Mental Health and Immigration Detention Action Group
Response to *Transforming Legal Aid Consultation*

Introduction

1. The Mental Health and Immigration Detention Action Group (MHIDAG) was set up in response to profound and on-going concerns about the ill-treatment of immigration detainees with mental health problems. It is a voluntary and unfunded group with a membership of lawyers, health professionals, ex-detainees and NGO workers. The group is chaired by Dr Hilary Pickles, who has significant experience working in health policy as a doctor and for the Department of Health. The other members of the group are:

    1) Professor Cornelius Katona, Consultant Psychiatrist, Royal College of Psychiatrists and Helen Bamber Foundation
    2) Emma Mlotshwa, coordinator, Medical Justice
    3) Theresa Schleicher, casework manager, Medical Justice
    4) Natasha Tsangarides, research, Medical Justice
    5) Michelle Warner-Borrow, finance and administration, Medical Justice
    6) Martha Spurrier, barrister, Mind
    7) Stephanie Harrison QC, barrister, Garden Court Chambers
    8) Sue Willman, Partner, Deighton Pierce Glynn Solicitors
    9) Hamish Arnott, Partner, Bhatt Murphy Solicitors
    10) Jed Pennington, solicitor, Bhatt Murphy Solicitors
    11) Camilla Graham-Wood, solicitor, Birnberg Peirce and Partners Solicitors
    12) Khuluza Mlotshwa, ex-detainee and law student
    13) Aisha Kabejja, ex-detainee and student

2. The group's terms of reference are as follows:

    The Mental Health and Immigration Detention Action Group (MHIDAG) is a voluntary and unfunded group with a membership of lawyers, health professionals, ex-detainees and NGO workers.
    The MHIDAG:
    - *is seriously concerned about the mental health of those held under Immigration Powers;*
    - *considers that aspects of the current detention and healthcare policy and their current implementation are detrimental to the mental health of immigration detainees; and*
    - *and will be marshalling evidence and submissions to influence a change for the better for both individual detainees and detainees as a whole.*

    The MHIDAG will do its work through collaborative discussion and information exchange and through influencing external bodies.

3. At the outset, MHIDAG asserts it concerns about the short time frame in which this consultation has taken place: a mere eight weeks, including two Bank Holidays. This is insufficient time to meaningfully engage with the consultation, which contains detailed,

lengthy and wide-ranging proposals with serious implications for access to justice for disadvantaged groups and individuals.

4. Of equal importance is the unavailability of relevant statistical information in support of the proposals. MHIDAG is aware of the letter sent to the Ministry of Justice by the Public Law Project on 22 May 2013[1] demanding the data that is said to justify these proposals. MHIDAG endorses the Public Law Project's view that without this data it is impossible to meaningfully engage with this consultation: the proposals, which will have wide-ranging, profound and differential impacts on access to justice for disadvantaged groups and individuals, have not been justified by reference to empirical data. In the absence of this data, MHIDAG is not able to assess either the necessity or proportionality of the proposals nor whether they are rationally connected to their stated aim.

5. MHIDAG has serious concerns about the implications of these proposals for immigration detainees with mental health problems. In order to understand these concerns, it is necessary to understand the reality of mental illness in immigration detention. Immigration detainees form a large and growing group of vulnerable people in the United Kingdom who are particularly susceptible to mental illness. The statutory immigration detention powers permit the executive to detain migrants in various circumstances, principally pending removal and deportation from the UK. There is no automatic oversight by the courts. The powers are not time limited. The powers have in recent years been used with increasing frequency and for longer periods of time. Cases have come before the courts where individuals have been detained for periods of 4-5 years.[2] Detention for periods exceeding one year is not at all uncommon. In 2012 the number of immigration detainees rose by 14 per cent to 3034, the highest since comparable data began to be collected in 2001.[3]

6. Findings consistently report high levels of mental illness among immigration detainees. High proportions of immigration detainees display clinically significant levels of depression, post-traumatic stress disorder (PTSD), anxiety, intense fear, sleep disturbance, profound hopelessness, self-harm and suicidal ideation. In a study monitoring immigration detainees over a nine month period, 85 per cent reported chronic depressive symptoms, 65 per cent reported suicidal ideation, 39 per cent experienced paranoid delusions, 21 per cent showed signs of psychosis and 57 per cent required psychotropic medication.[4] In a study reported in *Forensic and Legal Medicine*, Juliet Cohen found that the estimated percentage of self-harming in Immigration Removal Centres during a twelve month period was 12.79 per cent, compared with between 5 and 10 per cent in the prison community.[5]

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[1] Available here: http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf

[2] See, for example, *R (Sino) v SSHD* [2011] EWHC 2249 (Admin) (4 years and 11 months) and *R (Mhlanga) v SSHD* [2012] EWHC 1587 (Admin) (5 years 2 months). Mr Sino and Mr Mhlanga would not have met the proposed residence test

[3] *HM Inspectorate of Prisons for England and Wales, 2011-2012,* p.11.

[4] "Mental health implications of detaining asylum seekers: systematic review", *British Journal of Psychiatry* 2009, Katy Robjant, Rita Hassan and Cornelius Katona, p.307.

[5] "Safe in our hands? A study of suicide and self-harm in asylum seekers", *Forensic and Legal Medicine* 2008, Juliet Cohen, p.237.

7. Mental health care in immigration detention is often woefully inadequate. Reports from independent monitoring bodies such as the HM Inspectorate of Prisons (HMIP), have consistently and routinely found profound failures in the care of the mentally ill detainees in immigration removal centres. By way of example only, in 2009 HMIP described its report on Tinsley House IRC as "deeply depressing". It found that there was no regular input from community mental health teams and there was a lack of active nursing input for detainees with severe mental health needs, giving the following example:

> "We found a lack of nursing input into the care of one detainee who had become agitated and distressed. Although she was subsequently seen and treated by a psychiatrist, a nurse who had been on duty since 7am told us at 2:15pm that he had not yet seen the detainee that day. There was also no documented care plan for this detainee, which was unacceptable practice."

8. In 2010 HMIP described Brook House IRC as follows:

> "[W]e were disturbed to find one of the least safe immigration detention facilities we have inspected, with deeply frustrated detainees and demoralised staff, some of whom lacked the necessary confidence to manage those in their care. At the time of the inspection, Brook House was an unsafe place."

9. In 2011 the HMIP inspection of Harmondsworth IRC identified the following concerns, among many others:

> "A major area for on-going concern was health care, which remained a source of considerable complaint from detainees. Mental health needs were under identified and the inpatients department was described by staff themselves as a 'forgotten world'. The poor service we witnessed the last time we visited was still evident in many respects […]"

10. In the last two years the High Court has found four breaches of the absolute prohibition of inhuman and degrading treatment in Article 3 of the European Convention on Human Rights arising out of the treatment of mentally ill detainees in immigration detention: *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120; *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748; *R* (*D) v Secretary of State for the Home Department* [2012] EWHC 2501; and *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979. This is unprecedented. The cases that gave rise to these most serious of human rights violations were all brought before the High Court by way of judicial review.[6]

11. The gravity of these findings has been identified by the Home Affairs Select Committee's report *The Work of the UK Border Agency* (April – June 2012) HC 603, where it stated at [15]: '[w]e are concerned that the cases outlined above may not be isolated incidents but may reflect more systemic failures in relation to the treatment of mentally ill immigration detainees', and in *The effectiveness and impact of immigration casework* December 2012, a joint inspection report by HMIP and the Independent Inspector of Borders and Immigration, where it is stated in the introduction that '[t]here was little evidence of the

[6] They reflect a significant number of other judicial review cases challenging the lawfulness of immigration detention and its compatibility with Article 3 ECHR, which have been resolved through settlement without the necessity for a court hearing.

effectiveness of Detention Centre Rule 35 procedures, which are supposed to provide safeguards for vulnerable detainees, including those who have mental illnesses.'

12. It is in this context that MHIDAG responds to the proposals in this consultation and it urges the Ministry of Justice to have regard to the extreme vulnerability of immigration detainees, the fundamental right to liberty under our common law and the need to ensure that those who suffer abuses of their human rights at the hands of public authorities like the UK Border Agency (as it was) have a means of redress and vindication before an independent court so as to uphold the rule of law in the United Kingdom.

13. In its response to this consultation, MHIDAG confines its answers to those questions that fall within its expertise and concern. The absence of a response to any other question in this consultation should not be taken to mean that MHIDAG supports the proposal.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

14. MHIDAG does not agree with this proposal.

15. First and foremost, MHIDAG reminds the Ministry of Justice that the means and merits tests that already apply to the grant of legal aid ensure that immigration detainees who either have funds or have an unmeritorious claim, are prevented from accessing public funding. The cases that are funded are by definition meritorious and by definition brought on behalf of a person who cannot afford to pay for legal advice or representation. There should therefore be no illusions that this proposal is primarily about abusive claims: it is not. It will prevent meritorious claims from reaching the courts and deny the scrutiny and accountability that mechanisms like judicial review enforce upon executive decision-making. Furthermore, it undermines the fundamental principle of the rule of law that everyone within the jurisdiction is equal before the law.

16. This proposal would remove the majority of immigration detainees from the scope of legal aid: the asylum seeker exception will not apply to the majority of immigration detainees, most of whom are detained because they have exhausted their legal remedies under the immigration process. This is of profound concern to MHIDAG. As stated above, immigration detainees are some of the most vulnerable members of the UK population, with particular susceptibility to mental illness. The evidence from the courts and the monitoring bodies demonstrates that mentally ill immigration detainees are not adequately safeguarded in the immigration detention estate. Furthermore, detainees in the UK are often held for long periods of time: cases of detention of four or five years are not uncommon.[7] This may be contrasted with the position across the rest of the European Union, where Article 15 of the Returns Directive (2008/115/EC), from which it is noteworthy that the UK has opted out, restricts immigration detention to six months with an exceptional extension period of a further twelve months.

[7] See, for example, R (Sino) v SSHD [2011] EWHC 2249 (Admin) (four years and 11 months) and R (Mhlanga) v SSHD [2012] EWHC 1587 (Admin) (five years two months).

17. For many mentally ill detainees, the longer the period of detention, the more their condition deteriorates: a research study identified in a recent review found that a higher proportion of those who had been detained in excess of six months met the diagnostic criteria for PTSD, depression and moderate to severe mental health related disability than those who had been detained for shorter periods or had not been detained at all.[8] Another study found that "prolonged detention exerts a long-term impact on the psychological wellbeing" of detainees.[9]

18. The only way for mentally ill detainees to ensure that they have access to the treatment to which they have a right, and to ensure that the UK Border Agency complies with its policy that mentally ill detainees should be detained only in very exceptional circumstances, is by way of judicial review, habeas corpus or applications for temporary admission and release or bail in the First-Tier Tribunal (Immigration and Asylum Chamber).

19. Without legal aid, mentally ill detainees will not be able to bring the kinds of meritorious challenges that have resulted in policy changes, findings of unlawful detention and findings of human rights violations in the past.

20. Detainees cannot represent themselves because they are detained. This means that they do not have access to legal resources, advice centres, charities, NGOs and MPs surgeries in the way that other potential litigants might. The vulnerability of the detained, and the practical difficulties of accessing legal advice, has been recognised by the European Court of Human Rights.[10] They were also recognised in the 2010 Ministry of Justice consultation *Proposals for the reform of legal aid in England and Wales*:

> "4.53 We consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the required standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused… the determining factor [for retaining legal aid] is the role of such cases in ensuring the power of public authorities is not misused…
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> […]
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> 4.83 In these cases, the issue at stake – the appellant's liberty – is extremely important. We do not consider that there are sufficient alternative forms of advice or assistance, or alternative sources of funding, in relation to these issues to justify the removal of legal aid. Nor do we consider that these cases are ones in which the individual could be expected to resolve the issue themselves.

[8] Cited in "Mental health implications of detaining asylum seekers: systematic review", *British Journal of Psychiatry*, 2009, Katy Robjant, Rita Hassan and Cornelius Katona, p.308.
[9] "Impact of immigration detention and temporary protection on the mental health of refugees", *British Journal of Psychiatry,* 2006, Zachary Steel, Derrick Silove et al, p.61-63.
[10] See for example, *Winterwerp v the Netherlands*, *Megyeri v Germany*.

> 4.84 Given the importance of the issues at stake, and the absence of other routes to fund or resolve them, we therefore consider that legal aid is justified and propose that cases involving challenge to detention under immigration powers should continue to attract legal aid for advice and representation before the First-tier and Upper Tribunals, and higher courts…"

21. That assessment was correct then and remains correct now.

22. Furthermore, detainees with mental health problems are likely to be even less capable of representing themselves than healthy detainees, particularly in cases concerning access to treatment where a detainee's condition has been allowed to deteriorate to such a degree that s/he is psychotic, suicidal, manic or refusing food and fluid. Such was the case in *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979, which concerned a mentally ill Nigerian man whose condition deteriorated to such an extent that he was left lying naked on his cell floor, drinking from the toilet, refusing to eat or wash and suffering from insomnia for a period in excess of six months. A comparable scenario arose in *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 where the judge identified the UKBA's "deplorable failure" to address the claimant's mental illness, which included refusing to eat or drink, and at one stage found that IRC staff had responded with a "callous indifference to BA's plight". Similar findings were made by the High Court in *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120, where the judge noted the "apparent complacency and lack of action" of UKBA staff in responding to S's rapidly deteriorating mental health. In *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 D had a diagnosis of paranoid schizophrenia and was in immigration detention but not receiving any medical treatment for several months. He did not have leave to remain in the UK, but attempts to remove him since 2005 had failed, in part due to his mental condition. Dieghton Pierce Glynn solicitors were instructed by him but his mental health worsened so that he lacked mental capacity to give instructions and the Official Solicitor had to instruct the lawyers on his behalf. As a result of the legally aided judicial review, D was eventually released and the Administrative Court made a finding that his rights under Article 3 and Article 8 ECHR had been breached and his detention was unlawful. D's solicitor and a member of MHIDAG, Sue Willman, states that without legal aid her firm would not have been able to bring this case because it was high-risk and complex. If the judicial review had not been brought, D would have remained in detention, with worsening mental health, at considerable cost to the UK tax payer.

23. In the experience of the members of MHIDAG, these findings are not at all unusual; indeed they are typical of the problems faced by many mentally ill detainees and the failures of IRC staff and the UKBA to adequately address them. To suggest that such detainees should be removed wholesale from the scope of legal aid flies in the face of the UK's obligation to protect detainees from human rights abuses and fundamentally undermines the rule of law by allowing government bodies and their agents to act with impunity in their treatment of some of the most vulnerable people in this country. Without legal representation and challenges being brought by way of judicial review HA's release from detention could not have been secured nor S and BA transferred to hospital. In

each of these cases it is no exaggeration to suggest that these men's live were at risk if they remained in immigration detention given the high levels of self harm and neglect.

24. There are also concerns surrounding mentally ill detainees' capacity to seek legal advice, instruct a lawyer or represent themselves. Detainees with mental health problems may lack capacity under the Mental Capacity Act 2005 or have fluctuating capacity. In such cases they cannot litigate without a litigation friend, such as the Official Solicitor. Funding is needed to enable a lawyer or doctor to assess whether a person has the capacity to litigate. Detainees lacking capacity will, by definition, be unable to apply for exceptional funding without a litigation friend. Furthermore, if the litigation friend is the Official Solicitor, s/he will need to be funded to act as the detainee's lawyer, or to fund a different solicitor to act as the detainee's lawyer. Failure to provide legal aid in these circumstances will act as a complete bar to the detainee accessing the courts, as they cannot do so as a litigant in person. There can be no justification, and indeed none is advanced in the consultation paper, for barring this extremely vulnerable group of people from accessing justice.

25. Exceptional case funding is no answer to this. First and foremost, exceptional funding will not be available for judicial review, civil actions against the police or UKBA officials, or immigration detention proceedings for clients that fail the proposed residence test. Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) provides for exceptional funding to be made available for cases that are not listed in Part 1, Schedule 1 LASPO. The types of case that immigration detainees bring to vindicate their rights and achieve redress for abuses that they suffer, are all listed in Part 1, Schedule 1 of LASPO. Therefore exceptional funding is not available for this client group, contrary to what is stated in the consultation paper.

26. Even if LASPO was amended to enable those excluded by the residence test to be eligible for exceptional funding, this would not cure the unfairness or unlawfulness of the proposal. Exceptional funding applications involve the submission of a lengthy and complex form that is available only in English. In addition, before a definitive decision on a person's eligibility for exceptional funding (as opposed to a preliminary view) is made, a complete means and merits form must be submitted. A litigant in person, let alone one with mental health problems and for whom English is not their first language (or who are unable to speak or read English at all), will be unable to complete these forms and will be unable to access support in doing so because they are detained.

27. Furthermore, it is the experience of members of MHIDAG that many solicitors are currently refusing to complete exceptional funding applications because they are not paid to do so (funding is only provided if the application is successful, and even then only from the date that the application was submitted, and so not for the preliminary work required to make the application) and because they cannot justify taking on the work at risk of never being paid for their time. This is likely to be all the more relevant for immigration detainees, where completing the form would involve a solicitor making an unpaid trip to an IRC and incurring the cost of an interpreter.

28. A further indicator that the exceptional funding regime does not cure the residence test proposal of its unfairness and unlawfulness is that there is no provision for dealing with

urgent applications for exceptional funding under section 10 LASPO.[11] Cases involving mentally ill detainees who may be in urgent need of treatment, transfer to hospital or release from detention are by definition emergency cases. The failure to deal with such cases urgently will result in an operational bar to accessing the courts, and will inevitably mean that human rights abuses are allowed to continue and worsen.

29. It is also our view that this proposal unlawfully discriminates against people on the grounds of nationality. This discrimination cannot be cured by exceptional funding. It is not an answer to a discriminatory policy that individual cases may be dealt with in a non-discriminatory way. In MHIDAG's view there is nothing that can justify the wholesale removal of a class of vulnerable people from the scope of legal aid. It is our view that such a policy would lead to a high number of human rights violations being found against the UK both in the domestic courts and in Strasbourg.

30. Significantly, the consultation fails to enumerate the number of legally aided cases brought by non-UK nationals at present. Without this data, it is impossible to assess the impact of those cases or their cost to the legal aid budget. This is of fundamental importance: without the figures to justify the proposal, it is impossible to assess whether it is a necessary and proportionate pursuit of a legitimate aim or whether the proposal has any rational connection to the aim of reducing the legal aid budget as a whole. Furthermore, in the context of the fundamental rights that are at stake for mentally ill detainees, heightened scrutiny must be applied to any attempt to justify such a restrictive and blanket measure.

31. It is the experience of lawyers specialising in this field that the majority of cases challenging the legality of immigration detention by way of judicial review or as civil actions are successful and the costs of the claim have been recovered from the Defendant. MHIDAG is concerned that public authorities like the Home Office have a vested interest in these cases not being brought before the courts. This reflects an underlying concern that funding of contentious litigation should have been brought back under direct political control of the Government when the LSC, an independent agency, was disbanded.

32. MHIDAG is also aware of the response submitted by the Immigration Law Practitioners Association, Medical Justice and Mind, all of whom raise profound concerns about the proposed residence test and consider that it is unjust, unworkable and unlawful. MHIDAG adopts those views. In particular, MHIDAG endorses the following statement from the Immigration Law Practitioners Association:

> "The 2010 legal aid consultation recognised the importance of these cases; recognised that they require lawyers to bring them; recognised that there are not alternative ways of funding them; and recognised that there are not alternative ways of resolving them. If this proposal is implemented, there will be thousands of people detained each year, in principle without time limit, with no automatic oversight by the courts, and, on the Government's own analysis, no access to legal representation. The result would be a system of indefinite

[11] The Exceptional Case Funding provider pack states at p.5: "[…] we cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed."

detention without charge and without legal oversight; a system that is inimical to the rule of law, and is contrary to this country's democratic traditions."

33. The Ministry of Justice should be aware that as long ago as 1772 the English Courts recognised the inalienable right to liberty for all people irrespective of their immigration status when an application for Habeas Corpus was granted to secure the release of an African slave detained by his "owners" on a ship in British waters. Sommersett's Case (1772) 20 St Tr. 1. was relied upon over two hundred years later by Lord Scarman in the modern statement of this fundamental principle in *R v Home Secretary ex p Khawaja* [1984] AC 74 111-112: "He who is subject to English law is entitled to its protection". Limiting access to public funding of legal cases for those without a right of residence in the UK may bring short term political gain but it will be at the expense of long established principles of justice and equality before the law.

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or onward permission to appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursement should be payable in any event)?

34. MHIDAG does not agree with this proposal.

35. MHIDAG emphasises the fundamental importance of judicial review in holding public bodies to account, ensuring transparency and asserting the rights of minorities. Judicial review is central to the rule of law in this country, and restrictions on judicial review of the kind proposed in this consultation document may result in a constitutional crisis.

36. MHIDAG is profoundly concerned about the misuse of statistics relating to judicial review both in the consultation paper and by the Lord Chancellor in the media. Research published by the Public Law Project demonstrates the fallacies of those statistics.[12] MHIDAG does not propose to repeat that analysis, but it adopts it and reminds the Ministry of Justice that proposals based on misconceived and misleading empirical evidence cannot be objectively justified.

37. MHIDAG reminds the Ministry of Justice that this proposal is aimed at meritorious claims brought on behalf of individuals who do not have the means to pay for a lawyer and who have no other available remedy for resolving their legal problem. This is because legal aid will not currently be provided for a judicial review claim that does not meet these criterion.

38. For mentally ill detainees, judicial review is routinely the only route of redress for the human rights abuses that they suffer (all four cases cited above at paragraph 10 were judicial review claims, for example). Judicial review is also the only and appropriate way that unlawful policies or unlawful application of policies can be challenged and remedied.

[12] See: http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf

For example, judicial review litigation recently exposed "disturbing" evidence of systemic failures concerning the detention of victims of torture.[13]

39. MHIDAG is of the view that this proposal will have a devastating effect on meritorious judicial review, forcing public law specialists to go out of business and preventing meritorious claims from being brought.

40. One reason for this view is that strong claims routinely settle prior to permission. Our experience is that public bodies sometimes make their offer of settlement conditional upon the claimant's solicitors not pursuing a costs order. If this proposal is brought into force, such offers of settlement, which are usually in the best interests of the client, will prevent the solicitor from being paid at all. This will pit solicitors against their clients, creating an ethical dilemma that is impossible to resolve, and it will mean that public bodies are able to act unlawfully with impunity.

41. Secondly, unlike any other area of civil litigation, the nature of judicial review proceedings makes it difficult to assess the merits at the outset of a case. The reasons for this are enumerated by the Public Law Project in their response. They include:

    1) The test for granting permission is not a fixed one, meaning that claimant lawyers do not know from the outset what hurdle(s) they will have to jump for permission to be granted. Lord Bingham explained the need for flexibility in *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57 at paragraph 14, as follows:

        > "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. <u>But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application</u>" (emphasis added).

    2) There is a wide disparity in the number of permission grants made by different judges. This proposal would make payment conditional on a judicial lottery that is impossible to predict.
    3) The claimant will routinely not be in possession of the relevant information for a proper merits assessment of the claim to take place until after the claim has been issued or even until after permission has been granted and full disclosure has been made by the Defendant. Our experience is that disclosure from the defendant public body is routinely delayed until the Acknowledgement of Service or until the defendant serves its evidence after permission is granted. This reality is reflected in the Legal Aid Agency's standard limitations on funding certificates, which requires the merits of a claim to be addressed by the claimant's lawyers in a further application to the Agency following the refusal of permission on the papers or, if permission is granted, following service of the defendant's evidence.

[13] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin).

4) The time limits for bringing a judicial review are not fixed: the promptness requirement means that claimant providers may be of the firmly and honestly held view that a claim has been brought promptly, but the permission judge takes a different view. A claim may be knocked back because of timing, regardless of the merits of the substantive issues.
5) Events that are beyond the control of the claimant or his/her representatives may render the issue in dispute academic (for example, a policy change, or the actions of a third party), after the claim has been issued but before the permission stage. This has nothing to do with the merits of the case but will have the effect of preventing the claim from proceeding to or past permission.

42. Furthermore, MHIDAG emphasises that the incentive to bring strong claims already exists. First, legal aid will not be granted for weak cases. This exposes the fallacy of the suggestion that this proposal is designed to weed out unmeritorious claims. Second, legal aid rates have fallen in real terms since 1994. The only way that legal aid public lawyers can make their practice viable is by getting costs orders at *inter partes* rates. That means winning cases. A lawyer that does not win cases, will not be able to make their practice financially viable. There is therefore already a strong disincentive to bring unmeritorious claims.

43. MHIDAG supports and adopts the response of the Public Law Project, Medical Justice and the Immigration Law Practitioners Association in respect of this proposal. MHIDAG agrees with those organisations that this proposal would have a chilling effect on judicial review. This will leave mentally ill detainees beyond the reach of legal protection in spite of their highly vulnerable status. This is inimical to the rule of law and human rights protection.

44. In addition, MHIDAG is aware of the opposition to the proposals across the legal professions. For example, MHIDAG has had sight of the letter to The Telegraph from 90 Queen's Counsel, who act both for and against the Government in judicial review claims, stating that the proposal to restrict funding for judicial review will undermine the rule of law: http://www.telegraph.co.uk/comment/letters/10084925/Proposals-to-limit-legal-aid-for-judicial-review-will-undermine-the-rule-of-law.html

Q33 Do you agree with the proposal that fees paid to experts should be reduced by 20%?

45. MHIDAG does not agree with this proposal.

46. Access to expert reports is vital for mentally ill immigration detainees who are seeking to challenge the lawfulness of their detention, to access adequate treatment or demonstrate that they are not fit to be detained. Reducing fees for expert reports will make those reports more difficult to obtain, and will result in public bodies being able to pay more for expert reports than the individuals seeking to challenge them. This will undermine the principle of equality of arms.

47. Furthermore, we are not persuaded (and nothing in the consultation document persuades us) that the baseline rates for expert reports for mentally ill immigration detainees on which a 20 per cent cut could be imposed exist in this area of law.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals?

48. No. First and foremost, MHIDAG does not see how the Ministry of Justice can assess the impact of these proposals when they were published a mere eight days after the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force. That Act makes sweeping cuts to legal aid across all areas of social welfare law. There can be no doubt that those affected will, in large part, have protected characteristics and come from a poor socio-economic background. MHIDAG is of the view that the Ministry of Justice cannot assess the impact of the current proposals before it has assessed the impact of LASPO 2012.

49. MHIDAG is of the strong view that these proposals will have a disproportionate impact on people with protected characteristics. In particular, MHIDAG believes that mentally ill detainees will be some of the most disadvantaged if these proposals are brought into force as they will be hit by both the residence test and the cuts to judicial review funding, and they belong to one of the most vulnerable, and growing, groups in the UK.

50. In addition, the quality and reasoning of the impact assessment is poor. MHIDAG is struck by the erroneous assumption that:

> "We assume individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to represent themselves in court, seek to resolve issues by themselves, pay for services which support self resolution, pay for private representation or decide not to tackle the issue at all.
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> […]
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> Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue)."

51. No reasons are given for this justification and in the cases of mentally ill detainees, or detainees who lack capacity, it is impossible to see how the same outcomes could be achieved without public funding. To suggest that individuals may simply decide not to pursue the issues is pernicious: this is an open admission that these proposals may result in the victims of unlawful conduct by public bodies, being forced to abandon their meritorious claims because there is no way of pursuing them. The idea that unlawful conduct by public bodies may go unchecked, is fundamentally contrary to the rule of law.