteria for it to be deemed lawful, the original assessment would have to be set aside and the local authority would have to carry out a new assessment. Since the Supreme Court judgment in *A v Croydon* in 2009,[6] an assessment is still

[4] Department for Education, Guide to the Children's Homes Regulations including the quality standards, April 2015 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/463220/Guide_to_Children_s_Home_Standards_inc_quality_standards_Version__1.17_FINAL.pdf

[5] Taylor, C., A review of the use of pain-inducing techniques in the youth secure estate, June 2020

[6] *R (on the application of A) v London Borough of Croydon and one other; R (on the application of M) v London Borough of Lambeth and one other* [2009] UKSC 8

addressed as part of a judicial review, but it now falls to the court to decide the age of the young person, not only determining whether they are a child or an adult, but also ascribing a date of birth.[7] The Administrative Court hears applications for permission and examines whether it is arguable that the claimant is younger than the local authority's assessment. If it is arguable, the case can proceed.[8] The court's decision is then binding on the local authority and also the Home Office.

The process of judicial review has resulted in a number of significant judgments, the first being *R (B) v Merton London Borough Council*[9] providing further clarity on how an age assessment should be undertaken, such that practice in this country is arguably much further developed than in a number of other European countries[10] – this case law and the key developments are all captured in guidance on age assessment issued by the Association of Directors of Children's Services.[11]

Judicial review has also ensured the positive development of Home Office policy and practice. For example, the Home Office significantly revised its age assessment guidance following a Court of Appeal finding that its policy regarding age disputes was unlawful.[12] This case involved a young Eritrean child who arrived in the UK in March 2014 and said he was 16. Immigration officers believed that he was substantially over 18 and he was held in immigration detention for many months. In September 2015, an assessment carried out by two independent social workers found his date of birth to be as claimed by him on arrival. For nearly a decade, organisations working with children had highlighted their concerns to the Home Office regarding its policy allowing for a child to be treated as an adult[13] if their "physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age" and detained, in light of research, guidance and case law emphasising that physical appearance is not an accurate basis for the assessment of a person's age. The Home Office did not act on these long shared concerns and it took judicial review to secure positive change for vulnerable children. The Court of Appeal highlighted the damaging effects of children being detained and found that Home Office policy significantly increased the risk of children being unlawfully detained as adults.

To give a final example of the importance of judicial review in clarifying the legal obligations of public bodies – in 2019, Article 39 intervened, with The Care Leavers Association, in the case of *Poole Borough Council v GN.*[14] The case involved two children, aged 9 and 7, who were placed by Poole Borough Council in a house on an estate with their mother. One child has severe mental and physical disabilities. They sought damages for the physical and psychological injuries sustained as a result of ongoing harassment and abuse from their neighbouring family, which the authority failed to address. Although their individual case was unsuccessful, the Supreme Court concluded that a local authority *could* be liable for a failure to protect vulnerable children from abuse or neglect, whether the child is

[7] In 2010, age assessment cases began to be transferred to the Upper Tribunal of the Immigration and Asylum Chamber (UTIAC) although the Administrative Court still retains the power to hear cases if it so wishes.

[8] *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, at http://www.familylawweek.co.uk/site.aspx?i=ed79599

[9] [2003] 4 All ER 280. Lawful age assessments are commonly referred to as 'Merton compliant'

[10] https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf

[11] https://adcs.org.uk/safeguarding/article/ground-breaking-practice-guidance-on-age-assessment-published , section N 'Legislation and case law'

[12] *BF (Eritrea) vs Secretary of State for the Home Department* [2019] EWCA Civ 872 at https://www.bailii.org/ew/cases/EWCA/Civ/2019/872.html

[13] See for example, Coram Children's Legal Centre, Happy Birthday? Disputing the age of children in the immigration system, 2013 at https://www.childrenslegalcentre.com/report-happy-birthday-disputing-age-children-immigration-system/ and Refugee Council Not a Minor Offence, 2012 at https://www.refugeecouncil.org.uk/information/resources/not-a-minor-offence-unaccompanied-children-locked-up-as-part-of-the-asylum-system/

[14] [2019] UK SC 25, at https://www.supremecourt.uk/cases/docs/uksc-2018-0012-judgment.pdf

officially in the authority's care or not. This had very important implications for many children, including those living in a variety of institutional settings and care leavers. After the judgment was handed down, many abuse and negligence cases against local authorities that were put on hold pending a decision could then progress.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

For vulnerable children there are numerous impediments to their challenging breaches of their human rights – particularly if they are living away from their family and in institutional settings where they fear the consequences of raising concerns or do not know that their treatment breaches the law. This was epitomised in a challenge brought by the Children's Rights Alliance for England following the widespread unlawful restraint of children in secure training centres from when they first opened in 1998, which was confirmed by the High Court.[15] Mr Justice Foskett found:

> *I do not think that there is any true or realistic alternative to the conclusion (a) that probably up until July 2008 (and possibly, though unlikely, for another two years thereafter) there was widespread unlawful use of restraint within the STC system and many children and young persons were subjected to such restraint and (b) that very few, if any, of those who were subject to such unlawful restraint appreciated at the time that it was unlawful [91].*

The dependency of children, including very young children and disabled children, was one of the reasons the Committee on the Rights of the Child built into its Optional Protocol to the Convention on the Rights of the Child on a communications procedure the facility for others *acting on behalf of children* to bring complaints. Five years ago the Joint Committee on Human Rights highlighted the importance of an independent complaints mechanism to the UN Committee for children because "they are particularly vulnerable to rights abuses" and that "with the recent reforms to legal aid, there are growing concerns about the extent to which children enjoy practical and effective access to the legal remedies that do exist in domestic law."[16] The UK, however, has not signed up to this protocol. We believe it should and that provisions in law should be made for organisations representing the rights of children to bring claims on their behalf – in prescribed circumstances.

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Any attempt to capture the grounds of judicial review and put these into legislation should only proceed if to do so would make the existing law clearer and more accessible for citizens. We are concerned that such an endeavour could lead to a retraction of rights rather than, as the question indicates, making the law certain and clear. Given the complexity of codifying the grounds of judicial review, there is a substantial risk that 'codification' might narrow the grounds on which judicial review can occur.

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[15] https://www.bailii.org/ew/cases/EWHC/Admin/2012/8.html

[16] Joint Committee on Human Rights, The UK's compliance with the UN Convention on the Rights of the Child Eighth Report of Session 2014–15, March 2015, para 37 at https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

As a children's rights organisation, we are clear about the decisions and powers which can be subject to judicial review. We would be deeply concerned about certain decisions being removed from the ambit of judicial review – because of the threat this could pose to children's rights and well-being and for its negative impact on the rule of law and democracy.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

In Article 39's experience, the process of making/responding to/appealing a judicial review claim is sufficiently clear to lawyers but not to individuals who may need use judicial review to challenge public body decision-making, particularly children and young people. Part of the solution to this problem lies in public legal education and developing people's understanding of the law. Though not strictly about the law on judicial review we urge the Panel to consider the necessity of professionals working directly with children understanding the role, importance and practicalities of judicial review in ensuring children are properly protected and their rights upheld. There are some statutory roles - for example independent reviewing officers for looked after children and independent advocates for children in contact with health, social care, education and criminal justice systems - where government could play an especially positive role in awareness-raising. This could be achieved through amendments to relevant government guidance and government funding for training courses, for instance, as well as government ministers across different departments consistently making encouraging public statements.

Legal aid is also a key factor in ensuring individuals understand and access judicial review as a remedy. The legal aid system was based on the belief that every person should have equal access to and protection under the law, regardless of financial position or status. However, the areas of law to which legal aid apply have been progressively narrowed, threatening children's and young people's access to justice. Prior to April 2013, legal aid was available to help people access justice in almost all aspects of civil law, with some narrow exceptions.[17] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) overhauled the legal aid system, significantly reducing the areas of law and types of legal work which legal aid can cover. Areas of law that were removed from scope included employment, education (except for cases of special educational needs), non-asylum immigration, private family law, many debt and housing cases, and most welfare benefits cases.[18] This drastic reduction in the scope and availability of legal aid has had a significant impact on children's access to justice, and access to judicial review.

For example, there is a wealth of evidence about the unaddressed root causes of school exclusions, including institutional racism, and the long-term negative impact they have on children, including the

[17] The Access to Justice Act 1999 provided that work was in scope for legal aid unless specifically excluded by Schedule 2 of the Act, e.g. boundary disputes 1(c), the making of wills 1(d), and matters of trust law 1(e). This is in contrast to LASPO, which says only work explicitly included in Schedule 1 is in scope

[18] Everything was removed from scope unless it was specifically listed, whereas previously, everything was in scope unless it was specifically excluded.

impact on mental health and the risk of exposing children to harm.[19] The only legal remedy for a child who is unlawfully excluded from school is judicial review. Yet legal aid is no longer available for most education issues so a child's parents or carers cannot get funding help with any of the stages that might be necessary *prior* to the judicial review. They would then need to have a sufficient understanding of the system to know that their case is within the scope of legal aid and the action can be taken.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

The time limit for making an application for judicial review is already short (it must be brought "promptly", and in any case no more than 3 months after the initial decision is made). In a number of areas involving children this can be problematic, not least because in that time frame they will also need to secure legal representation, to apply for legal aid (where appropriate), and to gather evidence in support of their claim. For example, a child seeking asylum who has been assessed to be an adult may then be 'dispersed' to a different part of the country to accommodation with adults where they will have no existing networks and no longer have support from children's services. It can be extremely challenging for children in these circumstances to understand their rights and what action they can take.

It is Article 39's view that to reduce the time limit for lodging a judicial review further would leave substantially more vulnerable children unable to challenge decisions made about their lives and undermine their access to justice. It is important to reiterate that challenges to decisions brought by vulnerable children – who are in care, custody or detention for example – typically concern fundamental matters relating to their safety, well-being and feelings of security and attachment with others. Changes to the law on judicial review which further limit children's access to justice could have an extremely deleterious impact on child protection and safeguarding.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

We have not experienced any leniency ourselves regarding costs in judicial reviews.

As in most types of litigation, the unsuccessful party to a judicial review claim will normally be required to pay the successful party's costs. These can run into six figures. While Article 39 has brought cases in which we have successfully obtained costs caps, the risk of paying the government's costs as well as our own is already a significant barrier to pursuing a judicial review.

[19] See for example Timpson Review of School Exclusion, May 2019 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807862/Timpson_review.pdf; The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf.

Our recent appeal to the Court of Appeal, concerning the failure of the Education Secretary to consult organisations concerned with the rights and interests of children in care before deleting and diluting 65 safeguards, secured a costs cap but this was much higher than we asked for - £10,000 instead of £3,000. We are a tiny charity, with only three members of staff (two of whom are part-time). This is a case of enormous significance for vulnerable children. Yet the Department for Education opposed the cost cap.

We would only ever consider bringing or supporting cases where this is necessary to protect the rights of vulnerable children. However, it is not always clear to us that a government department or other authority has sought to legally defend a particular policy or action because this (in their view) benefits children.

The deterrence of having to pay costs is all the more evident for individuals who wish to bring a case, irrespective of the merits, and again the interplay between access to legal aid and judicial review is relevant.

8. **Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?**

The current system already works to address 'unmeritorious' claims. Usually a lawyer will have already advised on the merits of the claim and the claimant must convince the court that they have an arguable case in order to be granted permission to proceed to a full hearing. In addition to the existing mechanisms, it is worth noting that cases may develop over time as, for example, information is disclosed by the government. Any additional process to determine cases that may be 'unmeritorious' at the outset therefore risk creating further barriers to access to justice.

9. **Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?**

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10. **What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?**

It is our experience that more could be done by decision makers to improve their policy and practice, and responsiveness when concerns are raised about a child's rights and well-being, and this would go a long way to reducing the need for judicial review.

For example, the Home Office is a government department that faces a high volume of judicial reviews of its decision-making in asylum and immigration cases. A proportion of those relate to children and those working with children and young people have repeatedly highlighted concerns about the (lack of) consideration of children's best interests in decision-making in applications

from children or families. One of the concerns raised in recent years was the significant gap in time between key judicial decisions and guidance being amended to reflect those judgments. For example, the Supreme Court judgments *ZH Tanzania* and *Zoumbas*, in 2011 and 2013 respectively,[20] gave detailed guidance on the weight to be given to the best interests of children in decision-making concerning them. Yet, in 2015, the Home Office's Asylum Instruction had still not been amended to reflect the importance and weight which the Courts had attached to the primacy of best interests under Article 3 of the UNCRC. The UN Committee on the Rights of the Child, in its 2016 concluding observations, recommended that the UK ensure that the rights of the child to have his or her best interests taken as a primary consideration "is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children". [21]

In September 2017, the Independent Chief Inspector of Borders and Immigration published the findings of its inspection into the Home Office's mechanisms for learning from litigation in order to improve decision-making and the way claims are handled. While recognising that ultimately the actions of claimants and the Courts are not within its control, the report highlighted that if the Home Office is to have greater influence over the costs and other consequences of litigation "it needs to make a more deliberate and determined organisational effort to learn lessons from the claims it receives, and to apply these systematically".[22] As well as identifying further improvements the Home Office could make in the processing of claims, the Chief Inspector highlighted "the need for clearer communication to decision makers in other units about litigation outcomes in order to avoid the same issues giving rise to repeated claims". It is not reasonable to expect caseworkers to make the right decisions in these cases if the guidance provided by central government is not legally accurate and not promptly revised following significant legal judgments.

To give a different example – we have seen a change in government policy on legal aid for separated children that was prompted by litigation but this need not have reached that stage if evidence-based policy making had been pursued. During the passage of LASPO, NGOs and others raised concerns that the government had not considered the impact of the changes specifically on children and young people,[23] and it had not looked at the potential impact on children's rights under the UN Convention on the Rights of the Child. This was despite an overarching government commitment (in December 2010[24] and since renewed) to give due consideration to the treaty's obligations when making new policy and legislation affecting children. A significant area of concern was unaccompanied children who would no longer have legal aid for their immigration cases. Children could not be expected to navigate these complex legal issues without professional representation and without legal aid for their cases the costs of legal advice would likely fall to the

[20] *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4 and *Zoumbas v Secretary of State for the Home Department*, [2013] UKSC 74

[21] http://www.crae.org.uk/publications-resources/un-crc-committees-concluding-observations-2016/

[22] Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office's mechanisms for learning from immigration litigation, April – July 2017, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677560/An_inspection_of_the_Home_Office_s_mechanisms_for_learning_from_litigation.pdf

[23] Parliamentary Question on 7th June 2011: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110607/text/110607w0006.htm#11060826003959

[24] Written Ministerial Statement from the Department for Education in response to the independent review of the Children's Commissioner: https://www.theyworkforyou.com/wms/?id=2010-12-06a.5WS.1

local authorities caring for them.

Since the changes were introduced, the Justice Select Committee, the Joint Committee on Human Rights and Office, the Children's Commissioner for England and the Committee on the Rights of the Child have all criticised the removal of legal aid from children's cases.[25] A number of NGOs also published reports highlighting the negative impact on unaccompanied migrant children.[26] Despite this issue being raised, and evidenced, repeatedly over the course of seven years, it took the additional threat of legal action, in the form of a judicial review against the Ministry of Justice brought by The Children's Society, before the government announced it would restore legal aid for unaccompanied children's immigration cases.[27]

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

In a number of cases concerning children, such as cases brought against local authorities regarding the treatment and care of looked after children, the authority will settle at an early stage in proceedings in favour of the claimant. This will be because they realise there is a strong and valid case and they are not fulfilling their statutory obligations to the child. Although it does beg the question whether more could be done to improve practice such that the threat of judicial review was not necessary, settlement prior to 'trial' is part of the judicial review mechanism. It can also contribute to improvements in the policy and practice of public bodies.

In 2019, Article 39 brought a case against the Secretary of State for Education in response to a misleading document about local authority duties towards vulnerable children which the Department for Education refused to withdraw. The document, produced by the Department for Education's (DfE) children's social care innovation programme, claimed to expose myths in common understandings of council legal obligations towards vulnerable children. It presented a series of questions with advice from the government department about the minimum actions which local authorities were allowed to take. Article 39, together with other children's law experts, identified numerous errors and misrepresentations of the statutory framework for children's social care.

Most of the so-called 'myth-busting' topics concerned the protection given to children in care such as the frequency of visits from social workers, who is responsible for planning and supervising children's care and the support given to foster carers. The guide significantly weakened the

[25] Joint Committee on Human Rights, 'Human rights of unaccompanied migrant children and young people in the UK First Report of Session 2013–14', June 2013, https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf; House of Commons Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15', at https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf; The Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc: CRC/C/GBR/CO/5 3 June 2016, para 29; The Children's Commissioner, The impact of changes to legal aid on children since 2013, 2014, at https://www.childrenscommissioner.gov.uk/report/impact-on-children-of-legal-aid-changes/

[26] See, for example, Amnesty, Cuts that hurt: The impact of legal aid cuts in England on access to justice, 2016, at https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf; Coram Children's Legal Centre, Rights without remedies: legal aid and access to justice for children, 2018, at https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf

[27] https://questions-statements.parliament.uk/written-statements/detail/2018-07-12/HCWS853

existing legal protections for children.[28] The document was published two years after the government tried to introduce what came to be known as the exemption clauses in the Children and Social Work Bill, which would have allowed individual councils to opt-out of their social care duties towards children and families**.**

Article 39 and 49 other charities and social work experts wrote to the Children's Minister months beforehand warning that the document contained numerous inaccuracies and risked vulnerable children and care leavers losing vital support, but it took the threat of judicial review to secure change. In response to the legal challenge, before the case was heard, the DfE withdrew the document and committed to notify local authorities and others that the document had been withdrawn. It also confirmed that any plans to issue a similar document in the future would follow a consultation process that included relevant organisations and children and young people who may be directly affected.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

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13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

The majority of judicial review cases are brought by individuals but where it is not possible or appropriate for an individual victim to do this, organisations and charities can be granted "public interest standing" to bring the case. As outlined in the answer to question 2, often children are unable to challenge abuses themselves and Article 39 has brought several cases on behalf of children where is had felt ethically questionable to actively seek a highly vulnerable individual child who could bring the challenge**.** We believe it is essential that this option continues as a means of challenging public body decision making, and would go further to suggest that provisions in law should be made for organisations representing the rights of children to bring claims on their behalf – in prescribed circumstances (as stated in our answer to question 2).

'Public interest' cases must abide by the same rules as all other judicial review claims and must have sufficient merit. We consider that introducing stricter rules would seriously impact on positive use of the law to protect the rights of vulnerable children.

For more information, please contact:
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[28] For example, local authorities were advised that they could reduce visits to children in long-term foster care to twice a year, yet the law states this is only permissible if the child gives their consent. This ensures young children, and other children unable to understand the implications of relaxing council monitoring of their care, continue to be visited regularly by social workers. The guidance also suggested that councils did not have to offer a return home interview to children who have run away or gone missing, or appoint separate social workers to foster carers and children in long-term placements.