Neutral Citation Number: [2019] EWHC 2391 (Admin)

Case No: CO/543/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2019

Before:

MR JUSTICE FREEDMAN

- -

Between:

THE QUEEN on the application of MEDICAL JUSTICE

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

EQUALITY AND HUMAN RIGHTS COMMISSION

Intervener

Charlotte Kilroy QC and Alison Pickup (instructed by **The Public Law Project**) for the **Claimant**

Deok Joo Rhee QC and Colin Thomann (instructed by **The Government Legal Department**) for the **Defendant**

Stephanie Harrison QC and Shu Shin Luh (instructed by **The Equality and Human Rights Commission**) for the **Intervenor**

Hearing dates: 19 - 21 June 2019

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Judgment Approved by the court

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Mr Justice Freedman :

Introduction

1. This is an application for judicial review which challenges a government deportation policy in respect of the introduction of a removal notice window policy ("the RNW policy") instituted by the Defendant ("the SSHD") in 2015. The challenge is by Medical Justice, an independent charity established in 2005 which facilitates the provision of independent medical advice and representations to those detained in immigration removal centres, as well as conducting research into issues affecting those in immigration detention. The challenge is brought on a public interest ground.

2. Pursuant to an order of the Court made on 20 May 2019, the Equality and Human Rights Commission ("the EHRC") has intervened by written submissions and orally limited to 30 minutes.

3. The RNW policy is contained in the SSHD's Guidance document entitled Judicial Review and Injunctions ("JRI") Version 17.0, dated 5 November 2018. Version 18.0 was published on 4 April 2019, incorporating the interim suspension of the RNW policy following the interim injunction ordered by Walker J. In this judgment, the references herein are to Version 17.0 save where the contrary appears. Further detail on the use and content of the notices is contained in another guidance document entitled Liability to Administrative Removal (non-EAA): consideration and notification ("LAR"): there is also a document about the SSHD's policy entitled Arranging Removals ("AR").

4. The RNW policy affects all persons liable to removal under the three main immigration statutes. The main focus of the present challenge is the adequacy of the notice period which precedes the opening of the "removal window" – during which period the individual may not be removed. This is 72 hours in detained cases (which includes at least 2 working days), 5 working days in 'Dublin III' transfer and non-suspensive appeal cases, and 7 calendar days in non-detained cases. The Claimant argues that the 72-hour notice period, as well as the longer notice periods applicable in Dublin III transfer cases and in non-detained cases, are each inadequate on the basis that it is "*impossible*" for individuals and/or their advisors to carry out the necessary work to be able properly to challenge removal before the expiry of the relevant notice period.

5. The challenge to the adequacy of the notice periods is then set against the fact that (since 2015) the Policy operates by bringing forward the notice period to the time when the individual is notified of his or her liability to removal. Upon the expiry of the notice period, the removal window (of 3 months or 21 days) is then opened during which time the individual may be removed without further notice. This is contrasted with the "practical consequences" of the prior position when notice was given only once a decision to set removal directions had been taken: see Grounds of Claim, at [15]. A particular complaint is that the policy gives the SSHD a lengthy window in which, after the expiry of a short opportunity to identify any new ground for being able to stay here, such persons can be removed without any further warning at all.

6. The present challenge is brought, not by individuals who were subject to the Policy, but as a public interest challenge by Medical Justice, represented by the Public Law Project ("PLP"). It proceeds with the benefit of more extensive evidence, which intended to cover "*the full run of cases*" falling with the Policy: see Navarette WS1 at para 16(1) to (10). The Claimant:

(1) claims that the Policy is ultra vires ("**Ground 1**");
(2) adds that it is irrational for essentially the same reason ("**Ground 2**");
(3) contends that the Policy is in breach of Article 27 of Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("**Dublin III Regulation**") ("**Ground 3**");
(4) contends that the policy is in breach of Article 39 of the Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ("**the Procedures Directive**") ("**Ground 4**"); and
(5) contends that the Policy is in breach of Articles 3 and 8 European Convention on Human Rights ("ECHR") ("**Ground 5**").

7. It is the Claimant's case that the RNW policy is *ultra vires* and unlawful because it gives rise to an unacceptable risk of interference with the constitutional right of access to justice, and it also fails to comply with the SSHD's obligations under EU Procedures Directive 2005/85/EC, Article 27 of the EU Regulation EU/604/2013 (Dublin III), and Article 47 of the EU Charter, and Articles 3 and 8 of the ECHR. A submission which is made is that the effect of the RNW policy is to limit or abrogate the right of access to court to challenge decisions taken by the SSHD without statutory authority, express or implied, to do so.

8. The Claimant seeks at paragraph 84 of the claim form the following relief:

(1) a declaration that the removal window policy is

(i) ultra vires ("Ground 1");

(ii) irrational ("Ground 2");

(iii) a breach of Article 39 of the Procedures Directive ("Ground 3"); and

(iv) a breach of Article 27 of Dublin III ("Ground 4");

(2) An order quashing the removal window policy; and

(3) Interim relief preventing the SSHD from removing individuals pursuant to the removing window policy pending the outcome of this claim.

9. There was a recent unsuccessful challenge to the RNW policy in *R (on the application of FB and another) v Secretary of State for the Home Department (removal window policy)* [2018] UKUT 428 (IAC) (hereafter referred to simply as "*FB*"). *FB* was a decision of the Upper Tribunal (in which its President Mr Justice Lane sat with Upper Tribunal Judge O'Connor). The challenge in *FB* was in respect of two specific applicants, namely FB and NR. There was an intervention in that case, by PLP appearing as interveners, and not as solicitors, instructed by the applicants: the applicants were represented by Duncan Lewis Solicitors. The challenge was both in respect of the alleged inadequacy of the 72-hour and other notice periods and also as to a system that does not provide a notice of the actual removal, and is confined to notice of liability for removal. It concentrated on what is Grounds 1 in the instant public interest challenge: it did not raise a Dublin III challenge. It held that the immediate predecessor (version 15.0 which came into force on 21 May 2018) to the current RNW policy was, as a general matter, compatible with access to justice. An appeal against that decision is due to be heard by the Court of Appeal on 15-16 October 2019, permission to appeal having been given by the Upper Tribunal. It is

submitted by SSHD that (a) the decision is correct; (b), in any event, it is a decision of a court of co-ordinate jurisdiction which should be followed by this Court unless there is a powerful reason for departing from it, and (c) there is no reason for departing from *FB*.

10. The instant claim was issued on 7 February 2019. The application is brought with the permission of Walker J on 14 March 2019. A submission was made to Walker J that this case involved the same challenge as in *FB*, and there were arguments about the policy being *ultra vires* and about access to justice being denied which were considered and rejected by the Upper Tribunal. However, Walker J treated the instant case as being different.

11. The Claimant seeks to make good its challenge by reference to case studies: see the 11 case studies set out in the first witness statement of Ms Navarrete, a 12th case study produced in the witness statement of Ms Clarke of the Claimant's solicitors and an additional 4 case studies considered by the Upper Tribunal in *FB*. The existence of the 12 case studies in respect of a much wider range of categories presented, according to Walker J, *"apparently cogent evidence of individuals having good grounds to challenge removal being exposed to the risk of being removed without any ability to explain those grounds. On the face of those case studies there appears to be a strong reason for a real concern that the policy unjustifiably impedes access to justice."* Nevertheless, in connection with an application for an interim injunction, Walker J recognised the overlap with *FB*, and he recognised that *"this court would think long and hard before disagreeing with it"*, but he did not accept that this case involved the same argument *"in particular, the 11 case studies just mentioned were not before the tribunal in FB."*

12. The case studies were very much at the heart of the grant of permission and of the injunction. Walker J directed the case to be heard between 18 June 2019 and 20 June 2018 with the first day being a reading day: in the event, in view of the amount of evidence and legal argument, I directed that the case be heard over three days after the reading day, and it was heard between 19 and 21 June 2019. Walker J made a costs capping order without opposition from SSHD.

13. Walker J granted interim relief, preventing the removal of persons, who are liable to removal under section 10 of the Immigration and Asylum Act 1999 or to deportation, from being removed and until removal directions are served on that person and the relevant notice period has thereafter expired in accordance with those sections of JRI which govern service of the removal directions.

14. Leading Counsel has appeared before the Court on the hearing for each of the parties as noted above.

History of challenges to the removal window policy

15. The policy of giving returnees at least 72 hours' notice of removal save where one of the exceptions applied, was introduced in 2007. The policy is still undergoing review. As Version 17.0 states, *"this guidance is undergoing detailed review* In 2010, exceptions were introduced to the requirement to give 72 hours' notice. The exceptions were the subject of a successful challenge in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin), and affirmed on appeal at [2011] EWCA Civ 269; [2011] 1 WLR 2852, to which I shall refer as "*the 2010 Medical Justice case*".

16. In *the 2010 Medical Justice case*, there was a challenge based upon a contention that exceptions in the policy to the obligation to provide 72 hours' notice did not take account of the need to ensure proper access to the Courts. The challenge was to the lawfulness of the exceptions, and not to the adequacy of the 72 hours' notice period, as was made clear at [42] of the judgment of Silber J. He quoted from a letter of Ms Lin Homer, the Chief Executive of UKBA in relation to the 72-hour time frame, that "*in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities*". Thus, the 72-hour period was considered to be the "*minimum time frame*" to preserve the right of access to justice and it was presumed that this would safeguard the right of those served with removal directions to have access to justice. Nonetheless, the Court stated at [32] that the fact that there was no challenge to the 72-hour policy did not mean that its lawfulness was conceded, albeit that at [172] quoted below, it was stated that the judgment did not cast doubt on the minimum 72-hour frame.

17. Silber J considered the threshold to establish unlawful conduct in a public interest challenge such as the instant case. It is not necessary to prove any breach of a right to access to justice having actually occurred. It suffices if there is an unacceptable risk or "*a serious possibility*" that the right of access to justice of those subject to the policy would be or is curtailed by the policy: see Silber J at [33-36 and 41] applying *Fernandez v Government of Singapore* [1971] 1 WLR 987.

18. As regards the law in respect of access to justice, Silber J stated the following at [43]:

> *"43. ... It is settled law that:—*
>
> *(a) "it is a principle of law that every citizen has a right of unimpeded access to a court" per Steyn LJ giving the judgment of the Court of Appeal in* ***R v Secretary of State for the Home Department, Ex parte Leech [1994] QB 198****, 210;*
> *(b) rules which did not comply with that principle would be ultra vires (ibid) citing Lord Wilberforce in* ***Raymond v Honey*** *[1983 1 AC.1, 13]; and that*
> *(c) "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule, it is simply an application of the right of access to justice" per Lord Steyn with whom Lords Hoffman, Millett and Scott of Foscote agreed in* ***R (Anufrijeva) v Secretary of State for the Home Department*** *[2004] 1 AC 604 at 621[26]."*

19. At paragraphs [172-173], the judgment of Silber J concluded as follows:

> *"172. Unfortunately, the 2010 exceptions do not take account of "the need to ensure proper access to the courts" as they permit the Secretary of State to depart from the standard policy of giving a minimum of 72 hours' notice of removal including at least two working days with the last 24 hours being on a working day. The effect of the 2010 exceptions is that in practice in the limited time available between serving the removal*

directions and the actual removal, it is frequently almost impossible that somebody served with removal directions will be able to find a lawyer who would be ready, willing and able to provide legal advice within the time available prior to removal let alone in an appropriate case to challenge those removal directions. There is a very high risk if not an inevitability that the right of access to justice is being and will be infringed. Miss Rose suggested that the Secretary of State could have provided at her expense an independent lawyer to advise those served with abridged notice.

173. Unfortunately, there are no adequate safeguards built in to the present policy which would ensure that removal could not take place. If somebody had been given very short notice of removal and then in the time available before removal it was impossible for him to contact a lawyer and to obtain advice.[1] *There are instances which are set out in paragraphs 108 and 109 above and which show how the policy functions and how it could preclude those served with short notice from enjoying the basic right of access to justice. This means the policy in the 2010 exceptions and which is contained in Section 3 of the 2010 policy document, which was suspended as a result of an interim judgment by Cranston J, has to be quashed. I should record that I considered the possibility that I should not quash the policy but that instead should merely await challenges in individual cases but that is not appropriate because in many cases where access to justice is not available to those served with abridged notice pursuant to the 2010 exceptions, they will be deported and will be unable to pursue their claim from abroad. There are also, as I have explained other grounds for quashing parts of the policy in Section 3 of the 2010 document. Finally, I should stress that nothing in this judgment casts any doubt on the legality of the minimum 72-hour time frame and the effect of this quashing order is that those covered by the 2010 exceptions now fall within that time frame."*

20. The Court of Appeal upheld this judgment such that the policy of giving less than 72 hours' notice of directions for the removal of an individual at a specific time, to a specific place, was unlawful, as being contrary to the principle of access to justice.

21. In *FB*, there was a challenge based on Version 15 which was published on 21 May 2018. Save for three specific aspects of the removal window policy, the Upper Tribunal upheld the policy and the decisions in the two individual cases.

Domestic legislation

22. In *the 2010 Medical Justice* case, Silber J started his recitation of background with the following at [5]:

"The Secretary of State is charged by Parliament with maintaining immigration control: see sections 1(4) and 3(2) of the Immigration Act 1971 ("the 1971 Act"). She is therefore responsible for granting or refusing leave to remain in the United Kingdom for those who do not have the right of abode in this country in accordance with the Immigration Rules. It is an important aspect of maintaining immigration control that a credible enforcement process is in force and that those with no right to remain in the United Kingdom are removed from the jurisdiction while not infringing the accepted

[1] It may have been intended that the first two sentences should be read as one so that so that the words "If somebody…" should run on in the first sentence as "if somebody…" giving rise to one sentence instead of two.

rights of those about to be removed. Another important countervailing factor is the right of those about to be removed to challenge the removal directions because they infringe their rights under common law, under statute or under the ECHR."

23. The domestic legislation in the Immigration Act 2014 ("the 2014 Act") effected changes as follows.

24. As a result of section 1 of the 2014 Act with effect from 20 October 2014: SI 2014/2271, section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") was amended to read as follows:

> **"10 Removal of persons unlawfully in the United Kingdom**
>
> *(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.*
>
> [(2-6) and (10-11) Removal of family members]
>
> *(7) For the purposes of removing a person from the United Kingdom under subsection (1) or (2), the Secretary of State or an immigration officer may give any such direction for the removal of the person as may be given under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.*
>
> *(8) But subsection (7) does not apply where a deportation order is in force against a person (and any directions for such a person's removal must be given under Schedule 3 to the 1971 Act).*
>
> *(9) The following paragraphs of Schedule 2 to the 1971 Act apply in relation to directions under subsection (7) (and the persons subject to those directions) as they apply in relation to directions under paragraphs 8 to 10 of Schedule 2 (and the persons subject to those directions)—*
>
> *(a) paragraph 11 (placing of person on board ship or aircraft);*
>
> *(b) paragraph 16(2) to (4) (detention of person where reasonable grounds for suspecting removal directions may be given or pending removal in pursuance of directions);*
>
> *(c) paragraph 17 (arrest of person liable to be detained and search of premises for person liable to arrest);*
>
> *(d) paragraph 18 (supplementary provisions on detention);*
>
> *(e) paragraph 18A (search of detained person);*
>
> *(f) paragraph 18B (detention of unaccompanied children);*
>
> *(g) paragraphs 19 and 20 (payment of expenses of custody etc);*
>
> ***F2**(h). . . . . .*
>
> ***F2**(i). . . . . .*
>
> *(j)paragraphs 25A to 25E (searches etc)."*

25. Schedule 2 to the Immigration Act 1971 under paragraphs 8-10 (above referred to) made provision for giving the removal directions by an immigration officer or the SSHD to the captain, owners or agents of the ship or aircraft in question. There is no statutory requirement to give notice of removal directions to the person liable to removal.

26. Paragraph 13 of the Explanatory Notes to the 2014 Act explains:

> *"Currently, a removal decision can be made under several different powers in the Immigration Acts: paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 …; section 10 of the Immigration and Asylum Act 1999 … and section 47 of the Immigration, Asylum and Nationality Act 2006 … The relevant power depends on whether the person being removed has been refused leave at the border, is an illegal entrant, an overstayer, has obtained leave to enter or remain by deception or has no further leave to remain following the refusal of an application to extend their leave.* ***The Act replaces these separate powers with a single power to remove a person who requires leave to enter or remain in the UK but does not have it.*** *This could be because they never had such leave (they entered illegally), they did have such leave but stayed on after it expired or was revoked, or they could be a national of an EEA state who is subject to a deportation or exclusion order.* [emphasis added]*".*

27. This is set out more fully as part of the Home Office Policy Equality Statement ("PES") which formed a part of Annex 8 to a letter sent by Ms Hannah Smith for the Treasury Solicitor to Mr Singh of PLP on 10 May 2019. It includes the following:

> *"<u>Updated policy: notice of removal</u>*
> *The Immigration Act 2014 introduced the single power of removal (see PES dated 12 September 2013). The purpose was to simplify a complex system which required separate decisions to end a migrant's leave and to decide to remove them, with a further notice of removal directions served at a later date.*
>
> *The aim of the single power was to allow a single decision, which as well as refusing or curtailing leave (or giving notice that an overstayer or illegal entrant had no leave) would make clear the person was liable to removal with no need for a separate decision or notice. An ongoing duty was introduced to raise any reason why they should not be removed at the earliest opportunity.*
>
> *As a consequence, the practice of serving copies of removal directions, which allows claims to be withheld until removal is imminent, would be discontinued where migrants were removed under the Immigration Act.*"

28. There is also set out in a passage headed "Immigration Bill-Single Removal Decision" the following:

> "*Removing illegal migrants is one of the main functions of immigration enforcement within the Home Office. The current process for enforcing removal can be complex, with a series of decisions having to be made in order to end the migrant's leave and make a separate removal decision, with a further decision to set removal directions at a later date. This complexity creates an unnecessarily bureaucratic process for caseworkers and enforcement officers and leads to delays in enforcing immigration laws as the three stages attract a separate right of appeal, an opportunity for legal challenge or both.*

To rectify this we propose to change the primary legislation so that there will only be one decision which covers a refusal of leave (or decision to curtail leave) and all aspects of the removal process. The decision will explain to the person that they cannot stay in the UK, are liable to removal if they do not leave voluntarily and will have no further notice before it happens.

We recognise that a proportion of cases may have genuine reasons which mean that removal is not appropriate. The single decision will also advise the migrant that they must tell us immediately of any reasons why they should not be removed, e.g. on the grounds of an asylum or human rights claim. Reducing the process to a single decision and placing the onus on the individual to raise any human rights issues means that migrants will not be left in limbo and must take active steps to regularise their stay or depart. Bringing human rights challenges forward will help ensure that any issues are addressed before enforcement action commences.

We propose that the single decision would apply to:
• all persons who make applications to the Home Office to stay in the UK;
• all cases where a caseworker receives information (e.g. from a Sponsor) that leads to a person's leave being curtailed or revoked; and
• all persons who are encountered without permission to be in the UK.

The aims of this policy are to:
• simplify operational processes and procedures to improve the efficiency of the removals process
• reduce barriers to removal while maintaining the ability for the migrant to raise human rights issues

The objectives are to deliver:
• simplified legislative framework for the removal of illegal migrants
• a removals process which effectively balances the need to enforce immigration laws with the need to ensure that human rights issues are raised and properly considered

By implementing the policy and operational changes we aim to achieve the following outcomes:
• more efficient casework and operational enforcement
• higher volumes of voluntary departures
• reduced appeals and litigation costs, both for the Home Office and the migrant
• full consideration of any human rights issues at the outset of the process"

29. The rights to appeal are expressly preserved, as is made clear in paragraph 19 of the Explanatory Notes as follows:

"19. Currently a right of appeal to the Tribunal exists against any of the 14 different immigration decisions listed in section 82 of the 2002 Act. These include refusals of entry, refusals to vary leave to enter and remain and decisions to remove and deport. There are two further rights of appeal in section 83 and 83A of the 2002 Act against decisions to reject an asylum claim or revoke refugee status in certain circumstances. The Act restructures rights of appeal to the Tribunal, providing an appeal against refusal of a human rights claim, a protection claim (humanitarian protection and asylum) and revocation of refugee or humanitarian protection status. It will also

continue to be possible to bring an appeal, as is currently the case, against a decision to refuse an application based on a right under Community Treaties – provided for by regulations(2) under section 109 of the 2002 Act."

30. The amendment to the 1999 Act corresponds with an amendment to s.82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), by s.15 of the 2014 Act as to rights of appeal so as to cover only claims to international protection. The 2002 Act contains a number of safeguards against refoulement of persons making protection claims: s.77 (no removal whilst appeal pending); ss.92-96 (right of in-country appeal, subject to certification).

31. Section 96 of the 2002 Act after amendment by the 2014 Act reads as follows:

"96 Earlier right of appeal

1. *A person may not bring an appeal under section 82 against a decision ("the new decision")] if the Secretary of State or an immigration officer certifies—*
    1. *that the person was notified of a right of appeal under that section against another F3... decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),*
    2. *that the claim or application to which the new decision relates relies on a ground that could have been raised in an appeal against the old decision, and*
    3. *that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision.*
2. *A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies—*
    1. *that the person has received a notice under section 120(2),*
    2. *that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and*
    3. *that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in a statement under section 120(2) or (5)."*

32. Section 120 of the Act after amendment by the 2014 Act reads as follows:

"120 Requirement to state additional grounds for application

(1) Subsection (2) applies to a person ("P") if—

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

(c) a decision to deport or remove P has been or may be taken.

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in—

(a) P's protection or human rights claim,

(b) the application mentioned in subsection (1)(b), or

(c) an application to which the decision mentioned in subsection (1)(c) relates.

(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P has leave to enter or remain in the United Kingdom only by virtue of section 3C... of the Immigration Act 1971 (continuation of leave pending decision or appeal).

(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—

(a) additional reasons for wishing to enter or remain in the United Kingdom,

(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

(c) additional grounds on which P should not be removed from or required to leave the United Kingdom, P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.

(6) In this section—

"human rights claim" and "protection claim" have the same meanings as in Part 5;

references to "grounds" are to grounds on which an appeal under Part 5 may be brought (see section 84)."

33. Paragraph 329 of the Immigration Rules states that no action will be taken to require the departure from the United Kingdom of a person who has applied for asylum until the SSHD has determined the application.

34. Paragraph 353 provides:

"*When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:*

i) had not already been considered; and

ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

35. Paragraph 353A states that an applicant who has made further submissions shall not be removed before the SSHD has considered the submissions under paragraph 353 or otherwise.

The RNW Policy

36. The SSHD policy on judicial review and injunctions has existed in different forms for over a decade. It is to explain to the SSHD's caseworkers, legal representatives for individuals and the Courts the approach of the SSHD to two related aspects of her practice. It relates to the removal of those who are considered to have no right to remain in the UK. The two aspects are (1) notice of removal, and (2) removal when judicial review proceedings are either threatened or lodged.

37. The policy has been contained in guidance in the form of various versions of a long document entitled JRI. The scope and content of the guidance has altered over time: see *the 2010 Medical Justice case* at [5-28]. The original policy of the SSHD from 1999 until 2006 was that if a threat of judicial review was received after removal directions were notified to an individual, removal would be deferred for a short period to enable the judicial review to be lodged. If no proceedings were lodged, the removal would go ahead: if they were lodged, the removal would be cancelled.

38. From 2007 onwards, the policy was changed, following consultation including with the judiciary including the then President of the Queen's Bench Division Sir Igor Judge, and the then Chief Executive of what was then the UK Border Agency in 2006/2007. Under that new policy, the SSHD had to provide at least 72 hours' notice of removal directions, but would no longer suspend removal unless a judicial review was lodged at court, together with grounds of claim.

The changes effected in 2014 and operated thereafter

39. In the judgment in *FB*, section B headed "an overview of Chapter 60", there were highlighted salient features of the 21 May 2018 version of Chapter 60. There have been changes in the more recent versions of 5 November 2018 and 4 April 2019. The background to what is described as the development of the 72-hour policy is set out at paragraphs 7 to 17 of Silber J's judgment in *the 2010 Medical Justice case*, and is summarised in the statement of Ms Dolby on behalf of SSHD dated 12 April 2018 filed in the *FB* case. Ms Dolby is a part of SSHD's Removals, Enforcement and Detention Policy Team; Illegal Migration, Identity, Security and Enforcement Policy, Borders, Immigration and Citizenship Systems Policy and Strategy Group.

40. That statement of Ms Dolby was summarised at paragraphs 54-70 of the judgment in *FB* as regards the creation of the 72-hour policy in its inception. Paragraphs 61-70 of the judgment summarises what the statement said as regards the changes which were introduced after the Immigration Act 2014, namely the three-month removal policy so that there was generally notice of liability to remove and not notice of removal. Although it is likely that this judgment will be considered alongside the judgment in the *FB* case, it will assist for ease of reference for this summary of the Upper Tribunal of Ms Dolby's statement to be repeated in this judgment. It is noted that since her statement, the guidance has moved on by a number of versions, but what she says remains substantially the case because what she is predominantly discussing is the evolution of the notice of removal policy and specifically the change effected in 2015:

"54. Ms Dolby describes the respondent's enforcement policy as being founded on the expectation that those with no right to be in the United Kingdom should return home. The respondent expects such persons to leave voluntarily but where they do not, Immigration Enforcement will seek to enforce their departure. She says that such returns are only enforced "where both the Home Office and the courts are satisfied that an individual has no right to remain in the UK".

55. Before the changes introduced by the Immigration Act 2014, which amongst other things, re-cast section 10 of the 1999 Act, individuals being removed were notified of their removal by way of an enforcement decision, which set out the reasons why they were subject to enforcement action, followed by a notice of removal directions setting out the arrangements for their removal, including the date of removal. That date "had to be set after a minimum of 72 hours … or unless an asylum/human rights refusal had been certified, when five working days must be given, after the individual was notified that removal directions have been set, in order to allow them time to access justice".

56. The 72-hour period came about as follows. The respondent had previously entered into an arrangement with the High Court – known as the "Concordat" – which was intended to avoid the need for last minute injunctions. The respondent would agree to defer removal on threat of a judicial review, working on the assumption that such challenges were arguable ones that needed to be examined. The result, however, was that it was necessary to release from detention those threatening judicial review, since their claims took so long to resolve. It became apparent to the respondent that some detainees were threatening judicial review "simply to get out of detention, and in most instances the threatened JR was never lodged".

57. This led the respondent to develop an approach whereby persons were detained and removed very quickly; but that resulted in a reduction of access to lawyers and legal remedy, with the result that the "courts held that the practice was a denial of access to justice".

58. A new policy of providing 72 hours' notice before removal was discussed with the then President of the Queen's Bench Division and the previous Chief Executive of what was then the UK Border Agency in 2006/2007. The resulting policy required a change to be made to the Civil Procedure Rules. The change was aimed at reducing the impact of weak claims, designed to disrupt detention and removal. This attracted criticism from stakeholders.

59. In the event, the policy reflected in the changed Civil Procedure Rules was for a minimum notice period of 72 hours, rather than 48 hours suggested by the respondent; but with the requirement that any judicial review lodged within that period must include the full grounds. The thinking behind this was that the judicial review could be disposed of "in a matter of days". The policy came into effect in April 2007.

60. As originally framed, the policy contained certain exceptions to the 72-hour notice period, such as where there were risks of an unaccompanied asylum-seeking minor absconding or a risk of self-harm. Subsequently, further exceptions were added. However, in 2010, the Medical Justice litigation concluded that "a reasonable period between arrest and removal was required for those subject to removal to access legal advice". Following subsequent discussions with the judiciary, the respondent amended the Operational Guidance "to say that 72 hours must always be provided between an individual being served immigration papers and the actual removal of the offender" and that the period started when "removal directions" were served.

61. Following the legislative changes introduced in the Immigration Act 2014, amendments were made to the enforced removal process. Individuals who had no leave to enter or remain, would be notified of their liability to removal and told that if they had reasons to stay in the United Kingdom, they must state them at the earliest opportunity, pursuant to section 120 of the 2002 Act.

62. Ms Dolby says that:-

> *"The minimum 72-hour notice period was brought forward to the time when the individual was notified of their liability to removal in order to allow sufficient time for the Secretary of State to consider any issues raised at an earlier point rather than waiting until the actual removal directions … had been made and then potentially having to cancel the removal."*

63. Ms Dolby said that the thinking behind this was concern that the previous policy, where an individual was given notice of removal directions, led to the submission of late claims that could reasonably have been raised and considered earlier in the process and that in some cases this was being used as an attempt to frustrate or delay removal. Thus:-

> *"The aim was to make it clear at the refusal stage that people should not be waiting until the last possible moment before removal before seeking legal advice and submitting their claims. In addition, notifying the individual of the precise time and date of their removal directions was on occasion leading to disruption on the part of some detainees in immigration removal centres … or to information being circulated on social media by action groups who are seeking to disrupt the removal, for example, by preventing access to or egress from the IRCs, contacting airlines, or seeking to prevent flights from departing."*

64. The three-month removal window was introduced on 6 April 2015. This followed a threat of challenge to an earlier version of the policy, by the PLP on behalf of

Medical Justice, who objected to "having a completely un-ending period from when a person was first given notice of their liability to removal".

65. *In addition to introducing a three-month removal window, the minimum notice period was amended from being not within the first 72 hours for all cases to being 72 hours if detained or seven calendar days, if not detained. The respondent's rationale was that the 72-hour policy was appropriate for the "detained environment where there is access to a "legal surgery"". By contrast, in the "non-detained environment, the Home Office accepted that we needed to give individuals more time to seek legal advice".*

66. *The new removal policy included the practice of arresting a person and removing him or her "without them always being detained overnight in an immigration removal centre, sometimes called …same-day removal or Operation Perceptor cases after the initial pilot, which would not take place until after a person had been notified of their liability to removal and the seven day non-detained (notice period) had expired".*

67. *Same-day removal is, Ms Dolby says, used only for those who are deemed suitable for the three-month removal window and further consideration must be given to any health conditions or vulnerabilities. In same-day removal cases, the individual is always interviewed as to their current position, including health, domestic circumstances, and whether they have representatives or solicitors or any outstanding applications. The response of the individual will inform whether the same-day removal will proceed. Individuals concerned are provided with access to a telephone, with available credit, for the purpose of consulting a legal representative.*

68. *Ms Dolby says:-*

> *"If the individual says that they intend to submit a protection claim and this is a first-time claim, then removal will automatically be deferred until after the claim has been decided and any appeal rights exhausted. If the individual has previously made a protection claim, this will be referred to the Operational Support and Certification Unit (OSCU) who will consider the claim and decide whether or not this amounts to a fresh protection claim and if not, whether it has already been considered; or has not been previously considered but will not create a realistic prospect of success.*
>
> *If so, then the individual "can proceed to be removed on the same day once OSCU have considered the outstanding representations."*

69. *Ms Dolby reiterates that where an individual has signalled a wish to make a first-time protection claim, or has made such a claim, then removal "will be deferred to enable that claim to be considered". If the claim is refused with a right of appeal in the United Kingdom, then a fresh removal window cannot be opened until the individual has exhausted his or her appeal rights. If, on the other hand, the claim is certified under section 94 or 96 of the 2002 Act, then the individual will be given a notice period of at least five working days, for the purpose of deciding whether to bring a judicial review to challenge the certification decision.*

70. Ms Dolby's statement ends by describing aspects of the new section of Chapter 60 concerning the "Consideration of deferral of notice period". We shall return to this later."

The Guidance

41. The next section of this judgment in part borrows from some of paragraphs [7-33] of the judgment in *FB*. It summarises aspects of the Guidance. The guidance describes certain types of event that could be subject to judicial review. These comprise a failure to act; the setting of removal directions; the refusal to accept that further submissions amount to a fresh claim; a decision to certify a claim as clearly unfounded; and detention.

42. Under the heading "Notice of removal" it is stated that notice of removal may be given in three different forms:-

> *"• Notice of a removal window – the person is given notice of a period, known as the removal window, during which they may be removed.*
>
> *• Notice of removal directions – the person is given notice of removal directions and thus knows the exact date of departure.*
>
> *• Limited notice of removal – a more restricted version of the removal window form of notification."*

43. A notice of removal window makes it plain that the *"window"* is a period *"during which removal may proceed without further notice"*. A notice of removal window is said to be suitable for persons being removed under section 10 of the 1999 Act and those being deported under section 3 of the 1971 Act. A notice of removal window is not to be given to a person who has leave to enter or remain or to a person who is able, within the relevant time limit, to file an in-country notice of appeal or administrative review, or where such is pending.

44. The guidance says that certain categories are not suitable for a removal window. These include "family cases" (which are defined); cases where a person has made a protection or human rights claim, or appeal, which is pending; and where the Home Office has evidence, beyond a self-declaration, that a person is suffering from a condition listed as a risk factor in the adults at risk in immigration detention policy, or some other condition that would result in the person being regarded as an adult at risk under that policy.

45. A notice of a removal window will give a "notice period". The notice period begins when the notice is given to the person concerned, at the time the notice is given. The removal window says when the notice period ends.

46. The guidance deals with the requirements to be met in connection with giving a notice of removal directions. These include the fact that the person concerned *"must be given adequate notice that removal has been scheduled".* In the case of a detainee, notice should ideally be given as soon as removal directions have been set.

47. If the person concerned is not detained, the notice period is seven calendar days prior to the opening of the removal window. Otherwise, subject to exceptions described in the section of the guidance entitled "Consideration of deferral of notice period", the period must be one of the following:-

*"• normal enforcement cases – minimum **72 hours** (including at least two working days).*

- *third country cases and cases where the decision certified the claim … minimum **five working days** (unless the case has already been reviewed by JR …)".*

48. The guidance then goes into detail, by reference to examples, regarding what is meant by a minimum of 72-hours with at least two working days. There is then a section entitled *"Consideration of deferral of notice period".* This begins as follows:

> *"Whether or not they are detained, individuals must be allowed a reasonable opportunity to access legal advice and have recourse to the courts. The purpose of the notice period is to enable individuals to seek legal advice. If, during the notice period, an unrepresented person is yet to instruct a legal representative you [the case worker] must always consider deferring the removal window for an additional period.*
>
> *It is reasonable to expect individuals who are aware that they have not been successful in an immigration claim and/or appeal and/or that outstanding representations may be or have been rejected to act promptly in seeking legal advice. Each case for deferral must be considered on its individual merits. The key consideration is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts."*

49. There is a requirement for notice of liability for removal to be accompanied by an "Immigration Factual Summary", which must have a chronology of the case history of the person concerned, including details of whether any appeal rights were exercised in past applications for judicial review. Both the notice of liability for removal or deportation decision letter must be copied to any legal representative, where the respondent has details of such, or where a person asks for a specified representative to be sent copies.

50. Three specific matters are considered: change of legal representatives; access to legal advice in detained cases; and access to relevant documentation. As regards changes of legal representative, the guidance states that a delay caused by this may be unavoidable and consideration should be given based on the merits of the case, such that it may be reasonable to defer removal "for an additional period" where the person concerned has "unavoidably lost contact with previous representatives". Deferral should not normally be considered where there is no clear reason for the change or where there is cause to believe that the motive for the change is to bring about a postponement of removal: "*For instance, multiple changes in representative within a short period*".

51. Access to legal advice for detainees is provided by legal advice "surgeries", held in Immigration Removal Centres (IRC). There is a requirement to inform detainees of the availability of these surgeries and of the duty solicitor scheme which operates in the individual IRC during the induction process within the first 24 hours after arrival in the IRC. IRC welfare officers direct detainees to information concerning how to find an alternative solicitor or other immigration adviser; provide information about the Law Society and Legal Services Commission "*in a language that [the detainee] can understand*"; and provide copies of the Bail for Immigration Detainees (BID) notebook.

52. The section acknowledges that the 72-hour notice period may not always be sufficient:-

> *"Generally speaking, if an unrepresented person (in detention) wishes to obtain legal advice and cannot be given an appointment at an LAA advice surgery within the initial 72-hours' notice period, the removal window should normally be deferred to enable an appointment to be arranged. However, any request for an appointment that necessitates deferral and continued detention should be carefully considered on its merits. Consideration should be given whether the individual:*
>
> - *was properly notified of access to legal advice*
> - *made their request at the earliest reasonable opportunity*
> - *cooperated with any attempt to arrange a consultation*
> - *delayed their request in order to thwart removal".*

53. As for access to relevant documentation, legal representatives "*need access to relevant documents and case papers in order to properly advise their client*". It is acknowledged that there may be circumstances where an individual does not readily have access to documents, such as when they have been detained at a reporting event or have been outside the UK for a significant period.

54. Any refusal decision, notice of liability to removal and immigration factual summary *"will be provided to the representatives on request"* either when the individual is detained or at the point that he or she seeks legal advice on a "*same day removal*". In most cases, it is considered that the Immigration Factual Summary will provide the necessary key facts and case history.

55. There are instances where five working days' notice must be given. This includes third country and non-suspensive appeal cases on the basis that *"this is likely to be their first opportunity for legal redress".* The case worker must *"satisfy yourself that they have the opportunity to access the courts before their departure is enforced"*. Similarly, in respect of charter flights *"so they have the opportunity to take legal advice".* The purpose of the longer notice is to *"minimise the number of last-minute applications for injunctive relief… and to encourage people to inform the Home Office at the earliest opportunity of any further submissions they want to make".*

56. When the notice period ends, the removal window begins and a person *"may be removed during the removal window"*. The removal window *"will run for a maximum of three months"* from the time the notice of liability for removal or deportation decision letter is served. If, however, a removal window has not expired, it can be extended *"by way of reminder for a further 28 days".*

57. The guidance states that if a person *"makes an asylum, human rights or EU free movement claim, involving issues of substance which had not been previously raised and considered, or a further application for leave, the window ends".*

58. Where a removal window has expired, or where removal is not via one of the "safe countries" listed in section 3.2 and which was not notified in the original notice, then a fresh removal window has to be notified, with the result that a new notice period will begin. The form concerned (RED.0004 (Fresh)) may specify a "*range of potential transit points*".

59. If a person is detained or arrested for removal later on the same day but states that their circumstances have changed or that they wish to access legal advice, the guidance states that they will not be removed whilst they are seeking such advice, or have representations outstanding. Where representations do not amount to a fresh protection or human rights claim and have either already been considered or had not previously been considered but would not create a realistic prospect of success *"in terms of leading to an outcome other than removal from the UK"*, the individual in question can be removed on the same day *"once we have considered the outstanding representations"*.

60. The guidance deals with the circumstances in which the bringing of a judicial review will, and will not, result in the suspension of removal.

Forms for communication of the removal window

61. The removal window is ordinarily communicated to a person liable to removal by way of one or more RED.000 forms. The basic form is RED.0001. It explains how the removal window operates, and the importance of acting promptly if the individual wishes to contest his removal from the UK and (a) the country of removal; (b) is accompanied by the immigration factual summary, and is (c) copied to the legal representative. It notifies the person of their liability to removal, and that they will either (a) be removed with no further notice after the expiry of 72 hours or 7 days or (b) be given further notice of removal. In the case of a person with leave whose leave is curtailed or revoked, or who is refused a variation of leave, the notification of liability to removal will be contained within the casework decision itself, rather than being contained in a separate RED.0001 notice.

62. The notice of liability to removal contains a s.120 notice requiring the person to raise any reason why they should not be removed from, or should be allowed to remain in, the UK. If raised, the SSHD will then give consideration to any reasons as to why the person should not be removed. Section 120 of the 2002 Act was amended by the 2014 Act to make the duty to raise any additional grounds an ongoing duty which subsisted for so long as the person remained in the UK, thereby requiring them to raise any grounds as soon as reasonably practicable after any change of circumstances giving rise to such grounds. A failure to raise any such grounds as soon as reasonably practicable after they arose could give rise to certification under s.96 of the 2002 Act of any subsequent claim relying on those grounds. One of the requirements before certification is that in the opinion of the SSHD or the Immigration Officer there must be no satisfactory reason for the ground not having been raised in a statement under s.120 of the Act. Such certification is subject to judicial review: see *J v SSHD* [2009] EWHC 705 at [138].

63. Other RED.000 forms include RED.0004 (fresh) where a new removal window is set. There are also other forms, namely

    (1) RED.0002 (a notice reminding the addressee of his or her ongoing duty to inform the SSHD of any reasons which he or she should not be removed from the UK);

    (2) RED.0003 (a notice which the addressee can complete and return to the SSHD when giving reasons why he or she should not be removed from the UK)

(3) RED.0004 (extension) (a notice extending the removal window by a further 28 days without requiring a new notice period – this can only be used if served before the 3-month notice window expires). Under JRI, where it is known that removal is unlikely to take place within 28 days, a RED.0004 notice must not be served, but the removal window must be allowed to expire. There is an argument advanced that by consecutive removal windows of 3 months and 28 days exercised three times with 3 minimum notice periods in a year, a person could be in a removal window for almost the entirety of a year. This is entirely theoretical: it is not explained how this could be done consistently with the exercise of powers in good faith and exercised for proper purposes under the policy.

64. Version 17 of JRI, published on 5 November 2018, incorporates the following additions:

"***Cancellation of removal window: RED.0005***

When the person is no longer eligible to be removed in the 3-month removal window, (for example because they have made a subsequent protection claim or are a relevant adult at risk), you must provide written notice to the individual and their legal representative cancelling the removal window (using form RED.0005)."

65. In respect of requests for extending the notice period, RED.0006 is introduced by Version 17 as follows:

"*Consideration of extending the notice period: RED.0006*

Whether or not they are detained, individuals must be allowed a reasonable opportunity to access legal advice and have recourse to the courts. The purpose of the notice period is to enable individuals to seek legal advice.

It is reasonable to expect individuals who are aware that they have not been successful in an immigration claim and/or appeal, and/or that outstanding representations may be or have been rejected, to act promptly in seeking legal advice. Each case for extending the notice period must be considered on its individual merits. The key consideration is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts.

The extension of the notice period in this context also extends the removal window. It re-starts the clock so that the window will remain open for a maximum of 3 months from the time the RED.0006 notice is served. If, during the notice period, an unrepresented person is yet to instruct a legal representative you must always consider extending the notice period.

When the notice period and 3-month removal window is extended, you must provide written notice (using form RED.0006) to the individual and their legal representative, stating when the removal window will open and confirming the length of the removal window."

The case of FB

66. Reference is now made to that which was decided in *FB*. In *FB,* a submission was made by reference to *R (Anufrijeva) v Secretary of State for the Home Department and Another*

[2003] UKHL 36. That is authority for the constitutional principle that an administrative decision which is adverse to an individual must be communicated to the individual before it can have the character of a determination with legal effect, so enabling the individual to challenge the decision in the Courts, if so wished. It was submitted that the decision made during the RNW had to be communicated to the individual before being acted upon, notwithstanding the fact that the notice of the removal window had been provided previously. The Upper Tribunal in *FB* held that the making of a decision under section 10 of the 1999 Act does not alter an individual's status either directly or indirectly [149]. It can be made only where the individual concerned has no leave to enter or remain [149].

67. In *FB*, the Upper Tribunal found at [150-151] as follows:

> *"150. A person who receives an adverse decision from the respondent and who either does nothing about it or appeals it unsuccessfully to the Tribunal, can in general be expected to know that he or she lacks leave to enter or remain and so needs to depart the United Kingdom. If the person has been given a notice under section 120 of the 2002 Act, he or she will also have been informed of the need to let the respondent know, as soon as reasonably practicable, if the person's circumstances subsequently change, so as to give rise to additional grounds for being permitted to enter or remain and/or for resisting removal.*
>
> *151. The legislative scheme does not, therefore, confer any expectation that such grounds can be withheld until steps are taken to remove; quite the opposite. This point needs to be kept in mind in considering the operation of the principle of access to justice in the context of Chapter 60."*

68. The Upper Tribunal went on find that the RNW policy did not infringe access to justice, and to that this judgment shall turn after setting out some of the contentions as regards access to justice.

69. The new policy was not contrary to the reasoning in *the 2010 Medical Justice case* which held that exceptions to the 72-hour notice were unlawful. This is because the position now is that the notification process as set out in RED.0001 provides at least 72 hours' notice of an intended removal during the removal notice window [166].

70. It was submitted that *the 2010 Medical Justice case* did not make a finding that the 72-hour notice period in respect of removal directions was lawful, merely that nothing in the judgment should be taken to suggest that it was not [170]. To this, the Upper Tribunal said that the 72-hour notice period, introduced in 2007, has a long pedigree *"judged by reference to the dynamic nature of immigration law and practice*", and the fact that it was not challenged then or subsequently is of some relevance [170-171]. The policy position underpinning the 72-hour policy was recognised by Silber J in the 2010 Medical Justice case, at [42], where he observed that *"the 72 period was considered to be "the minimum time frame" to preserve the right of access to justice and it was presumed that this would safeguard the right of those served with removal directions to have access to justice."*

71. The decision of Silber J was affirmed by the Court of Appeal. Lord Neuberger noted that (at [20]) that *"[t]here seems to have been no issue before Silber J, that in order to have effective access to the courts, the person served with removal directions did need to have a reasonable opportunity to obtain legal advice and assistance if they wished to do so" –*

albeit *"in so far as that matter had a bearing on the time that was needed to obtain effective legal advice and assistance"* [19]. However, the principle of access to justice does not require the respondent to provide or to fund legal advice and assistance: *Medical Justice* at [7], [9], [18]-[24]. The criteria for eligibility for legal aid, and its funding arrangements, are matters for Parliament and the Lord Chancellor, not the Secretary of State for the Home Department.

72. Based on the evidence before the Upper Tribunal in FB, it found that "*the respondent has demonstrated that the 72-hour period, as set out in Chapter 60, and which is subject to the exceptions contained therein for provision of additional time in certain circumstances, constitutes a reasonable and proportionate response to the need to give effect to access to justice in cases of removal from the United Kingdom*" [172].

73. The Upper Tribunal considered at [182] the evidence as a whole and formed the view that *"we have concluded that the evidence (including the responses to the questionnaire), taken in the round, does not show that the provisions in Chapter 60 regarding time limits are operating in such a way as to amount to an unlawful restriction on access to justice."* This included the four case studies advanced as part of the public interest challenge in that case.

74. The Upper Tribunal commented at [176] that *"by the time very many individuals find themselves in receipt of form RED.0001, they will already have had legal representatives acting for them, but will nevertheless have failed in their appeals before the First-tier Tribunal and become "appeal rights exhausted". Many of the witnesses encounter the individual only at this point*."

76. There was also a challenge in respect of the so called "same day removal" policy known as Operation Perceptor. The Upper Tribunal was satisfied that this policy is *"a justifiable aspect of the overall removal window regime. The safeguards described in the respondent's evidence, including giving the individual access to a telephone to contact legal representatives, etc are, in our view, reasonable and proportionate. We note from the applicants' evidence that there may have been some failures in this regard. Again, however, the evidence does not begin to show a real risk to access to justice"* [188]. In fact, planned same day removals were stopped in 2018, and such removals have not been planned since that time. A decision was made on 1 August 2018 to close this process indefinitely.

77. The SSHD relies on the decision of *FB* and says that this Court should follow that decision. It emphasises the dual nature of the decision in *FB* in that it decided that (a) once an individual is served with a notice that they are liable to removal during the removal window, they can be removed without further notice, and (b) that the length of the relevant notice periods was not unlawful. *FB* rejected the argument that the applicants had a legal right to be notified of the removal directions because (a) the actual removal decision did not alter the individual's status at [149], and (b) the policy did not infringe their right to access to justice. The SSHD submitted that whilst the Administrative Court is not bound by a decision of the Upper Tribunal as a matter of judicial comity, the principle in *R v Greater Manchester Coroner ex p Tal* [1985] QB 67 (DC) that on a claim for judicial review a High Court first instance Judge should follow the decision of a Judge of equal jurisdiction unless the Court is satisfied that the decision is clearly wrong. In *Willers v Joyce (No.2)* [2016] UKSC 44 [2018] AC 843 at [9], Lord Neuberger said *"So*

far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so." The Upper Tribunal's judicial review jurisdiction is co-ordinate with that of the Administrative Court: Tribunals, Courts and Enforcement Act 2007 ss.15 to 18; Senior Courts Act 1981 s.31A.

78. The decision in *FB* is not only of a court of equal jurisdiction, but in this instance, it is a specialist court containing two Judges including the Upper Tribunal President Mr Justice Lane. That does not mean that this Court is bound by the decision, but that the usual reasons to afford respect to the decision are particularly evident.

79. The Claimant says that this Court is bound not to follow *FB* for reasons which will be set out and considered below, after more has been said about the evidence adduced in this case and the underlying facts.

The evidence on behalf of the Claimant

80. The evidence for the Claimant is set out in a table which appears below.

Witness	Date of statement	Occupation of witness	Date of statement in FB, if any statement made
Thakur Rakesh Singh	04.02.19, 27.02.19 and 13.03.19, 09.04.19 and 5.6.19	Public Law Project In-house solicitor	22.05.18
Marcela Navarete	04.02.19	Wilson Solicitors PLP Solicitor and partner	N/A
Richard Miller	04.02.19	The Law Society Head of Law Society Justice Team	N/A
Christopher Cole	04.02.19	Parker Rhodes Hickmott Solicitor and Partner	N/A
Emma Ginn	13.02.19	Medical Justice Director	
Nicole Francis	14.02.19	Immigration Law Practitioners' Association CEO	N/A
Theresa Schleicher	14.02.19	Medical Justice Casework Manager	03.11.17
Pierre Makhlouf	14.02.19	Bail for Immigration Detainees Assistant Director	14.09.17 and 16.05.18

81. It can be seen from the above table that there is an overlap between the subject matter of the evidence in *FB* and the instant case. In *FB*, the lead witness was Toufique Hossain, the Director of Public Law at Duncan Lewis solicitors and the lead solicitor in bringing that case. He made five witness statements, and he fulfilled a similar role in that case to

Mr Singh and Ms Navarette in the instant case. His evidence is summarised at [72-84] in the judgment in *FB*.

82. Mr Hossain's first witness statement at paragraph 13 (pages 4-11) gave evidence about access to justice. This includes the delays in making appointments at legal surgeries in detention (routinely for a week and in the worst cases for 2-3 weeks), the time spent in allocating cases after the surgery (typically 24-48 hours). It includes legal aid delays (applications are considered within 20 days, and, if urgent, the target time is 5 days). Legal aid on an emergency basis is considered within 48 hours. Delays are referred to in obtaining papers, in taking instructions after the initial 30-minute appointment and in reaching a conclusion which enables proceedings to be threatened or commenced.

83. Mr Hossain's third witness statement contained responses to a questionnaire of immigration practitioners about their experiences of the Chapter 60 policy. This related to detained persons' understanding of removal, accessing legal advice, time to prepare and lodge process, accessing papers in the case, taking on the case, requests for further time, and access to justice to challenge the decision. The responses were mainly from Duncan Lewis (34 practitioners), but also, among others, from Wilson Solicitors (4 practitioners) and four other responses. Duncan Lewis was described by Mr Hossain as having the largest publicly funded immigration and asylum practice in the UK. Further evidence from Mr Hossain contained four case studies provided to the Court in *FB*.

84. Mr Makhlouf who has given evidence in both cases, provided evidence to the Court in *FB* as he has done in the instant case about his work for the charity Bail for Immigration Detainees (BID). His two statements in *FB* were summarised by the Upper Tribunal in *FB* at [85-86] and [106-107]. It referred to access to justice problems of difficulties in obtaining any or any adequate legal representation. There were exhibited a report of BID of 2005 headed "Justice Denied". He exhibited various statistical reports comprising Legal Advice Surveys 2010-2017 and a report of February 2017 entitled "Mind the Gap: Immigration Advice for Detainees in Prisons."

85. Ms Schleicher of Medical Justice has given evidence in both cases. Her evidence was summarised by the Upper Tribunal at [87-90]. Despite the likelihood that readers of this judgment will also have referred to *FB*, for ease of reference, the judgment of the Upper Tribunal at [88] will be quoted in full:

> *"Medical Justice continues to be concerned that Chapter 60 significantly limits access to justice in that "even though detainees receive notice of the start of their removal window, reminding them to submit any challenge to the decision to remove them from the UK in the time before the beginning of the removal window, in practice this was often not possible, particularly in the large number of cases when only 72 hours is given". Prioritising clients within removal windows is, she says, difficult: "We are simply not able to prioritise the most urgent cases and in most cases are unable to secure legal representation before the start of a removal window. Many clients are not then removed during the early part of their removal window or at all. But some are removed before they are able to access legal advice".*

86. The evidence before the Upper Tribunal was summarised at [72-126]. This is far more extensive than the evidence summarised above.

87. As in *FB* where there was lead evidence of solicitors involved in the field, the evidence in the instant case includes specialist solicitors from the PLP, Wilson LLP and Parker Rhodes Hickmott, which firms have vast experience of the problems affecting people detained in immigration detention and people challenging immigration and asylum decisions or prospective decisions. There is overlap between the evidence given by Mr Singh of PLP in this claim and in *FB* where he gave a witness statement dated 22 May 2018 comprising evidence in respect of 4 cases which were reviewed in the judgment of the Upper Tribunal at [113-117]. The evidence of the solicitors in this case (particularly the lead evidence of Ms Navarette) has been endorsed by the evidence of Mr Miller, Head of Justice of the Law Society, to which this judgment will return.

Table of Propositions and Evidence

88. Upon the request of the Court, the Claimant has prepared a "Table of Propositions and Evidence". The reason for this request was because the evidence is lengthy and diffuse and the Court wished to have assistance in ascertaining what propositions are derived from the evidence. The table contains five overarching points and at least 24 other items.

89. The first overarching point is derived from paragraph 44(f) of the Grounds of Claim which reads as follows:

> *"For individuals [in detention]… it is next to impossible for them to 1) seek legal advice, let alone 2) make further representations, 3) complete this section 120 notice, 4) obtain public funding and 5) draft and lodge a judicial review within 72 hours (or 5 working days if it is a certification case)"*.

The Claimant relies on the statement of Ms Francis, the CEO of ILPA at [84 – 90]. That evidence is part of what she contends to be the lack of adequate availability of legal aid. Reference is made to the DDA surgeries, run in 6 different IRC's funded by the legal aid agency. Concerns are expressed that the 30-minute appointments of each detainee are too short for their cases to be fully investigated. Further, a maximum of 10 clients can attend the DDA surgery on any one day. Further, under the new contraction from September 2018, 74 firms have been on the DDA surgery rota thereby "*greatly restricting the ability of each individual firm to be able to assist."*

90. This overarching point is expanded upon as follows:

(1) *"Those who are in detention can, with limited exceptions, only access publicly funded legal advice through the DDA scheme"*: see Grounds of Claim 44(a); Navarrete WS1[30]; Schleicher [25].
(2) *"Accessing the DDA scheme the detainees to put their name down for an initial 30-minute appointment with whichever firm is allocated the rota slots for a particular week"*: see Grounds of Claim 44(b); Navarrete WS1 [31-32].
(3) *"For detainees who were not previously detained, there is delay in having an appointment occasioned by the need for them to be transported to the Detention Services Order, inducted, and provided with the information on where and how to request an appointment"*: see Grounds of Claim 44(c) and Schleicher [22]; Cole [17].
(4) *"Once requested, there are delays in obtaining appointment slots in many detention centres"*: see Grounds of Claim 44(d), Schleicher [23] and Makhlouf [21].

(5) *"It is extremely rare for a detainee to obtain a 30-minute appointment at all before the notice period has expired. It is inconceivable that they would be able to do so in the first 24 hours of the period in which they are expected to be taking legal advice"*: see Grounds of Claim 44(e) and Navarrete WS1 [116; Cole [17]; Navarrete WS2 para. 16(i)-16(iv).

(6) *"There are particular difficulties for immigration detainees held in prisons where there is no DDA surgery"*: see Makhlouf [28 – 33].

91. The above difficulties were considered in the *FB* case particularly in the extensive evidence of Mr Toufique Hossain, considered in *FB* at [72-84]. There is significant overlap of subject matter in *FB* and in this case, particularly between Hossain and Navarette. Further, both Schleicher and Makhlouf, have given evidence both in this case and in *FB.*

92. The second overarching point is said to be *"In the unlikely event that individuals are able to obtain a DDA slot at some point within the 72-hour or 5 day notice period, that would still not enable them to complete all the tasks expected of them by the time the period expires"*: see Grounds of Claim [45]. This overarching point is expanded upon as follows:

(1) *"The brevity of the DDA slot (30 minutes) combined with the other tasks which are required to be completed during that session, which include administrative tasks in order to assess legal aid eligibility, are such that it is not possible to take detailed instructions on the underlying claim"*: Grounds of Claim 45(a); Navarrete WS1 [32 – 57].

(2) *"The legal adviser an individual has seen is normally busy seeing other clients for the full day-slot of 30-minute appointments. They are unlikely to be able to take any further steps on any individual case until at least the following day"*: see Grounds of Claim 45(b); Navarrete WS1 [58]; Cole [13].

(3) *"After the DDA appointment it will be necessary to try to take further instructions which, since the clients remain in detention, and often do not have all their documentation with them, is time-consuming and difficult"*: see Grounds of Claim 45(b); Navarrete WS1 [61 – 63, 131 – 133].

(4) *"Individuals often do not have the relevant papers with them when detained. Papers can be requested from the SSHD, but the policy contains no timeframe for the SSHD to respond to these requests, or for the clock to be stopped in the meantime. Often requests are refused, or simply not responded to, despite repeated policy commitments from the SSHD to contrary effect"*: see Navarrete WS1 [34, 36 – 37, 62, 131 – 133]; Cole [20 – 21].

(5) *"Further delay may be occasioned by stringent legal aid contracting requirements, and the need to obtain adequate documentary evidence of the individual's financial circumstances before commencing work"*: see Grounds of Claim 45(c), Navarette WS1 [52 – 54]; Francis [32 – 69]; Cole [18 – 19].

(6) *"There are other practical problems with accessing advice and making representations from detention, including websites being blocked and problems with mobile phone reception"*: see Makhlouf [56]; Navarrete WS1 [59] and WS2 [17 – 21].

(7) *"Even if the DDA slot were on Day 2 (it cannot be on Day 1), it would be impossible the legal representative to complete all the tasks necessary in order to make representations and/or lodge a fully pleaded judicial review, on Day 3 of a 72-hour*

notice period, and very difficult to do so by day 5 of the five day notice period in third country cases": Grounds of Claim 45(d); Navarrete WS1 [69 – 91, 102 – 114].

93. Much of this evidence too was considered especially in the evidence of Mr Hossain above referred to. The evidence given by Ms Navarette about delays in accessing justice was given by Mr Hossain, and reference is again made to Ms Schleicher and Mr Makhlouf.

94. The third overarching point is said to be:

> *"Unless they already have a lawyer, individuals served with RNW or LNW in the community are likely to find it extremely difficult to find a lawyer within 7 calendar days, or 5 working days, let alone, in the case of LNW, 72 hours, and still less likely to find them in time to be able to complete all the tasks required before the notice period expires"*: see Grounds of Claim 48; Francis of [80 – 83]. This overarching point is expanded upon as follows *"Cuts to legal aid provision and the shrinking of the advice sector in recent years mean that there are areas of the country where there is no publicly funded immigration advice and those providers who remain in the sector have little capacity":* see Grounds of Claim 47; Navarrete WS1 [29]. Here again the evidence in *FB* is referred to covering similar areas.

95. There is a point raised in respect of cases raising Article 8 ECHR issues as follows:

(1) *"The timescales for applications for exceptional case funding for Article 8 cases (as they are out of scope for legal aid) mean that it is quite impossible for any individual served with an RNW or LNW to obtain legal advice in order to make representations based on Article 8 ECHR within the notice period"*: see Grounds of Claim 49; Navarrete (WS1) [46 – 51]; Francis [70 – 79]; Makhlouf [34 – 45].

96. The fourth overarching point is as follows:

(1) *"In Dublin III cases, individuals will face real challenges in submitting further representations within the notice period, so as to avoid a no-notice removal"*: see Grounds of Claim 52; Navarrete WS2 [55 – 65].

97. This overarching point is expanded upon as follows:

(1) *"In Dublin III cases the SSHD routinely makes and serves the decision to certify an asylum claim for removal to a third country without the asylum seeker having had any effective opportunity to explain why they should not be removed to that country, and without any consideration of the compatibility of removal with their human rights"*: see Grounds of Claim 52; Ms Navarrete WS1 [93 – 98] and WS2 [29 – 51].
(2) *"Even where this is done, the SSHD's frequent practice is to refuse to suspend the window while he considers the representations, and to generally serve the decision certifying the claim under Schedule 3, Part 2, para 4 within the window at a point where the right of access to court is severely curtailed"*: see Grounds of Claim 52; Navarrete WS1 [98 – 99 and 118] and WS2 [16(vi)-(vii) and 66-69]

98. The fifth overarching point is that in 'passage of time; change of circumstances', *"The notice period is so short that in all of these cases representations as to why removal should not take place cannot be served until it has ended"*: see Grounds of Claim 53; Cole [22].

99. This overarching point is expanded upon as follows:

(1) *"In Dublin III cases, individuals will face real challenges in submitting further representations within the notice period, so as to avoid a no-notice removal"*: see Grounds of Claim 52; Navarrete WS2 [55 – 65].
(2) *"The range of circumstances in which RNW and LNW can be served is vast; it could occur immediately upon curtailment of leave, when an individual is encountered as an overstayer or illegal entrant, or a decade after the conclusion of the appellate process, including when an individual has left the country and returned"*: see Grounds of Claim 53, Navarrete WS1 [16].

(3) *"The SSHD has a discretion whether to treat representations as suspending the removal window which he rarely exercises, and routinely serves decisions on further representations within the no notice window"*: see Navarrete WS1 [99 and 118 – 119].

100. Further points raised are as follows:
(1) *"Even if an individual is already represented when served with a RNW, or is able to secure such representation during the notice period, it is not possible in practice to complete the steps needed to i) properly advise the individual, ii) prepare any further representations, iii) receive a decision on the representations and iv) to access the court to challenge a decision during the notice period"*: see Grounds of Claim para 54; Navarrete WS1 [65 – 114]; Miller [11]; Clarke [3].
(2) *"Although vulnerable individuals are not suitable for RNW, this requires independent evidence that they are an 'Adult at Risk' under the SSHD's policy, and the mechanism for obtaining this (r34/35) is ineffective in practice. There is no mechanism for caseworkers to obtain the views of a medical or social work professional as to suitability for an LNW"*: see Schleicher [39]; Makhlouf [57 – 69], Ms Navarrete WS1 [123];
(3) *"It is harder for vulnerable individuals to access legal advice and to put forward reasons as to why they should not be removed"*: see Schleicher of the Claimant [24, 42-45].
(4) *"There is evidence that the right of access to the Court has been breached: Individuals who have been unlawfully removed"*: see Grounds of Claim 57; Singh WS1 [21-34, 47-55, 57-75].
(5) *"Individuals who did not have access to justice proper to an aborted removal"*: see Grounds of Claim [57]; Navarrete WS1 [119]; Cole [23 – 36].
(6) *"Individuals who had proper grounds to challenge removal which they had not been able to put forward before the 'no notice' window opened"*: see Grounds of Claim 57(2); Singh WS1 [86-104]; Navarrete WS1 [117].

Case Studies

101. The Claimant seeks to make good its challenge by reference to case studies: see the 11 case studies set out in the first witness statement of Ms Navarette ("**MN 1st w/s**") **[CB/G/29 at G/63ff]** and a 12th case study, a curtailment decision, supported by a witness statement of Ms Clarke ("**SC w/s**") **[CB/G207]** of the Claimant's solicitors. These are said by the SSHD to amount to the real foundation of the present claim and the basis on which it seeks to distinguish the Upper Tribunal's judgment in *FB*: they cover a wider area of cases than the four case studies which were considered by the Upper Tribunal in *FB*. The new case studies produced by the Claimant are a basis on the Claimant seeks to distinguish the Upper Tribunal's judgment in *FB*, and they were influential upon the

decisions of Walker J to give permission for judicial review and an interim injunction. In his judgment, this Court was going to consider a substantial body of evidence not before the Upper Tribunal, and of a kind which might lead this Court to a different conclusion from the decision in *FB*. It is also the case that the case studies are about a wider area of challenge than the narrower areas of challenge in the *FB* case, including the four case studies there submitted.

102. It is said for the Claimant that there has not been sufficient time to obtain more evidence. Ms Navarrete, in her second witness statement of 5 June 2019, says that there was not "*sufficient time*" to do more and that there were cases where client consent could not be obtained. However, this consideration has to be balanced against the length of time available to the Claimant to prepare its claims and what the SSHD in its skeleton describes as *"the array of witness statements and representations collated by it."* This is a reference to the evidence coming from representatives of several of the leading firms of solicitors and charities conducting cases for years in this field. Between their firms and charities, there must be a large number of cases in each year.

103. The challenge has been fashioned against the background of the criticism in *FB* of anecdotal evidence. The Claimant has chosen to fight this case as a public interest challenge to a policy rather than for specific Claimants. It has done so after the *FB* case in an effort to provide something more tangible than the cases of *FB* and the Other Applicant and a consideration of the four cases studies in *FB*. In my judgment, whilst some weight can be given to anecdotal evidence, it is of its nature going to be less precise and informative and less capable of detailed criticism than specific cases. If indeed, a case cannot be verified or exemplified by specific case studies, then its weight is much lessened.

104. The SSHD's response to the 12 case studies is set out in the schedule annexed to the Detailed Grounds **[CB/B/141-150]**. Ms Navarrete's second witness statement seeks to answer the observations made (see **[CB/G239-293]**).

105. It would extend this judgment far too long for the Court to set out in detail the full history of each of the Case Studies and the competing submissions. Nevertheless, some detail is required in order to appraise the extent to which the additional case studies make a substantial difference.

106. **MN1 (Dublin III case CO/2460/2018):** YY left Eritrea in 2003 and lived in Sudan until 2017. Fearing removal to Eritrea, he left for Libya, Italy (where he was homeless for 4 months), France and arrived in the UK on 28 August 2017, where he sought asylum. He had an asylum interview on 30 August 2017. He was then released. He was able to take steps to take legal advice following the making of an asylum application, although it is unclear whether YY had a reasonable opportunity of accessing legal advice and assistance with respect to his asylum claim and proposed return to Italy.
107. He says that he travelled to London to see a legal representative, but there is almost no detail about this. There is a dispute of fact as to whether YY received a letter dated 29 October 2017, notifying him of a take back request which had been made to Italy (which letter he ought to have received by the terms of Article 4 of Dublin III). In the initial case study, there was almost no detail about this. In the response attached to Navarette WS2, there are assertions about how during the many months thereafter YY believed that the

lawyer was continuing to represent him even though there were no communications between them.

108. YY was re-detained and served on 5 June 2018 with the notice of the opening of an RNW to open on 8 June 2018. There is a question as to whether he received notice of the take back request on 29 October 2017, but YY does not recall it, that he would not have understood the correspondence anyway and says that he was in shock when he received the RNW with proposed removal to Italy on 5 June 2018. He was seen at a legal advice surgery by a representative of Wilson LLP on 11 June 2018 (this being the first opportunity for the appointment to take place) and on 14 June 2018 a pre-action protocol letter was sent. It is said that on the basis that this was the earliest that could be done, the longer 5 or 7-day notice periods would not have sufficed. A request for additional time was rejected on 21 June 2018 on the basis of the time which he had had since 30 August 2017. On 21 June 2018, a Rule 35 examination took place and on 22 June 2018, a judicial review claim was filed.

109. **Conclusion**: this is a case where YY had been in the UK for 9 months prior to the notice of removal. Further, he had seen legal representation, and there is no corroborative evidence of what happened during that period, but an account of YY only, mainly attached to the responsive statement of Ms Navarette. As regards the failure to provide the correct notice, this appears to have been a caseworker error. Likewise, there may have been a failure of SSHD to ask YY whether further time was required to instruct a legal representative. In fact, YY was able to have access to justice.

110. **MN2 (trafficking):** PO arrived in the UK aged 10 with her 'aunt' in 1994. She was apprehended in 2004 and detained. An application for asylum was lodged in June 2004 was made and refused and an appeal was refused. In 2004, she became appeal rights exhausted. In March 2014, PO's case was reviewed by the SSHD but leave to remain was refused.

111. The RNW was served on 20 June 2017, opening on 23 June 2017. The evidence about what occured from 20 June 2017 is mainly attached to the responsive second statement of Ms Navarette and based on uncorroborated statements of PO, and in very unspecific terms to explain why the first appointment was not until 26 June 2017.

112. PO was seen at a legal advice surgery on 26 June 2017 and a PAP was sent out on 30 June 2017. When received, the SSHD acknowledged receipt and requested further information. On 10 July 2017, UKVI refused to withdraw the removal notice. By 14 July 2017, a decision was made that there were reasonable grounds to consider that PO may have been trafficked.

113. **Conclusion:** this was a case where PO had been in the UK for 13 years since her asylum application was refused and for 13 years since her appeal rights were exhausted. There was the possibility that PO could have been deported between 26 June and 14 July 2017, but in fact, there was access to justice and the problem was averted.

114. **MN3 (asylum/deportation):** MMA presented an asylum claim on 30 March 2014, which was refused on 13 January 2015. He lodged an appeal on 30 January 2015, which was dismissed, and subsequent applications for permission to appeal to the Upper Tribunal were refused on 19 May 2015 and 13 August 2015.

115. On 26 September 2016, he was served with a notice of decision to deport him and a one-stop notice, although this is questioned, following his conviction and sentence on 26 July 2016 for wounding and grievous bodily harm (it is not apparent whether this was s.20 or s.18 of the Offences Against the Persons Act 1861). The Secretary of State considered that he was a danger to the community.

116. He failed to respond to a s.120 notice that was said to have been served on him on 26 September 2016 (although it is disputed that this was served). He responded to the letter from the Home Office dated 14 January 2017 concerning his deportation order , which he did by representations of 3 February and 18 September 2017. He was seen by Wilson LLP on 20 June 2018. The decision rejecting his protection claim and certifying his human rights claim was served on him on 31 July 2018 which was more than three weeks prior to the service of the NRW which occurred on 21 August 2018, giving him 7 days to make representations prior to the opening of the removal window. Such representations were subsequently received on 6 September 2018. On 8 October 2018, SSHD served MMA with a further immigration factual summary which stated that further representations had been rejected.

117. It appears that there was a failure to notify MMA about the rejection of the representations, which may have been wrong in all the circumstances, and there may have been a failure to consider further submissions made by MMA as regards what might happen in the event of a return to Somalia. An injunction was then sought and obtained pending MMA's removal which was granted by the Upper Tribunal who had just been persuaded to make the order on 15 October 2018. On 4 December 2018, the decision of 8 October 2018 was withdrawn with directions for the further consideration of the matter.

118. **Conclusion**: Service of the NRW did not deprive MMA of an opportunity to advance any claims to be permitted to remain and seek legal advice. Such lapse as there has been about the failure to notify about the rejection of the representations did not lead to a denial of access to justice.

119. **MN4 Dublin III – Italy**: on 25 October 2017, EAA was apprehended by the police in the UK and EAA stated that he wished to claim asylum. There was a gap of 8 months between the asylum screening interview at that time and the RNW of 31 May 2018. On 23 April 2018, EAA's asylum and human rights claim was certified on third country grounds, but there is an issue of fact as to whether this was served by post or was served prior to the opening of the NRW. The removal window opened on 8 June 2018, and for reasons which were not explained in the first chronology, EAA did not see a representative of Wilson LLP until 15 June 2018. It appears that he was unaware of his ability to obtain free legal advice until 11 June 2018, and the first legal appointment was not until 15 June 2018.

120. From the response in the document attached to Navarette WS2, it now appears that EAA had instructed a firm to act for him since at least 8 January 2018. It is said that EAA did not understand or was not aware of what was being done for him prior to Wilson LLP acting, but there is no independent corroboration of this.

121. Wilson LLP sent a PAP letter on 19 June 2018, and new removal notice was served on 28 June 2018 with removal window to open on 5 July 2018. In the meantime, judicial review proceedings were instituted on 4 July 2018.

122. In Navarette WS2, it is said that between 8 June and 26 June 2018, EAA was at immediate risk of removal: for most of that time between 19 June and 26 June, there was a request to defer the notice period due to the change of legal representatives. The SSHD subsequently assessed EAA as an "Adult at Risk" and therefore he was given a limited notice of removal window with a new notice perio.d. Criticisms were also made about the Third Country Unit's failure to disclose specific documents subsequently served, but Wilson LLP could and did obtain legal redress in respect of this before the opening of the second window for his removal. Here too, there was no denial of access to justice.

123. **MN5: Overstayer or victim of trafficking**: PM had had a period of 17 years in the UK between the expiry of her leave in 2000 and the service of the NRW in which to regularise her position. In 2007, she was served with a form IS 151A and treated as an absconder and she did not apply for further leave to remain until 2012 which was rejected on 1 June 2013. Between 2015 and 2018, she had the benefit of legal representation by "*various firms*" and made a claim for asylum. It is stated by that removal directions had been cancelled due to her issuing applications for judicial review subsequently certified as "*clearly without merit*".

124. When detained, and served with the NRW, on 7 November 2017, she stated that she had lost her papers. A representative from Wilson LLP saw her on 9 November 2017, and therefore before the opening of the removal window on 13 November 2017. It is unclear whether there was at this stage any request for the notice of removal to be extended. A request was made on 15 November 2017 for her case to be referred to the NRM, and by 17 November 2017 the SSHD had provided a consent order agreeing for this to be done. A positive reasonable grounds decision was made on 23 November 2017.

125. **Conclusion:** This case is also to be judged about a history going back to 2000 with numerous prior opportunities to deal with her position, and with attempts being including applications certified as "*without merit*". PM was not deprived of an opportunity to access legal advice and access justice. It is said that once in the removal window between 13 November 2017 and the injunction granted on 21 November 2017, PM was at risk of immediate removal without further notice. It is said that it was a matter of luck that she was not removed. In fact, this case study pre-dates the amendments made to JRI in May 2018 as a result of which it became possible individual cases such as this to extend the period up to the removal window, which would have ended this possibility pursuant to RED.0006.

126. **MN6**: It appears to be accepted that TA was duly served with notice that Italy had been asked to accept responsibility for his asylum claim under Dublin III on 21 June 2018, and was able to instruct legal representatives to advise him, and make submissions on his asylum claim, advanced on 21 September 2018. He was served with an NRW on 27 November 2018, with the removal window opening on 4 December 2018.

127. It is said that there was a "*lack of any advice or action by TA's solicitors*" in the period between the service of the notice and the attempt to remove TA on 10 December 2018, some 14 days later. Wilson LLP agreed to act for him pro bono on 12 December 2018. They were able to submit a letter before action the next day, and TA was released on the same date. There is no indication that any request

for additional time to submit further matters was made between the service of NRW on 27 November and the attempted removal on 10 December.

128. **Conclusion**: This case study does not demonstrate that the notice periods and safeguards set out within JRI deprived TA of the opportunity to seek legal advice and redress, as opposed to the inaction by his legal representatives.

129. **MN7:** This case study long pre-dates the May 2018 amendments. The failure, by reason of caseworker error, to serve the decision to certify TH's asylum claim of 12 September 2016 prior to the service of the NRW on 21 October 2016 is directly contrary to the terms of JRI. Similarly, the attempt to remove TH on 15 November 2016, prior to the provision of a response to his solicitor's application on human rights grounds of 4 November 2016 is directly contrary to JRI.

130. **Conclusion**: It is unclear whether or when TH attempted to secure legal advice and assistance during the seven-day period following the service of the NRW. There is, again, a disconnect between the individual errors identified and the argument that the SSHD's removal window policy set out in JRI is, as presently framed, unlawful.

131. **MN8**: After arriving in the UK on 28 April 2014, AB was able (a) to advance his claim for asylum, in which he was assisted by Lawrence Lupin solicitors; (b) to attend a full hearing at the FTT on 9 January 2017, following which his appeal was dismissed by decision of 27 January 2017. It is said that the Judge found that his previous solicitors had abandoned him 6 days earlier. It is also said that he was vulnerable being a victim of torture suffering from PTSD, depression and with impaired cognitive function); (c) to apply for permission to appeal to the Upper Tribunal on 7 August 2017, but this was refused.

132. It is not explained why South Yorkshire Refugee Law and Justice who provided pro bono assistance did not obtain an extension of time following the service of NRW on 26 October 2017, or why nobody else did. It is not explained why there was a delay from 26 October 2017 until seeing Wilson LLP at a surgery rota at Morton Hall where AB was detained. When notified by Wilson LLP that further submissions were due to be made on 10 November 2017, it is said that SSHD requested that these be submitted by 16 November 2017. The further submissions were refused on 17 November 2017 and AB was able to seek interim relief on the same day.

133. As regards the suggestion that AB was deprived of access to justice, it is noted that Choudhury J observed, in refusing an application for interim relief on 17 November 2017, that AB had been aware of the removal window since 26 October 2017, and that there was no good reason for not advancing submissions made sooner. AB was thereafter able to obtain interim relief, granted by William Davis J on 20 November 2017. A subsequent application for further interim relief was refused by Mostyn J on 4 December 2017 and certified as totally without merit. He stated that every single piece of evidence that was sought to be relied upon could have been obtained with due diligence for the purposes of the case in January 2017.

134. On 20 June 2018, the SSHD refused the claim, but accepted that it met the fresh claim rule and therefore entitled AB to a further in-country appeal. There was

thereafter a large amount of new medical evidence and the appeal was allowed on 20 December 2018. The decision was not critical of AB, but was critical of his previous solicitors in failing to obtain further evidence in readiness for the hearing before Judge Greasley in January 2017.

135. **Conclusion:** The suggestion that AB has been deprived of access to legal advice and access to justice appears directly contrary to the findings of both Choudhury J and of Mostyn J, who had the advantage of considering AB's immigration papers and legal documents. The problem arose because of the failure of his previous solicitors.

136. **MN9: Age-disputed child – Dublin III – Italy**: A month before the NRW, Wilson LLP first took instructions. During this month, it made four requests for disclosure of vital documents.

137. On 9 June 2017, NRW was served with a removal window from 16 June 2017. Submissions were made subject to the repeated caveat about key documents not having been disclosed.

138. On 20 June 2017, after the window had ended, SSHD certified that QE's human rights claim was clearly unfounded on the basis of his removal to Italy. After having maintained that QE was over 18, eventually on 13 July 2017, a new age assessment was conducted and it was accepted that QE was only 16. The grounds of claim were amended on 21 July 2017, and on 26 January 2018, the claim was settled by consent so that the asylum claim would be determined in the UK and the NRW was withdrawn.

139. The matters alleged by QE, show a caseworker error in failing to provide QE's solicitors with disclosure to which they were entitled. QE was able to challenge that failure by two letters of claim and further "*detailed human rights submissions*" sent within the notice period to 15 June 2017 accorded in the NRW of 8 June 2017, said to have been served on 9 June 2017. QE's solicitors were further able to lodge a judicial review claim by 15 June 2017. Whilst the decision served on 20 June 2017 certified his human rights claim as clearly unfounded, QE was released from detention on 21 June 2017.

140. **Conclusion**: The case study is an example of caseworker error, specifically with respect to disclosure, in respect of which prompt legal assistance and legal redress was obtained. The case study does not show QE to have been deprived of access to justice by reason of the terms of the SSHD'S removal window policy. It is to be inferred that if the documents had been provided when they should have been, that the matter would have been dealt with before the NRW or before the expiry of the window.

141. **MN10 Dublin/Third Country**: It is unclear whether ZA attempted to seek legal advice in the period between his making a human rights claim on 5 October 2016 and the refusal and certification of that claim on 28 October 2016. He was, however, able to attend the legal advice surgery at Morton Hall IRC on 3 November 2016, before he was given a seven-day NRW on 8 November 2016. Whilst ZA complains that he experienced difficulties contacting his solicitors in subsequent days "*due to a lack of phone signal*", it is not stated whether he sought assistance from staff in respect of this.

142. The facts advanced show a number of caseworker errors made in 2016: the failure to notify Wilson LLP of the NRW on 8 November 2016; an error made as to the country of return within the certification process; and the attempted removal of 25 November 2016 before responding to Wilson LLP's letter before claim and human rights claims advanced therein. The deportation did not take effect since ZA collapsed whilst about to board the aircraft and so was not in a fit state to travel and so the removal did not occur.

143. Emergency legal aid was sought on the same day, and obtained on 29 November 2016. By 30 November 2016, judicial review proceedings were issued. A manifestly unfounded certification decision was issued in respect of the human rights claims on 5 December 2016, but SSHD confirmed that ZA would not be removed until after conclusion of his judicial review. Having been refused permission for judicial review by a Deputy High Court Judge (9 January 2017), the Court of Appeal granted permission (7 March 2017) and remitted the matter to the Administrative Court for reconsideration where permission was granted on all grounds on 27 June 2017. On 7 February 2018, SSHD agreed to withdraw the safe third country certification of ZA's asylum claim and to give it substantive consideration in the UK.

144. **Conclusion**: There were a series of caseworker errors. Without these, it is to be inferred that ZA would not have been taken to board the flight on 25 November 2016. In the circumstances, the events do not undermine the legality of the JRI as currently formulated.

145. **MN11 Dublin/Third Country**: The absence of a Home Office reference is noted, and SSHD says that there has been an inability to verify what is said by Ms Navarette.

146. XY's solicitors were able to lodge a judicial review of the 5 April 2016 certification of his asylum claim on third country grounds, following acceptance by Bulgaria. Permission was refused by the Upper Tribunal on 9 August 2016 and, it appears that the application was renewed and then,it is said, stayed thereafter to await the outcome of the Court of Appeal's decision in *HK & ors* [2017] EWCA Civ 1871. For reasons which are unclear, it is said that his previous solicitors notified XY of their intention to cease to act for him on 26 April 2018, six days before his oral permission hearing. By a judgment of 27 November 2017, the Court of Appeal had dismissed the appeals against certifications of the asylum claims as clearly unfounded in HK. On 2 May 2018 the Upper Tribunal duly refused XY permission to proceed, the ground pursued having become unarguable.

147. XY did not attend that hearing. On 7 August 2018 XY was served with a 7 day NRW, Expiring on 15 August 2018he was seen by Wilson LLP at a legal advice surgery in detention by 10 August 2018 and Wilson LLP came on record on 13 August 2018 and requested a full file of XY's papers.

148. The SSHD deferred the XY's removal on 14 August 2018, it is said, as the Bulgarian authorities informed him, they had not had adequate notice of removal.

149. **Conclusion**: On the basis of the outline advanced, the case study shows an apparent failure, contrary to JRI, to provide Wilson LLP with key documents requested for the purposes of assisting XY. This case study does not undermine the legality of the policy guidance in JRI.

150. **Case Study of Ms Clarke**: This case study describes the service of a letter notifying an individual with three children of the curtailment of her leave dated 9 December 2015. The letter contained a notice of the opening of a removal window following a notice period ending 18 December 2015. This reflected the standard template deployed for curtailment letters.

151. A pre-action protocol letter was sent by the claimant's legal representative, requesting a response by 15 December 2015, and legal aid was granted on 16 December 2015. By 18 December 2015, grounds had been settled by Counsel. The claim was on the point of being issued on 22 December 2015 when a fax was received from the Home Office indicated that leave had been reinstated.

152. The matter was reconsidered, following receipt of the Pre-action Protocol Letter, and the individual's leave was reinstated. There has now been an opportunity to consider the GCID notes for this case. From these, it appears that no actual steps had been taken to set in train removal directions for this individual.

153. The SSHD did not, and could not, proceed to set actual removal directions at this stage, consistently with the terms of the policy, which provide with a separate Family Returns Process. It is made clear, too, in JRI, that the notice of removal window policy there described may not be used to give notice of removal in family cases.

154. The Home Office has reviewed the standard wording of its curtailment letters, and is correcting the erroneous template reference to the opening of a removal window. In the meantime, staff have been instructed that if a template only includes a removal window wording, they must edit the template to replace this wording with *"You will be given further notice of when you will be removed."*

The deferral of removal and its significance

(a) FB and the deferral of removal

155. In *FB*, a matter that had arisen only in May 2018 was the decision of the SSHD to be prepared to defer the RNW. On 14 June 2018, instructions were issued to caseworkers in OSCU setting out the process for considering requests received to defer a notice period, and information to be recorded in order to permit the SSHD to keep track of the application of the new guidance on consideration of deferral of the notice period in JRI to require case owners to record on the Casework Information Database their reasons for a response to such a request, regardless of whether removal was maintained. It was emphasised that consideration of deferral should be triggered whenever issues covered by this section of the JRI guidance was raised, regardless of whether an explicit request for consideration of deferral was made.

156. At that stage, it was so new that it had a legal deficiency, namely that it was not clear what was being deferred. If it was the commencement of the removal window, then that needed to be made plain. The individual and any legal adviser needed to be given a written notice and must state when the removal window was to open and confirm the length of the window [204].

157. In *FB*, at [22] and [23], it was noted that for the first time on 18 May 2018 in JRI version 15.0 that there was a new section entitled "Consideration of deferral of notice period". It was relied on by the SSHD as providing a discretion of deferral, but the Claimant said that it could not rescue a fundamentally unlawful policy [22]. The Court did take it into account, but was critical of the terminology, since there was imprecision as to what was being deferred, the notice period or the commencement of the removal window. It seemed to be the latter, but the heading did not say that, and it was important for this to be clarified so as to avoid confusion not least to applicants for deferral. It would also not be clear whether the deferral would eat into the removal window [204]. Hence, it is important *"if the commencement of the removal window is to be deferred, [that] the individual (and his or her legal adviser, if there is one) must be given a written notice, which must state when the removal window is to open and confirm that length of that window"* [204].

158. The relevant evidence here is as follows. In *FB*, there was a witness statement of Adam Pompa, Assistant Director, Immigration Enforcement, Detention Progression and Returns Command ("DPRC"), OSCU made on 20 July 2018. Mr Pompa referred to the amendment to the policy to include the deferral provision and to the instructions given to caseworkers. It was indicated that since the instruction had been given, there were 18 requests for deferral, and four were considered appropriate.

159. On 28 September 2018, a summary of the terms of the guidance on extending notice periods and cancelling removal windows was re-circulated to caseworkers, following instances when the guidance on deferral had not been applied.

160. Following the *FB* decision, the policy was amended in two respects in order to address the deficiencies identified by the Upper Tribunal, through the introduction of two further 'RED' notices, RED.0005 and RED.0006, as mentioned above. The terms of the guidance were revised, and the provisions as to deferral of removal highlighted, following receipt of the handed down judgment in *FB* on 31 October 2018 (See Policy Instruction – Notification of Enforced Removals at Annex 7 to the Secretary of State's Detailed Grounds). The instruction emphasised again the need to consider extending the notice period when reasonably requested to enable individuals to seek legal advice, and to provide notification or cancellation of the removal window. Guidance was further amended, and circulated, in respect of routing and final destinations of return.

(b) The deferral of removal and the JRI post-FB and the form RED.0006

161. These matters have now been clarified in the more recent versions and particularly Version 17.0. The form RED.0006 has been created and the policy has been written in a way to show that there is a discretion to defer the commencement of the removal period. Hence, there have been added two paragraphs in the notice that show that there is extended both the notice period and the 3-month removal window. The guidance that was given to the caseworker was to provide written notice using the form RED.0006 to

the individual and their legal representative stating when the removal window would open and confirming the length of the removal window. This gives effect to [204] of the judgment of the Upper Tribunal in *FB*.

162. The existence of this discretion to defer the commencement of the removal window is a matter which reduces the chance of any possible unfairness about the period of notice being too short in any particular case. It therefore assists the case of the SSHD that the provisions in the policy regarding time limits do not operate in such a way to amount to an unlawful restriction on access to justice.

(c) The deferral of removal and the refusal to provide information in response to the Law Society/PLP prior to the appeal in FB

163. There then has to be taken into account how the policy would work in practice. If there was reason to believe that the discretion was window dressing or that it was unlikely to have any practical or beneficial effect, then its impact would be rendered nugatory. It is in this context that the questions were raised by the Law Society and PLP in December 2018 and January 2019 respectively about the operation of the deferral period.

164. On 21 December 2018, the Law Society through Mr Miller, Head of Justice, sent a letter to Ms Dolby. The letter was a response to the updates in the policy so that in the event that the notice periods were not sufficiently long, an applicant or his or her advisors would be able to ask for more time. Mr Miller sought information about the monitoring of how the new policy about extensions to notice periods would work. There were many questions asked in this regard, including about how the requests for extensions would be considered and the instructions to caseworkers in this regard and how the operation of the new policy would be monitored.

165. In a response dated 11 January 2019, Ms Dolby responded to Mr Miller that a deadline set for that date could not be met because of the large number of questions, but that *"we are looking at the points you have raised, including whether we need to make any amendments to our notices, and hope to provide a full response shortly".* Thereafter, a pre-action protocol letter was sent dated 15 January 2019 from PLP on behalf of Medical Justice, which was in respect of the instant claim. This letter also substantially replicated the information sought from the SSHD by the Law Society. This then led to a letter of 29 January 2019 from Ms Dolby attaching a copy of the response to PLP to the effect that the matter was covered by the *FB* case. The letter of 29 January 2019 to PLP stated that there would be a substantive response once the Court of Appeal judgment had been handed down. The removals policy was not to be suspended in the interim (but in the event, it was suspended due to the Order of Walker J). A letter was also sent to the Law Society saying "…*we will respond substantively to your letter of 21 December 2018 after the Court of Appeal has given its judgment [in the FB case]*".

166. The response of the SSHD was unsatisfactory. Whereas it was going to answer the letter of the Law Society (according to its letter of 11 January 2019), once it received a pre-action protocol of these proceedings, it decided not to answer until after the decision of the Court of Appeal in *FB*. This is a fast-developing area where policy evolves quickly as a result of experience of the SSHD in dealing with asylum and immigration cases and the representations and queries of solicitors and charities in the field. Indeed, it has been said on behalf of the SSHD that the policy is being reviewed all the time, and in that sense each version of the JRI is interim, and that is a reason why

there are so many versions. This fast evolution is reflected in the number of versions of the JRI e.g. version 15.0 referred to in *FB* was in May 2018, version 17.0 in November 2018, version 18.0 in April 2019. The failure or refusal to provide information pending an appeal to the Court of Appeal is not conducive to the process of sharing information and being receptive to evolving the policies in the light of that information and representations from interested parties.

167. The Claimant is able to rely upon *the 2010 Medical Justice case* as to the significance of a failure to monitor the policy. In that case, Silber J made findings about a failure to monitor the policy as preventing the SSHD from being able to show how exceptions to the 72-hour notice period did not risk infringing the right of access to justice. He cited Baroness Hale who explained in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1, 62 [91], that the absence of monitoring information means that the SSHD cannot show that the policy was being operated in a lawful manner by giving access to justice to those served with the relevant notice period.

(d) The deferral of removal and the statement of Mr Pompa of 11 March 2019 and disclosure in May 2019

168. Whilst the decision not to provide any answer at this stage to the questions of the Law Society or PLP was unsatisfactory, the position has been mitigated by subsequent steps taken by the SSHD. By a further statement of Mr Pompa of 11 March 2019 about steps being taken towards monitoring, and by the provision of further disclosure provided on 10 and 31 May 2019 and information regarding specific instances of deferral cases. The disclosure has contained information relating to not only the deferral of the notice period, but to courtesy notices, third country removals and unlawful removals.

169. The statement of Mr Pompa dated 11 March 2019 referred to further amendments to the policy made since the judgment in *FB* and to instructions given to case working units and operational staff. He mentioned training packages to train staff in respect of unlawful detention and improper removals and the operation of the policy. He also referred to requests for locally held data as regards the way in which requests for deferrals were dealt with. He described the steps taken to introduce consistent monitoring of the information with a view to developing an assurance mechanism within the data from each case working area which is subjected to review.

170. He referred to the information which is collated and how a new management casework system (Atlas) is being implemented and it is anticipated will provide a wider range of data on demand supporting improved assurance processes and monitoring. At paragraph 19, Mr Pompa identified the additional data which is recorded and reported as including;

> *"* - *Number of referrals received*
>
> - *Date and time of referral received (allowing calculation of average time before planned removal)*
>
> - *Type of referral (further representations, judicial review, asylum claim etc)*
>
> - *Date and time of decision is made (allowing calculation of average time taken to decide, and time before planned removal)*

- *Number of cases where removal is maintained*
- *Number of cases where removal is deferred*
- *Reasons for deferral of removal*
- *Average time before removal referral including requests to defer removal or for disclosure of documentation is made*
- *Average time before removal that a decision is made."*

171. On 21 March 2019, the Claimant wrote to the SSHD seeking information regarding training materials, guidance, instructions and other policy documents, service of decisions on further submissions, limited notice of removal, access to legal advice in detention, the witness statement of Mr Pompa, requests for documents, extending the notice period/deferral of removal, impact assessments, monitoring, statistics and cases of unlawful removal. On 10 May 2019, there was provided lengthy response including annexes comprising 438 pages.

172. In the section about extending the notice period/deferral of removal, there was provided training materials and associated guidance to caseworkers in this regard and answers of Julia Dolby to questions 49-56 asked by the Law Society in the letter of 21 December 2018. A specific amendment was sought to the RED.0006 form and Ms Dolby stated that that amendment could be made.

173. In response to questions about monitoring and statistics, there were provided data on consideration of extension of removal notices/deferral of removal (25 May 2018 to 9 March 2019). There was provided information relating to the number of requests for legal surgeries/appointments at the various detention centres and the average length of time between requests and appointments, data on the number of RED.0005 and RED.0006 forms since June 2018. There was provided information that in the period of April 2018 to March 2019, there had been deferred or cancelled a total of 4319 removals and in the year 2018-2019, OSCU maintained 2,900 cases (52%) and deferred 2,639 cases (48%). There were also identified immigration enforcement data available online www.gov.uk/government/collections/migration-transparency-data#immigration-enforcement. Mean and average times between receipt of referral in OSCU and scheduled removal, receipt of referral in OSCU and a decision being made and a decision being made in OSCU and scheduled departure for the period of April 2018 to March 2019. There is identified 68 cases (1.3%) where representations were not received until after a person's scheduled departure or so close to the removal that the departure could not be halted. In these cases, OSCU reviews the representations and makes a decision whether a post-removal response can be issued or whether the individual is returned to the UK.

174. Towards the end of the letter, there is related the number of enforced returns, that is over 40,000 in a 4-year period from 2015 to 2018 and the sites where this is recorded online. There were only 8 of these cases where the Applicant had been brought back to the UK or was trying to bring them back to the UK and the SSHD or the Courts decided that they have a legal basis to remain or there are ongoing proceedings to decide their case. This comprises less than 0.02% of the actual removals.

175. Following a request of 21 May 2019, on 31 May 2019, there was provided further disclosure by the SSHD. This concerned information relating to requests for extensions/deferrals and unlawful removal cases. It was accompanied by over 1500 pages of documents comprising various documents relating to various cases including 19 deferral cases and other unlawful removal cases. This has in turn given rise to case studies, consideration of which follows in this judgment.

176. The provision of this information has been in contrast to the refusal to answer the questions of the Law Society. It has provided a considerable amount of information both as to the impact of the RNW policy and as to specific case information in addition to the specific case studies which were in the evidence before Walker J in March 2019. Some of the force of the points about absence of monitoring has been reduced by the information which has been provided. However, it is still regrettable that there was not an earlier engagement with the information sought by the Law Society. The information which was provided in May 2019 was only shortly before the hearing, some just over a month before the hearing and some less than three weeks before the hearing. The effect has been that the information has come before the Court through late evidence, annexes and skeleton arguments, some even after the hearing itself. This has caused difficulties for the parties and for the Court. It has included supplemental skeleton arguments with the Court's permission even after the hearing. It is probable that some of these difficulties would have been averted or alleviated if the monitoring referred to by Mr Pompa had started earlier and been shared, and if the SSHD had engaged earlier with the information sought. It is also regrettable that the SSHD did not provide the information which it did provide in witness statement form and it would have been more helpful if it had considered more evidence in response to the evidence filed by the Claimant. Nevertheless, entirely responsibly, the Court was not asked to exclude altogether the more informal way in which the SSHD adduced this information, but to give to it less weight than evidence. This judgment now considers the information which has been provided.

(e) The deferral of removal cases in practice: specific case studies

177. It is said on behalf of the Claimant that the power has been exercised only in a small proportion of cases. Of the 71 requests for extension of the notice period considered during the period from 25 May 2018 to 9 March 2019, 13 were granted. The SSHD is unable to break down these figures by reason prior to December 2018. However, since December 2018, of 15 requests which related to access to legal advice, 10 were rejected. This does not prove that deferrals are being refused thereby causing a denial of access to justice. Further, it is apparent from the much fuller information since December 2018 provided through the further information of the end of May 2019 and the documents provided on disclosure that the Claimant is able to obtain information relating to deferral cases.

178. The further disclosure has led to the parties setting out information about various deferral cases and unlawful removal cases. Through the SSHD's responses to the Claimant's disclosure requests, there have been identified deferral case studies and unlawful removal case studies. The SSHD has served a skeleton argument dated 25 June 2019 containing an annex about the case studies relied upon by Ms Navarette and an annex relating to the deferral and unlawful removal cases. The Claimant responded with a skeleton argument dated 28 June 2019.

179. It is necessary to include some of the detail of the six deferral cases where it is contended that the applicant has been removed without effective access to justice are as follows. The reason is that, as was no doubt the purpose of the detailed work undertaken by the Claimant in this regard and the detailed cases are capable of providing particularly tangible evidence.

180. The first case **("DC1")** concerns an Albanian national whose asylum claim was refused and appeal dismissed on 7 September 2011. This person absconded until encountered on 12 June 2018 when served with a 72 hours' notice of removal, not to take place before 19.30 hours on 15 June 2018. Submissions were only advanced on 16 June 2018 but no explanation is provided as to why this did not happen earlier. The submissions were refused on 17 June 2018. On that date, there was a request for the removal window to be reset but that was refused. Fresh representations were refused on the same date. Further submissions were advanced on 18 June 2018 but they were refused on the same date. This case is said by the Claimant to amount to a clear illustration of the inadequacy of the safeguard of the power in extension in practice. However, this is a case where there is no explanation as to why the submission was not within the notice period, and where there have been repeated representations with no explanation as to why they could not have been made earlier. This case does not establish a removal without effective access to justice.

181. The second case **("DC2")** concerns an Albanian national who made unlawful entry on 7 February 2013 whose asylum claim was refused on 21 March 2013 and appeal rights were exhausted on 12 September 2013. The NRW was served on 5 June 2018. The removal window opened on 8 June 2018. A request for the removal window to be reset was sent on 17 June 2018. The request was refused, absent any explanation why the applicant had decided to change legal representatives at that stage, nor why the documentation requested could not be provided by his previous representatives. They were also rejected as not crossing the fresh claims threshold and appearing to be an attempt to frustrate removal at the last minute. Multiple further representations were made on 18 June 2018 and refused on the same day. The request for the deferral was not made until after the expiry of the notice period and there is no explanation why this is the case. Removal took place on 19 June 2018. On 1 September 2018 using a forged identity card from Cyprus this person sought entry at Edinburgh Airport but was refused and removed to Italy on 6 September 2018. This case does not establish a removal without effective access to justice.

182. The third alleged case of removal without access to justice **("DC8")** was a case where a previous asylum claim had been refused on 12 March 2018 and appeal rights were exhausted on 24 July 2018. There was a limited notice of removal by a charter flight on 26 July 2018, not to be before 30 July 2018. On 31 July 2018 there were multiple sets of representations and an injunction was refused at 17.02 hours. The final representations were responded to that day. A pre-action protocol letter was sent 20.59 hours on 31 July 2018 and that was refused on the same day at 23.31 hours. This was a case of multiple representations very shortly after appeal rights had been exhausted thereby not supporting an inference that the applicant was deprived an access to justice. Home Office records showed that the individual was granted leave to enter as a visitor in 2008 but overstayed thereafter.

183. The fourth deferral case **("DC10")** was of a person who had an asylum claim refused on 21 August 2017 and became appeal rights exhausted on 12 February 2018. A limited notice of removal was served 31 July 2018 not to be removed before 17.00 hours on 3

August 2018. An extension of the notice period was requested. However, since the appeal had been concluded within the previous six months, there was nothing to indicate why extra time was required, and this case does not establish a removal without effective access to justice.

184. The fifth deferral case **("DC11 and 12")** concerns an applicant served with an NRW on 30 June 2018 and a removal opening on 4 July 2018. Submissions premised on private and family life were rejected on 13 July 2018 and certified. The person was notified on 17 July 2018 of a removal on 31 July 2018. Further submissions were advanced on 28 July 2018 and rejected on the next day. Further representations were made on 30 July 2018 and rejected on the same day. The removal did not proceed on 31 July 2018 (apparently because of disruptive conduct). New solicitors were instructed on 4 August 2018 and further submissions were made on 13 August 2018 which were rejected for want of supporting evidence concerning family life on 14 August 2018. By an email of 21.52 hours, the SSHD was advised that the applicant had instructed solicitors to initiate judicial review proceedings. It was not accepted that there was a good ground for not instituting these in the month since the rejection on 30 July 2018. The removal took place on 15 August 2018. The comment of the SSHD is that the interval between the NRW on 30 June 2018 and the removal on 15 August 2018 was over six weeks, during which time there was representation by two different sets of solicitors. There is no evidence of a denial of an opportunity to an access to justice. This person has now exercised their out of country right of appeal against the refusal of the human rights claim: the appeal was dismissed on 18 February 2019.

185. The sixth deferral case **("DC13 and 14")** was one where an asylum claim had been refused on 19 November 2017 on Article 1F grounds: the appeal rights were exhausted on 24 May 2018. The applicant was arrested and detained on 16 August 2018 and served with an NRW not to be removed before 17.00 hours on 20 August 2018. The applicant suggested that she would be submitting additional grounds and new evidence and that she had not exhausted her appeal rights. Deferral of the notice period was considered and rejected since she had previously been represented and had had access to the Courts. An application to defer removal was made on 25 August 2018 by her solicitors but that was rejected. The representations were not assessed as amounting to a fresh claim and removal was effected on that date. There was no denial of access to justice.

186. As regards other deferral cases, they can be summarised as follows. As regards **("DC3")** an application for asylum had been rejected six weeks prior to service of an RNW on 6 July 2018. A further submission was made on 17 July 2018 by representatives instructed on 3 July 2018. The removal directions were maintained. There is nothing to indicate a deprivation of rights.

187. As regards **("DC6")**, a judicial review application was refused on 17 April 2018 and certified as totally without merit. An NRW was served on 26 July 2018. The applicant was seen in an advice surgery on 30 July 2018 and a request for deferral was refused on 31 July 2018. Given the very recent representation in connection with a judicial review, the suggestion of deprivation of rights is not substantiated.

188. In respect of **("DC7")**, the applicant had made numerous unsuccessful protection applications and had had permanent residency refused. After a refusal of an asylum application, the appeal rights were exhausted on 18 May 2018. The NRW was issued on 23 July 2018 not to be removed before 10.30 hours before 27 July 2018. Further representations of 26 July 2018 were rejected on 30 July 2018. On that date a request for

a deferral was refused based on the fact that the applicant was represented and had enjoyed recent access to the Courts.

189. As regards **("DC9")**, an RNW was served on 23 July 2018 for removal not before 17.00 hours on 31 July 2018. A time and date of removal were notified. Further representations of 24 July 2018 were refused on 3 August 2018 when the Applicant was removed. The extension was refused since the applicant was represented and there was no evidence that she needed additional time.

190. As regards **("DC16")**, the applicant had exhausted previous appeal rights in her asylum claim on 21 February 2018. On 10 August 2018, this person was informed of a removal window opening on 15 August 2018. There were multiple sets of representations rejected by decision on 22 and 28 August 2018 and 16 September 2018. There was no indication that access to justice was denied.

191. **("DC17")** concerns a notice of criminal deportation arrangements served on 22 January 2019 and the opening of a removal window on 29 January 2019. Solicitors were instructed and requested a deferral on 29 January 2019 which was refused on the next day. There is nothing to suggest that the deferral was not properly considered.

(f) The deferral of removal case studies: conclusion

192. The analysis of the deferral cases contended to give rise to denials of access to justice suggests that in fact the contention of denials of the applicants' rights has not been established. That is the case of the highlighted cases, and in respect of the other cases too, no denial of access to justice has been established. It has been informative to set out the cases in some detail showing a history often of appeal rights having been exhausted sometimes shortly before the notice being served of the RNW: in other cases, the persons have had previous legal representatives, where there is no information other than anecdotal to explain why they would not be able to assist. Frequently, there are indicators as set out above where it is indicated that the applicant is simply delaying to thwart removal.

193. To similar effect is information provided by the SSHD on 31 May 2019 indicating that in 8 of 13 cases where removal followed on such a refusal, it was effected less than 12 hours later (in none of the remaining five was the delay 72 hours or more). That information does not show that the process of deferral is not genuine, or that there was a denial of access to justice: if anything, it is likely to show that these applicants did not have a case to avoid or postpone removal.

194. The Claimant says that the safeguard of deferral is inadequate because deferral is discretionary rather than obligatory. However, that fails to give adequate weight to the policy which states expressly that the opening of a removal window should *'normally'* be deferred if an unrepresented person wishes to obtain legal advice and cannot be give an appointment at the advice surgery within the initial 72-hour period. The fact that the matter must still be considered is not surprising, when one of the mischiefs referred to in the policy is in case the individual has "*delayed their request in order to thwart removal*." A decision to refuse a deferral would in these circumstances be amenable to judicial review.

195. Reference is again made to RED.0006, which came into being in May 2018. This considers the relevant time period in the context of access to justice. It requires

consideration of each case on its individual merits. "*The key consideration is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts."* It is not one size fits all. A related point is that the removal window periods in MN2, MN5, MN7, MN8, MN9 and MN10 pre-date the amendments made to JRI in May 2018 outlined above and the specific guidance in place since then, particularly in Version 17.0. In deciding whether there has been a failure to provide access to justice, these developments must be borne in mind, which are designed to reduce any risk of injustice.

196. The deferral possibility is in the context of a system which is not risk-free. Reverting back to the quotation from Sedley LJ in *R (Refugee Legal Centre) v Secretary of State*, one cannot expect the system to be risk-free, but the deferral enables the risk of unfairness to be reduced. Further, it is capable of being controlled by judicial review, so that those case workers who operate know that they are answerable for their actions. In the light of the foregoing, the policy regarding deferral provides some inbuilt flexibility into the system on which the SSHD relies.

The evidence of unlawful removal case studies

197. As part of the submissions of the Claimant, there has been highlighted various case studies, and they have been responded to by the SSHD.

198. The first two such cases highlighted by the Claimant are as follows:

    (1) **Case number 1, annex 7.1** was a person who was removed at a time when his representatives had advised of an intention to make a first asylum claim. This was a communication failure to forward the representations and to address that correspondence prior to removal. There was further a breach to the duty of candour in failing to make that clear in a subsequent judicial review action. The SSHD accepted that the removal should not have taken place and the case was incorporated as a training example in slides.

    (2) **Case number 2, annex 7.3** there was a removal at a time when submissions had been received and refused but not sent to legal representatives due to a typing error in the email address. Accordingly, the applicant was ordered to be returned and subsequently his request for asylum was allowed on appeal. This caseworker error was also selected in training slides of the SSHD.

199. The caseworker errors in specific cases do not indicate that the policy as a whole was defective. Departures from the policy does not necessarily indicate a failure of the policy, but a failure to follow the policy in specific instances. The fact that the errors have been incorporated into training says something about the willingness of the SSHD to learn from experience, which is important in the context of an evolving policy.

200. The other case numbers 3-6 are as follows:

    (1) **Case number 3, annex 9.2**, this was a case where the applicant had received not only notice of removal, but also notice of the date of removal. He applied for asylum. In error, he was removed before the result of his asylum claim. However, in the words of SSHD "*there is no obvious connect between the error and the policy under challenge*."

    (2) **Case 4, annex 9.3**, is of a person who overstayed for years and worked illegally. On 29 July 2017, a claim was made for asylum which was not considered in error

before removal on 9 August 2017. The applicant was returned on 15 September 2017: the claim was rejected but the appeal was allowed. The caseworker error does not inform about the lawfulness or otherwise the policy.

(3) **Case 5, annex 9.4** is a case of a person who overstayed between 20 May 2017 and the service of the RNW on 12 February 2019. The removal window was cancelled following the provision of a medical report. Following a limited notice of removal, a judicial review claim was received and considered on 6 March 2017 and was considered "*bound to fail*". Due to a caseworker error, it appears that the applicant was removed prior to the consideration of the judicial review and he was removed on 7 March 2019. The error does not support the submission that the policy is unlawful, and in any event, the judicial review application had no prospect of success.

(4) **Case 6, annex 9.5** concerns an overstaying student from 9 October 2013 until his arrest on 3 February 2019. His removal window was to open on 6 February 2019. An asylum claim was lodged on 20 February 2019 and he was removed on 26 February 2019 prior to consideration of the asylum claim. He was returned to the UK on 25 April 2019. The error does not indicate that the policy challenge was unlawful. There is no explanation as to why an earlier asylum claim was not made.

The law relating to access to justice

201. Before reaching conclusions about the impact of the evidence, it is first necessary to consider the law relating to access to justice, which is fundamental to the grounds of the application, and in particular to Grounds 1 and 2.

202. There is a challenge on the basis that the policy gives rise to an unacceptable risk of interference with the constitutional right of access to justice. It is first necessary to consider the relevant law regarding the right of access to justice. There is no disagreement between the parties as that the law of the right of access to justice derived from the recent leading case of *R(UNISON) v Lord Chancellor* [2017] 3 WLR 409 where the law was set out at [66-85]. The following propositions of law are there set out:

(1) The constitutional right of access to the Courts is inherent in the rule of law [66].
(2) The right of access to court is one of a trilogy of rights which together constitute the right of access to justice, alongside the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege [82].
(3) The high constitutional status of the right means express words are required before a public authority can limit or abrogate the right [76-85].
(4) Even where such words are present, the degree of intrusion is no more than is reasonably necessary to achieve the objective of the measure [80-82].

203. The Supreme Court went on to hold that the Employment Appeal Tribunal Fees Order 2013 – which imposed fees for access to employment tribunals and the appeal tribunal – was unlawful under both domestic and EU law because it prevented access to justice. In this respect, the Court had before it detailed evidence as to the effect of the fees order on, inter alia, the number of claims [38-39] as well as the value of claims [40-42]. As to the former, reliance was placed on two sets of statistics published by the Ministry of Justice (in December 2016 and January 2017) (neither of which had been available to the courts

below): see [38] which painted a "*troubling*" picture, namely a reduction of 66-80% of the number of claims accepted by the Employment Tribunal within a short period after the inception of the fees order. This was explicable predominantly by reference to the fees order.

204. In *Unison*, the Court applied these principles to conclude that the high fees charged to those seeking to access employment tribunals were *ultra vires* the primary statute, because i) there was a real risk that '*persons will effectively be prevented from having access to justice'* both because the evidence indicated that the fees were unaffordable, and because they made it futile or irrational to bring a claim, and ii) because the primary statute, while authorising the imposition of fees did not contain any words authorising the prevention of access to justice [86-98]. The Court also concluded that even if there had been such express words, the fees would have been *ultra vires* because they were not necessary to achieve the intended aim of the Fees Order [99-102].

205. The applicable principles as to when a system will be declared unlawful were summarised by the Court of Appeal in *R (Detention Action) v First-Tier Tribunal* [2015] EWCA Civ 840 [2015] 1 WLR 5341 at [27]. In particular, Lord Dyson (with whom Briggs and Bean LJJ agreed) accepted the submission at [27] as follows:

> *"I would accept Mr Eadie's summary of the general principles that can be derived from these authorities: (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v)* ***the core question is whether the system has the capacity to react appropriately to ensure fairness*** *(in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts. I would enter a note of caution in relation to (iv). I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the* high*est standards of fairness will suffice in the context of asylum appeals.* [emphasis added]*"*

206. Most recently, in *BF (Eritrea) v Home Secretary* [2019] EWCA 872 at [63] Underhill LJ said that *"…the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular "aberrant" decisions – that is, individual mistakes or misjudgements made in the pursuit of a proper policy. The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated."*

207. The fact that a system contains risks is by itself not sufficient for the system to be unlawful. In *R (Refugee Legal Centre) v Secretary of State for the Home Department*, Sedley LJ said (at [7]):

> *"We accept that no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in*

advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself."

208. The Claimant's approach, which is to focus on the length of the notice period and the time it takes to carry out particular tasks, is artificial if only for the reason that this forms only part of the broader contextual analysis that is required – an analysis which necessarily will vary from case to case. In *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14, at [91], Lord Mance referred to public interest cases not being decided by the circumstances whether a particular victim has suffered the particular mischief (which may be susceptible to remedies in the individual case), but to the risk caused by the risk of the policy as a whole, and in the case of a human rights question, whether the policy is incompatible with the Convention.

209. The Claimant submitted that the right overrides the desire of the SSHD to control immigration. There is no balancing act to be performed. The only question is whether Parliament conferred on the SSHD the power to interfere with access to justice. Since there was no express power in the legislation, the right to access to justice was absolute.

210. This submission was considered by the Upper Tribunal in *FB*. At [161], the Upper Tribunal considered Unison as follows:

> *"161. It is, in our view, impossible to extrapolate from UNISON a universal proposition of what, precisely, access to justice entails, regardless of the particular circumstances. Not only is there no suggestion in the judgments that the Supreme Court embarked upon such a task; it would have been doomed to failure. This is because the question of what access to justice entails depends on the circumstances of the case."*

211. The reasoning of the Upper Tribunal continued at [162 – 165] as follows:

> *"162. It is an integral feature of a power of removal, such as that conferred by section 10 of the 1999 Act (and the deportation powers in the 1971 Act) that, if a person is to be removed under the power, the point must come when his or her ability to access the courts and tribunals of the United Kingdom, in order to prevent the removal, will disappear; and that, by the same token, during the period leading up to removal, that person's ability to access the courts and tribunals will be progressively diminished. It is quite manifest, in our view, that section 10 authorises such a state of affairs. If it did not, then the power of removal would become effectively meaningless.*
>
> *163. The correct approach, therefore, is to view the respondent's policy, as contained in Chapter 60, as an attempt by the respondent to articulate an appropriate relationship between access to justice and what are the inevitable consequences of the power to remove a person from the United Kingdom.*
>
> *164. Seen in this light, the power of removal is, in some respects, analogous to the powers contained in the rule-making legislation of the courts and tribunals to impose time limits for bringing and progressing legal proceedings. All such time limits are, obviously, a restriction on access to courts and tribunals. The question is whether such time limits (and the associated relief from sanctions) are reasonably necessary, in the particular circumstances of each type of case.*

165. For this reason, we reject the submission that UNISON dooms the respondent's case to failure…"

212. On this basis, it is not a question of denying access to justice because of the need to be able to devise and operate an effective and lawful system of immigration. It is a question of understanding what access to justice means. It does not mean that the Courts can be accessed at any time and without any restriction. Hence, the Upper Tribunal referred to the restriction of limitation periods and time limits, provided that they are reasonably necessary in the circumstances of each case: for a case where they were unduly restrictive, see *(Detention Action) v First-Tier Tribunal* [2015] EWCA Civ 840 [2015] 1 WLR 5341 at [27]. Similarly, the Upper Tribunal rightly referred to the ability to access the Courts diminishing progressively and eventually disappearing. Were it not so, removal could never be effected. This is not to deny access to justice, but give it greater definition and not such elasticity that it can be abused or even used such as to thwart the ability to remove those whose rights have been exhausted.

213. In my judgment, the Upper Tribunal was right to see access to justice in the context of abuses of the right of access to justice. At [127] and following, the Upper Tribunal referred to the right to bring a fresh claim: see Immigration Rules paragraphs 353 and 353A. However, that right does not entitle any assertion of a fresh claim, however ill thought out or even abusive to halt removal. The Upper Tribunal referred at length to the case of *SB (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ 215 ("*SB*") and to the judgment of the Court of Appeal, large parts of which are cited in full [139-140] comprising of *SB* at paragraphs 54-58 and 70-73, in which Lord Burnett of Maldon CJ gave the judgment of the full Court. Paragraphs [54-56] are so germane to the considerations in this case that they will be set out in full here too:

> *"54. The making of last minute representations to the Secretary of State, which are claimed to amount to a "fresh claim" for asylum or leave to remain for the purposes of para. 353 of the Immigration Rules, and the making in parallel of an application for urgent interim relief to prevent the removal of an immigrant pending consideration of those representations, can be highly disruptive of attempts by the Secretary of State to remove individuals who in truth have no right to be here. Where a removal which is planned and in progress is stopped at the last moment, there may be a significant delay before the Secretary of State can set up suitable new arrangements for removal. Also, it is likely that the substantial cost of the aborted removal will be wasted.*
>
> *55. The courts have had experience of some applications for interim relief being made by legal advisers where there is no real merit in them, but as an abuse of process to disrupt the removal operations and to buy more time in the UK for their clients. The courts have therefore already had occasion to give guidance emphasising the professional obligations of legal advisers to make applications for interim relief to prevent removal promptly and with a maximum of notice which is feasibly possible to be given to the Secretary of State: see, in particular, R (Madan) v Secretary of State for the Home Department and the Hamid case, both referred to in the Administrative Court Guide.*

> *56. It is unnecessary to set out again in this judgment the guidance which has already been given so clearly in those cases. We take this opportunity, however, to reiterate the importance of that guidance. The basic principles are clear: (i) steps to challenge removal should be taken as early as possible, and should be taken promptly after receipt of notice of a removal window of the kind which SB received on 4 July 2017 in this case; and (ii) applications to the court for interim relief should be made with as much notice to the Secretary of State as is practicably feasible."*

214. Lord Burnett of Maldon CJ in *SB* also cited relevant paragraphs in the Administrative Court Judicial Review Guide under the heading "Abuse of the Procedures for Urgent Consideration".

215. In *FB*, the Upper Tribunal also referred to *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin) at [6-12] where the Divisional Court (in a judgment given by Green J with which Sharp LJ concurred) referred to *"some of the situations that too frequently confront the courts and tribunals."*

216. Whilst all of the citation should be referred to, in summary, it referred to cases advanced which were wholly lacking in merit with *"the incentive of some practitioners in initiating court or tribunal proceedings is simply to delay the immigration process. They do this by exhausting every judicial or tribunal opportunity, irrespective of the merits of the case. Buying time is valuable."* [10]. There was also reference to last minute applications where to restrain removal *"often to the "out of hours" duty Judge literally hours or even minutes before the removal flight departs the runway*….[11]" At the end of these paragraphs, the judgment went on to say that *"it is crucial that the courts and tribunals retain the integrity of their processes. It is unacceptable that they should be used as part of a continuing game played between applicants and the Home Office* [12]."

217. It is this context which has entitled the SSHD, consistent with the legislative structure, to restrict last minute representations. Hence the notice of the removal window instead of notice of the removal itself. As Lord Burnett of Maldon CJ said in *SB (Afghanistan) v SSHD* above said: *"steps to challenge removal should be taken as early as possible, and should be taken promptly after receipt of notice of a removal window…"*

218. In my judgment, the Upper Tribunal was right to say that access to justice was preserved, but there is *"an appropriate relationship between access to justice and what are the inevitable consequences of the power to remove a person from the United Kingdom"*: see [163] of the judgment of the Upper Tribunal as cited above.

219. To like effect is the judgment of Stadlen J in *R (J) v Secretary of State for the Home Department* [2009] EWHC 705 (Admin) in analysing the nature of the Part V of the 2002 Act which conferred upon the SSHD the right to certify that there was no satisfactory reason why a second fresh claim for asylum had not been raised earlier. There is an unconditional right of appeal for a first asylum or human rights claim, but any second appeal is conditional. A safeguard is a right of judicial review against such certification, albeit subject to the well know limitations of such a right. This was in the judgment of Stadlen J the way in which *"Parliament has sought to strike a balance between two important and legitimate public policy objectives which are potentially in conflict with each other. On the one hand is the principle of access to an independent tribunal for*

determination of asylum and human rights claims. On the other there is the legitimate public interest in the efficient and cost effective disposal of asylum claims and the desirability of finality in such disposal. [138]"

220. If the submission of the Claimant that the right of access to justice in this context is meant in the sense that there is no room for the necessary balancing exercise to be carried out between access to justice on the one hand and the need to be able to devise and operate an effective and lawful system of immigration on the other, then it is contrary to authority.

221. The logical implication of the approach contended for by the Claimant would be that individuals should be entitled to provoke and then to challenge decisions indefinitely – thus undermining the ability of the SSHD to operate a reasonable and effective removal policy. It is important to be careful about expressions such as guaranteeing access to justice. This cannot mean a power to delay removal indefinitely. It is always possible to make last minute representations. A system cannot sensibly be operated on the basis that any and every representation, however repetitious or unmeritorious, triggers a further right to judicial scrutiny before removal.

222. This is a public interest challenge. The SSHD submits that the public interest involves the consideration of both parties. While a private solicitor acts in the interest of his client (subject to an overriding duty to the Court), the public interest in the present context requires striking a fair balance between giving migrants a fair opportunity to put forward their grounds for remaining in the UK, and the maintenance of immigration control. The latter cannot be dismissed as an irrelevant consideration. The Immigration Acts represent Parliament's expression of will in this area, and that includes mechanisms for the maintenance and enforcement of immigration control. Parliament has entrusted that control, and the setting of policy to support it, to the SSHD, who is accountable to Parliament. Access to justice is not a one-sided matter of giving a "*guarantee*" to migrants, whatever the consequences for immigration control. Provided that access to justice is recognised at all times as a fundamental right, seeing it in this context is in my judgment correct.

223. Thus, it was appropriate for the Upper Tribunal in *FB* to consider the Hamid jurisdiction, *SB* and more recent cases about abusive claims as well as examples of attempts to frustrate removals by last minute representation ([63], [127]-[143], [176]-[178], [186]. A recent further example is *TM (Kenya) v Home Secretary* [2019] EWCA Civ 784 at [6], [79]. Disruptive behaviour cannot be dismissed as insignificant or irrelevant.

Applying the law on access to justice to the facts

224. Applying the law, unless there is evidence that the policy operates in a way that denies access to justice in a legally significant number of cases, the question must be, whether having regard to all the evidence before the Court, a risk of unfairness inheres in the system itself, which is a high threshold. The law referred to above including the references to the judgment of Lord Dyson MR in *R (Detention Action) v First-Tier Tribunal* [2015] EWCA Civ 840 [2015] 1 WLR 5341 at [27] must be applied, the core question being whether the system has the capacity to react appropriately to ensure fairness. In this respect, the SSHD relies on procedural safeguards and flexibility in the policy.

(a) Procedural safeguards

225. The starting point of the policy is that a series of checks and reviews must be carried out before notice of removal, including the preparation of an immigration factual summary, checks for outstanding appeals and representations and consideration of matters such as family separation and any vulnerability indicators.

226. Where it is determined that service of a notice of liability for removal is appropriate, the guidance now identifies three forms of process that may be adopted.

    (1) A notice of removal window. Here a person is given notice of a period of time, known as a **"removal window"**, during which they may be removed from the UK without further notice. The period cannot begin earlier than 72 hours (in the case of detainees) or 7 days (in the case of non-detainees) following receipt of the Notice, and can extend for a maximum of 3 months.
    (2) A limited notice of removal. This is similar to the first method, but the removal window is limited to 21 days.
    (3) A notice of removal directions. Here a person is provided with notice of removal directions which states the exact date, time, and flight details of their departure from the UK.

227. The guidance makes clear that (a) notice of removal must not be given *"where the person has no leave but has a pending protection (asylum or humanitarian protections) or human rights claim, or appeal"*; and (b) the window ends when a person makes an asylum, human rights or EU free movement claim, involving issues of substance which have not been previously raised and considered, or a further application for leave.

228. Detention Services Order 06/2013 Reception, Induction and Discharge Checklist and Supplementary Guidance explains the induction and reception procedures (and see DSO 07/2013 Welfare Provision in IRCs includes access to legal services). Provisions on access to legal services are incorporated under Detention Services Operating Standards Manual (2005).

229. There are safeguards against removal whilst legal advice is being sought, for example: *"If someone is detained/arrested for removal later on the same day but states that their circumstances have changed or that they wish to access legal advice they will not be removed whilst they are seeking legal advice, or they have representations outstanding"* Planned same day removals were stopped in 2018, and such removals have not been planned since that time. A decision was made on 1 August 2018 to close this process indefinitely.

230. As Ms Dolby states, in respect of persons detained and served with 72 hours' notice, they will have the opportunity to contact their existing representative immediately by telephone. If they do not have any, they will be given information to assist them in finding representation. The same approach applies to persons who are detained and served with 72-hours' notice of the removal window. Those who have representatives will have the opportunity to contact them immediately by telephone. Those who are unrepresented will have access to information to assist them in finding representation. In the event that they wish to access the LAA surgery, they will not be removed until they have been able to

attend a surgery appointment, and their representatives are then able to contact the SSHD and request such extra time as may reasonably be necessary: see Dolby [20].

231. As regards access to relevant documentation, the guidance recognises that legal representatives need access to case papers in order to properly advise their client. Consistently with this recognition, the guidance provides:

> *"Where requested by representatives, it is reasonable to provide all relevant documents but, it should be noted, you may reasonably expect that, unless there has been a change or representative, documents previously provided to an individual and/or their representatives should have been retained."*

232. As regards delaying removal upon a threat of judicial review, the guidance mandates as follows:

> *"It is not necessary to defer removal on a threat of JR, though it is important to satisfy yourself that the person concerned has had the opportunity to lodge a claim with the courts (particularly in certified or third country cases where there is no statutory in-country right of appeal)."*

There has been noted above the change in respect of deferral of the notice period from May 2018 and particularly in Version 17.

233. As regards change of legal representation, the guidance states:

> *"A delay caused by a change in legal representative may be unavoidable and consideration must be given based on the merits of the case. It may be reasonable to extend the notice period where the individual has unavoidably lost contact with previous representatives, for instance, because the legal service has ceased business or discontinued responsibility for other reasons.*
>
> *However, consideration must also be given to related factors. Extension of the notice period should not normally be considered in cases where there is no clear reason provided (and you have asked for reasons) for the change of representatives and/or there is cause to believe that the motive for the change is to bring about a postponement of removal, for instance, multiple changes of representative within a short period."*

234. As regards access to legal advice in detained cases, the guidance provides expressly that the removal window should *'normally'* be deferred if an unrepresented person wishes to obtain legal advice and cannot be given an appointment at the advice surgery within the initial 72-hour notice period. In keeping with the scheme of the guidance, the judgment conferred on caseworkers requires the careful consideration of the merits of any deferral request. There has been set out above how the deferral of notice period became a part of the policy, about the RED notices, and how the terms of guidance were amended in the light of the judgment in *FB*.

234. It follows from the above that there is a whole series of safeguards. This includes keeping certain applicants for protection outside the RNW policy pending protection (asylum or humanitarian protections) or human rights claims, or appeals. It includes matters promoting the ability of people to obtain legal advice and the relevant documentation. It includes the deferral of the notice periods on the basis that they are minimum periods with the flexibility of being capable of being extended. The impact of these matters goes to

the core question described by Lord Dyson, that is to create a system that has the capacity to react appropriately to ensure fairness.

(b) The RNW policy: only one opportunity to challenge removal

235. There are two particular aspects of the policy to which especial attention is drawn by the Claimant. First, it is the removal of two opportunities to challenge the removal, both of the decision to remove and then of the removal itself, there were formerly two opportunities to challenge the removal. This is said to be a reduction in the applicant's access to justice. Secondly, there is the 72-hour notice period and other short periods for bringing the challenge, both in the context of a period up to the commencement of a removal window and generally.

236. I have considered the reasoning in *FB* in this regard. I respectfully agree with the reasoning in particular at [169-188] which relate to both aspects of the policy, but there are matters to be added in the instant challenge of the Claimant.

237. As regards the removal of one of two opportunities to challenge removal, the legislative change in 2014 was to give a single right of challenge at the point of the section 10 notice. At that point, there is a liability to removal, whether because the individual never had leave to enter or did have leave to enter, but had stayed on after leave expired or was revoked, or in the case of a national of an EEA, was subject to a deportation or exclusion order. That can be the subject of challenge at that stage. If there is no basis for such challenge, then unless a fresh claim arises in which case the RNW policy will not apply, there is no reason to allow a further challenge to the removal itself.

235. The submission is made by the Claimant (Grounds of Claim [68-70]) that "*it is the inevitable consequence of the terms of the RNW policy that the SSHD will, during that no-notice period, be taking a wide range of decisions on matters of substance relating to the lawfulness of removal, and yet iii) the policy does not require any further notice to be given to permit access to court to challenge those decisions*".

236. The removal itself is simply administratively to give effect to the liability to removal. The status of the applicant does not change from the time of the original notice to the time of the removal itself. There are pragmatic reasons requiring that there should not be two challenges, that is to say reducing the scope for last minute applications, which can be so disruptive. The RNW policy is not a bar to access to justice, but a rational attempt to bring forward the notice period to the section 10 decision so that in most cases where there is no subsequent fresh claim, any challenge takes place at that time and not when the removal is about to take place.

237. The fact that it is simply bringing forward the application is made possible by the provision that any fresh claim can still be brought even if the window has opened. Thus, as noted above, the window ends when a person makes an asylum, human rights or EU free movement claim, involving issues of substance which have not been previously raised and considered, or a further application for leave.

238. Further, the sense of the change to the policy is apparent from the fact that many applications occur proximately after appeal rights have become exhausted without a claim qualifying as a fresh claim. The concerns expressed in *SB Afghanistan* and in *Sathivel* as well as in the judgment of *FB* as cited above fuel the need for providing

generally for one challenge of the notice of removal rather than two. It also provides a rationale for the notice to be given of a window rather than of a particular flight or the like so as to discourage last minute applications or disruption.

(c) The RNW policy: the 72-hour notice period

239. As regards the 72-hour notice period prior to the opening of the removal window, in addition to the reasoning contained in *FB* at [169-188], there are the following points to be noted. The force of any challenge as to the period of notice is to be seen against the background of more than a decade of the 72-hour policy. Since the 72-hour period was started in about 2007, there has not been any challenge about the same. *The 2010 Medical Justice case* was by reference to exceptions to the 72-hour policy and not the 72-hour policy. Whilst that was not an admission that the 72-hour policy was lawful, the combination of absence of challenge then or at any time prior to the *FB* case is, as was stated in *FB*, of some relevance [170].

240. As regards the points made about legal aid that were before the Court in *FB*, it might be said that there is more detailed evidence in the statement of Ms Francis as well as evidence of solicitors about their experience in respect of legal aid. However, in my judgment, the greater volume of evidence does not affect the fact that the substance of the points was made. I agree with the points of the Upper Tribunal at [172-173] that to a very significant extent, the position regarding legal aid lie outside the remit of the proceedings in *FB*, as they do in respect of the current claim. Navarette WS2 [12] makes a point about a very significant increase in the number of legal aid providers with effect from September 2019 (presumed to mean September 2018), thereby reducing the slots available to Wilson Solicitors LLP. Whilst that affects the ability of a client to become a client of Wilsons, it does not affect the number of slots afforded to solicitors, and therefore does not affect access to justice overall. Further, as noted in *FB*, the lack of availability has not meant that individuals facing removal are not able to engage a lawyer in that many have been able to secure legal advice. The questions raised as to the level of competence of lawyers is not part of the right of access to justice as discussed at [173].

241. This Court also echoes the point of the Upper Tribunal about the absence of co-relation between the evidence and a longer period than 3 days. The evidence does not suggest that a short period of extension e.g. to 5 days would suffice. On the contrary, there are indicated far longer periods of time, which would greatly impede the ability of the SSHD to operate an effective and lawful system of immigration.

242. The reason for short periods of notice is, as recognised in *FB*, because of the context. Many of the cases are of individuals whose appeal rights have been exhausted. A striking deficiency in the evidence before this Court has been the absence of evidence, other than uncorroborated anecdotal evidence, of the representation which applicants have enjoyed before the NRW, and why previous representatives cannot be expected to assist: see the Upper Tribunal's remarks at [176-178]. This is demonstrated in respect of NR (an applicant with *FB* in the *FB* case) where he had the benefit of legal assistance from a number of firms, but a move to Duncan Lewis was not explained, and allegations made about shoddy work were, according to the experience of the President and the Upper Tribunal judge at [184] *"easily and often made in this jurisdiction and there is no evidence that the firm in question has been given an opportunity to respond. The same is true of another firm, about which NR also complains."* (The Upper Tribunal found that NR, had not been denied access to justice, and, unlike *FB*, NR does not pursue an

appeal to the Court of Appeal). Hence, as noted above in the policy document, consideration is given about changes of legal representatives where there must be a clear reason for a change, and where the motive for change must be other than to postpone a removal.

(d) The impact of caseworker error

243. The Claimant says that caseworker error is not an answer because the action may be unlawful if the caseworker does not follow the policy. A failure of a caseworker in cases might have been capable of giving rise to a challenge of that case (which this case is not about), but not to the policy as a whole, unless they evidence a risk of unfairness which inheres in the system itself. Within reason, there will always be caseworker errors. Examples of such errors comprise failing to give adequate disclosure or in failing to give the requisite notice or in failing to extend time in answer to a request. However, criticisms of caseworkers in a small number of cases do not show that there is something wrong about the policy as a whole. This is established from caselaw, and recently in the case of *BF (Eritrea) v Home Secretary* [2019] EWCA 872 at [63] cited above that individual mistakes or misjudgements made in the pursuit of a proper policy do not render the policy unlawful, unless the terms of the policy themselves create a risk which could be avoided if they were better formulated.

244. The Claimant and the Intervener criticise the JRI for its giving caseworkers 'discretion' on a number of matters. But it is difficult to imagine how there could be a policy which did not require caseworkers to exercise judgement in individual cases on a matter that is so inherently fact sensitive as the removal of a particular migrant. The discretion is not to be exercised arbitrarily, and the JRI sets out a lawful framework for structured decision making.

245. It is of significance as to how the SSHD deals with caseworker error. It is that errors sometimes form a part of the training process to reduce the risk of the repetition of such errors in the future. In a particular case, there was a breach of a duty of candour in failing to own up to the error in the course of a judicial review, which is a very serious matter. If that were a regular feature, then it might undermine much of the case of the SSHD, but there is no evidence of widespread breaches of that kind. Further, there is no foundation for any assumption that if there had been a longer period, then there would have been a redress. If there were too short a notice period given or there was no notice of removal given, then it would be the departure from the policy rather than the policy itself which caused the problem.

Other cases

246. The letter of 31 May 2019 on behalf of the SSHD responded to a request as to how many cases it was aware of in which an individual was removed and subsequently returned to the United Kingdom, in each of five categories identified in the earlier letter of 10 May 2019. They comprised:
    (1) Persons removed from the United Kingdom who were removed following service of an NRW/LNW and immediately brought back without going through immigration control in the receiving country;
    (2) Persons removed following service of a NRW/LNW who were not admitted by immigration authorities in the country to which they are returned, and returned to the UK;

(3) Persons removed in line with the policy in place at the time of removal, but where the policy was subsequently found to be unlawful (e.g. EEA nationals removed as rough sleepers because it was considered they were not exercising treaty rights);
(5) Cases where transfers following a service of NRW/LNW to accepting states under the Dublin III Regulations failed, because of administrative errors with the transfer notification;
(6) Persons brought back, when it was subsequently concluded that they had no legal basis to remain in the United Kingdom.
(7) With the limitation that this was based on corporate memory in the absence of central records and published statistics recording specifically each of these categories, the SSHD identified these cases for the period from 2015 to 2018. The SSHD further explained that it had provided documents that were relevant, and that were accessible electronically in the time available to comply with the disclosure request of 21 May 2019, and provided those in Annex 10.3. At Annex 10.2, it provided a summary of the 11 cases identified within the above five categories set out in its letter of 10 May 2019, and repeated for ease of reference above. Two of these duplicated cases were already identified in other categories.

247. This left:
(1) One remaining case where the individual was removed following service of an NRW and returned without going through immigration control in the receiving country, Case 1, Annex 10.2. As to this case, the SSHD accepted that the individual was removed on 19 September 2017 in circumstances where there remained an asylum claim at the time of return. This was identified prior to the individual entering the destination country. As will be apparent from the Immigration Factual Summary in the disclosure provided for Case 1, the individual had enjoyed numerous previous opportunities to regularise their stay in the United Kingdom, and to advance submissions asserting any legitimate reason to remain (Annex 10.2). Arrangements were made for the immediate return of the individual, prior even to their entry to the destination country, following the error of 19 September 2017. The individual was subsequently removed from the United Kingdom following the refusal of the late asylum claim, and the exhaustion of appeal rights in respect of it.
(2) No cases identified where persons served with LNR/LNW were not admitted by the immigration authorities in the country of return.
(3) No cases identified where persons were removed in line with the policy in place at the time of removal, but where the policy was subsequently found to be unlawful.
(4) Two cases where transfer following an LNR/LNW to accepting states under the Dublin III Regulation failed because of administrative errors with the transfer notification. The Secretary of State's summary of each of these is found as Cases 3 and 4 at Annex 10.2.
(5) This left six remaining cases (Cases 5-10) at Annex 10.2 where individuals were removed and brought back, and it was subsequently concluded that the returnee had no legal basis for leave to remain in the United Kingdom. For the post-return developments, and the SSHD's comment on those cases, a table was provided at Annex 10.2. In case 5 (where permission to move for judicial review was sought upon return, and refused on the basis that it was totally without merit), the individual's claim is currently being reconsidered. In case 9, the individual did not wish to depart voluntarily. The appeal of the decision to deport was scheduled to be heard with the First-tier Tribunal hearing on 4 September 2019. 247. Each of these cases had had prior opportunities to advance claims of entitlement to

remain prior, and to challenge those. In case 10, the Albanian national removed not only failed to attend the hearing of a subsequent in-country appeal accorded upon return, but absconded and has remained at large.

248. The foregoing does not advance the Claimant's case about access to justice. Where errors were identified, they were corrected in each case by return. This is all in the context of over 40,000 enforced returns over the years 2015—2018, and these cases, like the other cases, do not assist the Claimant to make out a case of systemic failure and/or access to justice being denied such that the system was inherently unfair.

The impact of the case studies

249. As regards the case studies, the following points are to be noted. First, the SSHD characterises the case studies as being the real foundation of the claim. When the matter was before Walker J, it was especially the case studies which enabled the Court to give permission to bring this judicial review claim on the basis that this case was being decided on the basis of evidence not available to the Court in *FB*. A matter which makes this challenge different from the *FB* case is a much larger number of case studies than had been prepared in respect of the *FB* case (where there were four only). Whilst the Claimant says its case does not necessarily depend on the case studies, they provide the most tangible expression of access to justice issues in practice, and that is why they form an important and central feature of this case.

250. References made to paragraph 102 above and the suggestion of Ms Navarrete that there was not sufficient time to obtain more evidence. However, as noted above, there was over a period of time preparation of evidence from leading solicitors and charities in the field who between them must have been involved in a large number of cases in each year. . It might be said that there are difficulties of confidentiality, but with tens of thousands of cases to choose and with many of their cases coming to the Tribunals, it is to be inferred that enough applicants would have consented and/or there would have been ways of anonymising cases.

251. The application was only ready to be brought when the relevant evidence had been obtained. It seems more likely that if there are shortcomings, it is that that is because the case studies fall short of demonstrating the propositions relied upon by the Claimant rather than because of want of time for preparation.

252. As noted in paragraph 103 above, the purpose of the case studies was to provide something of greater weight and more tangible than the evidence in *FB*. Secondly, it is in a substantial part a repetition of the substance of evidence given in *FB*: some of the witnesses are the same, and some of the witnesses were from the same discipline as others who gave evidence in *FB*.

253. The 12 case studies advanced by the Claimant are a very small cross-section of cases in order to make the points. The 12 case studies cover a period of over 3 years, from 9 December 2015 to 4 February 2019. During that period, the Defendant carried out over 30,000 enforced returns (10,706 in 2016; 12,321 in 2017; 9,474 in 2018).[2] The 12 case

[2] – the statistics can be found at:
https://www.gov.uk/government/publications/immigration-statistics-october-to-

studies represent less than 0.04% of relevant removals. These statistics are exclusive of many proposed removals during that period which were deferred or cancelled following consideration of representations and/or the commencement of a legal challenge, though no data on the numbers are collated. This tiny sample has been selected by the Claimant which has available potentially to it a vast amount of information through the makers of the witness statements, who have between them involved in a vast number of caseloads over the three years.

254. Further, whilst it is denied that there has been a selection of the best cases (Navarette WS1 [115 and following]), there is no evidence to explain the method of selection of the case studies, simply a reference to identifying and producing summaries of recent cases. It is not apparent that the cases selected form a randomized or representative selection. If the cases showed a pattern of confirmation of the propositions of the case of the Claimants, the position would be far from satisfactory, and open to the suggestion that without appropriate methodology in selection, they should be given little weight. If, as here, the cases do not provide that confirmation, even without a clear selection process, then the case studies weaken rather than strengthen the Claimant's case. This is not only to the extent that they are not supportive, but because it is to be inferred that if there were cases which were supportive, they would have been deployed by the Claimant, using the cases of the many people engaged in asylum and immigration cases who have given evidence and the firms and organisations for which they work.

255. It is to be borne in mind that this absence of detailed instances to support the contentions of the Claimant about a lack of access to justice is in the following context. First, the incidence of tens of thousands of cases which have been subject to the instant policy. Secondly, the fact that this is a public interest challenge rather than of a small number of individual applicants or appellants. It is spearheaded, as the evidence shows, by representatives of some of the leading firms of solicitors in the field (in addition to like evidence in *FB*). There has been concerted activity of various charities and the Law Society immediately before or coincident with the bringing of the claim. That is criticised by the SSHD, but this Court is not to be critical about this: the pressure towards change of an evolving policy is valuable and it is in the public interest. It is nonetheless significant that despite the cooperation of professional advisers, charities and activists in the field, the case studies have not provided evidence to support substantially a case about repeated denials of access to justice or that the system is inherently unfair.

256. The complaints are more about what could have happened rather than what has happened. That might suffice in the context of apprehension of serious harm if a policy is implemented, but it is very different after the policy has been in operation now for so long. In this regard, the Claimant by reference to the above-mentioned decision of Silber J in *Medical Justice* 2010 points to the fact that it is not necessary to prove actual breaches of the right of access to justice which have actually occurred, and it is sufficient to assess

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december-2016/summary; https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/summary-of-latest-statistics#how-many-people-are-detained-or-returned; https://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2018/summary-of-latest-statistics#how-many-people-are-detained-or-returned. There were 12,056 in 2015: see the letter of the Government Legal Department of 10 May 2019.

evidence as to the likely effect of policy [38-39]. However, that is expressly in the context of *quia timet* injunctions to prevent anticipated wrongs, not in the context of a policy which has been going for years where there have been tens of thousands of cases, and where the Claimant has available to it the assistance of several of the leading law firms, charities and activists in the field. The Claimant also relied on the same judgment at [41] that a potent form of evidence is where SSHD could provide evidence that there was no serious possibility or significant risk that breaches of the right to access to justice would occur, but if the SSHD did not do so, then that evidence was not available.

257. However, this case is different because there is extensive material before the Court about the safeguards contained in the policy and in the guidance: further, the case studies have not proven that the policy or the guidance infringes the right of access to justice. As noted above, the access to justice challenge in the 2010 *Medical Justice* case only related to the 2010 exceptions and not to the standard policy of giving 72 hours' notice.

258. The hard evidence of case studies has not advanced the Claimant's case. It is highly informative that the cases which might have been expected to give rise to some more tangible expression of injustice than was available to the Court in *FB* support overall the conclusions in that case. Applying the appropriate test, the case studies do not show that there is an unfairness inherent in the system and there are several instances which support the notion that the system has the capacity to react appropriately to ensure fairness.

The impact of the deferral of notice

259. The above applies not only to the case studies from the start, but also to the case studies following disclosure referred to as the deferral cases and the unlawful removal cases. Although there were instances of caseworker errors, they did not prove an unfairness. On the contrary, these were cases where the reaction was appropriate including in particular using these instances as lessons for the future, forming part of training of what not to do to other caseworkers.

260. The information provided from disclosure is to the effect that the recent change in the policy to permit requests for deferrals is operating in practice. It provides a flexibility which enables the system to react appropriately to ensure fairness. However, in order for that fairness to continue, it must be the case that the SSHD subjects the system to monitoring such that it can be seen that it continues to provide that fairness.

261. The result of the new policy is that the periods in question are minimum periods. If there is a failure to allow for a renewal where there is Wednesbury unreasonableness in not allowing renewal, then that could be the subject of a challenge of judicial review. This flexibility is an important part of the answer of the SSHD to the challenge of the Claimant about the policy as a whole.

262. The criticisms of the Claimant as regards the deferral policy have been considered. It is submitted that the policy does not require the notice period to be extended where an unrepresented person has not been able to obtain an appointment at the duty advice surgery within the notice period. It suffices that the policy says that any request should be "*carefully considered on its merits*". Given that there may be abusive cases e.g. where the individual "*delayed their request in order to thwart removal*", it suffices that "*the*

removal window should <u>normally</u> be deferred to enable an appointment to be arranged " [emphasis added].

263. As noted above, it is not accepted that the statistics in the disclosure given about the limited numbers of deferrals granted or the periods of such deferrals indicate that the deferrals are not a real safeguard. This is not a case where the policy is not operated in practice, nor is it window dressing. The safeguard is not undermined by the fact that it is for the applicant to seek the deferral: it would be difficult to imagine how the SSHD could submit itself to a duty to consider in each case an extension of its own initiative. In any event, as pointed out in a note on behalf of the Defendant on 25 June 2019, in many of the deferral cases, consideration given to deferral was instigated by the caseworker

The impact of absence of evidence from the Defendant

264. It is important to say something about the absence of evidence on the part of the SSHD beyond referring back to the evidence of Ms Dolby and to the rather unspecific evidence of Mr Pompa. In a case such as *R (Das) v SSHD* [2014] EWCA Civ 45 [2014] 1 WLR 3538 at [80], the absence of evidence was treated as a high-risk strategy. If there is probative evidence on a point on the part of one party and no apparent answer from a person able to provide an answer, the absence of such evidence might lead to an inference that there is no answer to the point.

265. However, the instant case is not such a case. Many of the cases on want of candour cited to the Court are where there is some specific information in the knowledge of the public body or easily available from reasonable enquiry which either renders some evidence misleading or false, or such that it is necessary to have it before the Court for an informed response by the Court. Here the suggestion appears to be that by not conducting a large enquiry of the kind sought by the Law Society or in response to the evidence as to policy adduced by the Claimant, that there has been a breach of the duty of candour. It would be an unusual case where the duty of candour requires an extensive inquiry into categories of cases, and more natural for the duty of candour to relate to how a failure to make reasonable enquiries in more specific and self-contained areas.

266. Thus, there has not been established a breach of the duty of candour by the failure of the SSHD to provide more specific evidence in response to that of the Claimant. There are nonetheless two matters of comment. First, any evidence which is probative and credible, and which is uncontradicted, would usually be accepted by the Court. Secondly, in the sense that the policy is evolving in new circumstances, it is for the reasons stated above the wrong approach for the SSHD not to engage in such legitimately sought information.

267. There is no reason to believe that there has been concealment by the SSHD. As noted above, there is concern about the failure to engage with the request by the Law Society. However, that has changed somewhat by the evidence of Mr Pompa and the steps being taken towards monitoring information and by the information provided on disclosure and by the results of the various case studies. It is important also to refer to the letter of Ms Smith for the Treasury Solicitor to Mr Singh of PLP on 10 May 2019.

The impact of FB and whether the Court should follow FB

268. As to the application of that law to the facts of the instant case, that is to the two prongs of the notice of liability to remove without notice of the removal itself and the periods of

notice, the Court has come to the same view as that of the Court in FB. It has come to that view based on the evidence before the Court in this case, and particularly the evidence not available to the Court in *FB*. It has taken into account the reasoning in *FB* which is supportive of the case of SSHD, albeit being careful on the basis that the reasoning in *FB* was by reference to different, albeit similar, evidence. As noted above, it is fortified in its views because of the impact of the case studies and of the additional disclosure and deferral and improper removal cases.

269. It is necessary to revert to the reasons why it is said that this Court should not follow the decision in *FB*, namely the submission that:

(1) its decision conflicts with the fundamental principles on access to justice established in higher courts;

(2) the 72-hour period is too short in the changed legal aid landscape;

(3) the Upper Tribunal did not have the evidence available before this Court or of disclosure from the SSHD;

(4) *FB* was confined to cases where individuals had reached the end of the statutory appeal and then in addition withheld grounds of challenge until the last minute;

(5) the Upper Tribunal did not consider cases of factual scenarios such as the use of RNW notices in Dublin III cases and where EU law rights are in play;

(6) the effect of the LAR policy, not before the Court in *FB*, on the reasoning in *FB*.

270. As regards (1), this Court has sought to follow the reasoning of the higher courts, which are binding on it. As regards *FB* itself, the submission that *FB* has not applied correctly the fundamental principles on access to justice as expressed in the higher courts is rejected for the reasons set out above. The reasoning set out in particular in the summary of *FB* in the section above headed "the FB decision" is respectfully treated as correct, and this Court follows it. There is no reason, powerful or otherwise, not to do so. This applies to the extent that the evidence in *FB* and in this case is the same or substantially the same. Further, as regards the application of the law to the twin prongs of the policy, this Court comes to the same conclusion in finding that neither the RNW policy nor the period of notice conflict with the principle of access to justice. It has been observed above how much of the evidence is in the same or substantially the same areas as that before the Court in *FB*. There is different evidence, especially of the case studies, but nothing which leads this Court to come to a different conclusion from that in *FB* about the lawfulness of the twin prongs.

271. Applying the test in *R (Detention Action) v First-Tier Tribunal*, the policy and guidance does not contain unfairness inherent in the system itself, bearing in mind its inbuilt safeguards (e.g. new claims and protected claims). There has not been demonstrated in the evidence a real risk of more than minimal deprivations of access to justice. The high threshold of showing unfairness in the system itself has not been reached. Further, the system has the capacity to react appropriately to ensure fairness e.g. the ability to defer the removal window and to redress injustice through judicial review. Although the system is not risk-free, applying the judgment of Sedley LJ in *R (Refugee Legal Centre) v Secretary of State for the Home Department*, the risk of unfairness is capable of being kept to an absolute minimum.

272. Reference is now made to (2), namely the legal aid landscape. That has been considered in detail above, and for all the reasons set out in *FB* in this regard, it is not a matter which leads to the policy being undermined.

273. Reference is now made to (3), namely the Upper Tribunal did not have the evidence available before this Court or of disclosure from the SSHD. It is true that the Upper Tribunal did not have the 12 case studies in this case or the material available from disclosure giving rise to the additional case studies in respect of deferral cases and unlawful removal cases. However, the overall analysis is that these cases provide assistance to the case of SSHD and not to the Claimant's case.

274. As to point (4), namely that *FB* was confined to cases where individuals had reached the end of the statutory appeal and then in addition withheld grounds of challenge until the last minute, that is not to give sufficient weight to the fact that in *FB* there was a public interest challenge as well as that of the two applicants. PLP intervened in that case, and the broader nature of that evidence appears at [118-126] of the decision of the Upper Tribunal. Further, and in any event, the case studies prepared for this case alone concern different areas, as do the unlawful removal cases. Again, in an overall sense, they provide assistance to the case of the SSHD and not to the Claimant for the reasons set out above.

275. Further, the fact that the majority of the case studies, the deferral cases and the unlawful removal cases do involve last minute challenges is telling by itself of the kind of challenges made to the SSHD on a daily basis. It is this which informed in connection with the creation of the policy and with the balancing act referred to above.

276. As to point (5), that the Upper Tribunal did not consider cases of factual scenarios such as the use of RNW notices in Dublin III cases and where EU law rights are in play, these points are considered below. As to point (6), as regards the effect of the LAR policy which is referred to in Mr Singh's first statement at [15-17], whilst this was not before the Court in *FB*, it is not apparent what is the point which is being made. The Claimant refers to LAR and also to the SSHD's "General Instructions: Arranging Removal (Version 2, 4 October 2018) ("**AR**"): Grounds of Claim, paras 9, 20-24, 40. However, the Claimant, while noting at paragraph 75 of its grounds that the Upper Tribunal did not have the benefit of submissions on LAR, does not raise any separate ground based on either of these two documents.

Conclusion

277. In the above circumstances, the submission of the Claimant (Grounds of Claim [3]) that the policy poses a serious threat to the rule of law because the SSHD has curtailed or removed the right of access to court to challenge her decisions is rejected. Likewise, contrary to the submission (Grounds of Claim [73]) that the Claimant has adduced compelling evidence that the high risk of interference with the right of access to justice caused by the structure of the policy materialises regularly in practice, this is not borne out by the evidence provided to the Court and in particular of the case studies, and the instances of case deferrals and unlawful removals not before the Court in *FB*. Whereas that was apprehended as a real possibility at the time of the hearing before Walker J, following subsequent analysis of the case studies and the other material not available at the time of that hearing, it is not borne out by the analysis of the cases in the evidence and in the hearing before this Court.

278. It is now necessary to consider each of the challenges. The first two challenges are largely covered in the analysis by what has been discussed above, but it is intended to bring together the matters discussed under the headings of the grounds.

Ground 1: Ultra Vires / Access to Justice

279. By Ground 1, the Claimant contends that the Policy is ultra vires because it gives rise to an unacceptable risk of interference with the constitutional right of access to justice. There are two fundamental prongs of the challenge of the Claimant. First, it is said that the replacement of the notice of removal by notice of liability to remove is unlawful. Secondly, it is said in any event that the notice periods of the window are too short.

280. As noted above, both of these points have been considered by the Upper Tribunal in *FB*. This has been set out in detail. As to the replacement of notice of removal by notice of liability to remove, in my respectful judgment, the reasoning of the Upper Tribunal is correct. It rejected the argument that the applicants had a legal right to be notified of the removal directions because the actual removal decision did not alter the individual's status at [149]. Thus, it held that the policy did not infringe the individual's right to access to justice, only the timing of that access. As to the notice period, this is a matter which had been assumed to be in order at the time of the 2010 *Medical Justice* case, and had not been the subject of challenge. The attempt to say that it was too short a time was against a background of years of operation of the policy without this challenge, apparently because it had been assumed to suffice. Further, insofar as it was not sufficient time in some cases, there was the possibility of seeking an extension of time on a case by case basis. In *FB*, the period of time was found not to be so inadequate as to amount to a bar to access to justice.

281. Not only has the reasoning of FB been followed, but there are sections above which lead to the same conclusion. In particular, the various safeguards have been examined, and the criticisms of the safeguards considered. The safeguards are not illusory or theoretical. Especially, there has been consideration of the categories falling outside the removal notice windows and the guidance given to caseworkers to assist with access to justice. The two prongs have been considered in this judgment, particularly in the sections above about (a) the RNW policy: only one opportunity to challenge removal, and (b) the RNW policy: the 72 hours' notice period). Consideration has been given as to whether the inevitable caseworker errors which occur from time to time show that the safeguards are illusory, and it has been found that they are not. The various case studies have been examined: they have not taken forward the Claimant's case and have not shown that there is an unfairness inherent in the system. There has also been examined the statistical evidence now available, and particularly in recent months about the deferral of notices.

282. In all the circumstances, it is not only the decision of *FB*, but a considerable amount of other material which has led to the conclusion that the challenge made about the removal notice window system and the periods of notice fails. The specific grounds will each be considered, but much of the foundations of this consideration is contained in the above analysis and the conclusions reached thus far.

283. It is also important to note that since this is not a specific case on its facts, but a general public interest challenge that the bar for such a challenge is quite high. It is not about a

specific narrow challenge of the kind which exists in a particular case or cases, but it is that there is something about the RNW policy which renders it unlawful. This is not a case like at the end of *FB* where there was reliance an alternative case about aspects of the policy which could be improved, but it is a case where the policy in the respects referred to above is so defective in its current form as to be unlawful.

284. As part of the challenge, almost every safeguard has been challenged and is said to be non-existent or illusory or theoretical. In short, a safeguard which does not operate in practice is not in fact a safeguard. The argument is that since there are no safeguards or such safeguards are inadequate, the policy removes access to justice. In fact, for the reasons set out above, the safeguards are real and they operate so as to preserve rather than to impede access to justice.

285. Consideration has been given to the power to defer the removal window or to extend the notice period before the removal window. This is a real power, and its existence removes of force much of the argument to the effect that the notice periods are too short because they are capable of being overridden. Reference is made to the detailed section considering deferral notices.

286. In all the circumstances and for all of the above reasons, as well as in line with the reasoning of the Upper Tribunal, it was not ultra vires for the individual not to be served with notice of removal of directions for the reasons set out above. The submission that the policy of the SSHD was ultra vires as infringing access to justice fails. The analysis of the law in *FB* was appropriate and was consistent with the authorities of the higher courts. The application of the law to the RNW policy and the observations made at [161-165] in *FB* quoted above as regards the impact of the decision of the Supreme Court in *R (Unison) v Lord Chancellor* are followed in this case as being consistent with higher authority and a correct appraisal of how and why the RNW policy does not infringe the right of access to justice.

287. The Claimant's approach – which is to focus on the length of the notice period and the time it takes to carry out particular tasks – is artificial if only for the reason that this forms only part of the broader contextual analysis that is required – an analysis which necessarily will vary from case to case. The absence of evidence of the policy actually operating so as to deprive individuals of access to justice is informative. It has been particularly telling that the case studies and the statistical information which have been provided have not assisted the Claimant to prove that the safeguards are per se inadequate. The fact that there have been more than 40,000 enforced returns over the period examined since the commencement of the removal window policy with so few wrong deportations highly relevant to the examination about whether there has been a failure of access to justice. It is inevitable that there will be mistakes due to caseworker errors, but they are not identified on a scale which make the safeguards illusory or theoretical. Further, the rectification or mitigation of injustice includes bringing back people removed in error, which, as indicated above, has usually been effected.

288. If there had been a systemic failure, the statistical information and the case studies would have been expected to come some way to demonstrating that the policy of giving notices of windows was barring or impeding access to justice. However, it has not demonstrated what it was expected to show. For reasons set out above in consideration of the impact of the case studies, in the context of over 40,000 removals, the statistical evidence and the

case studies do not provide support to the Claimant's case such as to show that the risk of unfairness was not contained to a minimum.

289. There has been consideration above of the submissions concerning the meaning of access to justice generally and in the context of this case. The approach that there is no balancing exercise between access to justice on the one hand and the need to be able to devise and operate an effective and lawful system of immigration on the other hand is wrong. The logical implication of the approach contended for by the Claimant would be that individuals should be entitled to provoke and then to challenge decisions indefinitely – thus undermining the ability of the SSHD to operate a reasonable and effective removal policy: see *FB* at [162-165].

290. In the particular case, the relevant test for determining whether the policy is unlawful, particularly that set out by Lord Dyson in *R (Detention Action) v First-Tier Tribunal* [2015] EWCA Civ 840 [2015] 1 WLR 5341 at [27], is not satisfied. No system is risk-free, but the risk here of unfairness has been reduced to an acceptable minimum, and potential unfairness is reduced by the ability to defer the commencement of the removal window, which itself is subject to judicial review. The ultimate question is whether having regard to all the evidence before the Court, a risk of unfairness is "*inherent in the system itself*."

291. In all the circumstances set out above, the claim that the policy was unlawful as being ultra vires must fail.

Ground 2: Rationality

292. The introduction of the removal windows policy was accompanied, on 4 September 2015 Home Office Policy equality statement ("PES"). Under the heading "Updated policy: notice of removal", the opening paragraphs have been set out above in which the aim of the single power of removal was identified. Further, Ms Dolby stated at [12] of her first witness statement:

> *"The aim was to make it clear at the refusal stage that people should not be waiting until the last possible moment before removal before seeking legal advice and submitting their claims. In addition, notifying the individual of the precise time and date of their removal directions was on occasion leading to disruption on the part of some detainees in immigration removal centres … or to information being circulated on social media by action groups who are seeking to disrupt the removal, for example, by preventing access to or egress from the IRCs, contacting airlines, or seeking to prevent flights from departing."*

293. These policy aims are both rational, and achieved by JRI. The Claimant's submission that the serving of a notice of removal window may trigger further claims and challenges at that late stage is true, but the same arises in respect of the service of notice of removal directions. In both instances, however, the SSHD's reasonable requirement is that individuals requiring leave to remain, and lacking this, will take steps to advance any claims to entitlement to remain before this.

294. In so far as such further submissions are received, it is rational to adopt a policy which encourages them to be made before the opening of a removal window, rather than immediately prior to fixed directions set for removal. It is a policy which did not affect

access to justice, but it also balanced access to justice with the public interest in establishing an effective removal process. It follows that Ground 2 must fail.

Ground 3: Dublin III Regulation

295. In the case of *Dublin III*, this was not an aspect which arose in the *FB* decision case. That concerned Grounds 1 and 2, but not breaches of Dublin III.

296. It is worth at the outset drawing attention to the concession of the Defendant that the fact that the Court may have not found for the Claimant in respect of Grounds 1 and 2, does not mean that it is not open to the Court to find for it on Ground 3. Likewise, if the Court has found for the Claimant in respect of Grounds 1 and 2, then it does not mean that it cannot found for the Defendant on Ground 3. Although these are logical possibilities, the results on Grounds 1 and 2 may inform in respect of Ground 3. Thus, the fact that the Court has already found safeguards inherent in the policy and has not struck down the time periods, particularly where there is a 72-hour period to consider as part of Grounds 1 and 2, but a 5-day period in respect of Dublin III cases, may well be relevant to the outcome of a challenge in respect of Ground 3.

297. Article 27 of Dublin III provides:

> "*The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal."*
>
> *Member States shall provide for a reasonable of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.*
>
> *For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:*
>
> *(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or*
> *(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or*
> *(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based…*

(5) Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.

(6)Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

298. The United Kingdom has opted in to this Regulation: recital (41). Recitals (5) and (19) recognise the fair balance that has to be struck between the objectives of rapid determination of the responsible Member State and due process. Article 27 confers on all those notified of a transfer decision under Article 26 a right to an effective remedy, in the form of an appeal or review, in fact and in law, before a court or tribunal (Article 27(1)). Individuals are entitled to a reasonable period of time to exercise that right (Article 27(2).

299. Paragraphs (3) and (4) of article 27 require Member States to provide in their national law either:
    (a) that the appeal or review confers the right to remain pending its outcome; or
    (b) that that transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or tribunal shall have decided whether to grant suspensive effect to an appeal or review; or
    (c) that that applicant has the opportunity to request "within a reasonable period of time" (emphasis added) a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his appeal or review, and Member States must suspend the transfer until the decision on the first suspension request is taken; the decision whether to suspend must be taken within a reasonable time and a decision not to suspend shall state the reasons on which it is based. Member States "may" (not must) provide that the competent authorities may decide ex officio to suspend the implementation of the transfer decision pending the outcome of the appeal or review: article 27(4).

300. The removal window policy does not apply to persons who have a pending claim for asylum: p.12. There is a right of appeal against a refusal of a claim for asylum: Nationality, Immigration and Asylum Act 2002 s.82(1)(a).

301. The Claimant submits that the five-working day period which precedes the RNW in Dublin III cases is "*a wholly insufficient period of time for individuals to make submissions as to why their removal to another Member State would be unlawful either under Dublin III substantive or procedural criteria, or under the ECHR, and to bring a*

challenge to any refusal of those submissions before a court." It points out that once the five-working day period expires, individuals are at risk of no-notice removal, and are thereby deprived of the right to an effective remedy against their transfer decision and the right to request its suspension in the meantime. Ms Navarette's case-studies include cases where the removal of individuals in circumstances which unquestionably interfered with their rights under Article 27 was only averted by chance. The Claimant therefore submits that the JRI policy is thus additionally unlawful for breach of Dublin III.

302. Where the SSHD decides to remove, pursuant to the Dublin Regulation, a person whose claim for asylum is to be determined in another Dublin state, there is no right of appeal on asylum grounds, or on the human rights grounds based on the risk of refoulement: Immigration and Asylum (Treatment of Claimants etc) Act 2004 s.33 and Schedule 3 paragraph 5. The removal window policy applies, unless the applicant falls within any of the other categories to which it does not apply. The notice period is 5 working days: p.21.

303. In Dublin III cases, the SSHD's notification requirements, at the outset of the referral process, are proscribed by Article 4 of the Regulation. The standard text of the leaflets is set out in Implementing Regulation 118/2014 and UK Dublin leaflets are published. The information is to be provided in a language that the applicant understands or is reasonably supposed to understand. Where necessary for the proper understanding of the applicant the information shall also be given orally. In cases of doubt as to whether the applicant understands the language used caseworkers should consult a senior caseworker in TCU.

304. The SSHD's policy guidance Dublin III Regulation, published on 2 November 2017 provides at page 231:

> *"As specified in Article 4 of the Dublin III Regulation, an asylum claimant must receive, at the beginning of their asylum procedure, timely and adequate information on the Dublin procedure itself. This is for the individual's understanding of his or her situation and for the effective function of the Dublin system by the Dublin States. The standard text of the leaflets is set out in Implementing Regulation 118/2014 and UK Dublin leaflets are published. The information is to be provided in a language that the claimant understands or is reasonably supposed to understand. Where necessary for the proper understanding of the claimant the information shall also be given orally. In cases of doubt as to whether the claimant understands the language used caseworkers should consult a senior caseworker in TCU."*

305. Where the requested state accepts responsibility for consideration of an applicant's case, consideration of certification of the case under the relevant provisions of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 will take place. This will include (see page 33 of the Dublin III guidance):

> *"...the consideration of any claims or allegations that removal from the UK and / or treatment in the responsible State in question would amount to an interference with the applicant's human rights under the terms of the European Convention on Human Rights (ECHR). It is essential that all matters raised should be fully answered with reference to relevant case law. If a human rights claim or allegation against removal is considered to be 'clearly unfounded' and therefore rejected, the removal decision from the UK will not attract an in-country statutory right of appeal – see Schedule 3 to the*

2004 Act (as above). This means that the effective remedy against the removal decision is in the form of a judicial review against either, or both the third country and 'clearly unfounded' certification or certifications. Any representations which may have been received on behalf of the applicant must be answered before the case is certified."

306. In these categories of case, as the SSHD's policy recognises, an individual may be able to show that he has not been able to advance a claim to remain previously and/or that he has not previously been able to seek legal redress. JRI makes specific provision accordingly.

307. In Third Country cases and certified cases, individuals are accorded a minimum 5 working day notice period, unless the case has already been reviewed by judicial review. This applies even when submissions are received following service of RED 0001 raising for the first time an asylum, human rights or EU free movement claim for leave to remain involving issues of substance which have not previously been raised and considered, or a further charged application for leave. A new RNW is then required to be given, providing a notice period of at least five working days.

308. Caseworkers are directed to give particular consideration to deferral in cases certified in order to accord an opportunity for legal redress. JRI provides: *"… When you give notice of removal to a person in these cases, you must satisfy yourself that they have the opportunity to access the courts before their departure is enforced, see Consideration of deferral. If notice of removal is given at the same time as the NSA or third country decisions this is likely to be their first opportunity for legal redress. A minimum of 5 working days' notice must therefore be given between giving notice of removal and the removal itself (unless the case has already been reviewed by judicial review, or in some circumstances where the individual has received such notice previously, see NSA cases already reviewed by judicial review or following a failed removal."*

309. The Claimant contends that even this is insufficient, both generally and in view of the sophisticated nature of many legal challenges to Dublin III decisions, often based on an overall assessment of the reception facilities and procedures in the third country to which the Defendant is proposing to remove the applicant. However, the Defendant submits that a five-working day notice period is sufficient to *"ensure that effective access to justice is not hindered*". The Defendant relies on the familiarity with Dublin III arguments of the Administrative Court and specialist solicitors. It says that are familiar with such arguments, and the documents supporting them, as they arise from time to time, and experience has shown that leading cases are soon identified and, where appropriate, case management directions are given to ensure orderly treatment of similar cases.

310. Where the Administrative Court decides that all Dublin III removals to a particular third country should be suspended pending determination of the relevant test case, it gives directions to that effect. Where no such directions are given, it is because the Court considers that the evidence does not warrant them, and so any applicant wishing to resist removal will have to do so on the basis of the circumstances particular to his individual case, which are matters of which he will necessarily be aware and able to inform his legal representative, if any. Moreover, those countries to which persons are removed under Dublin III are all in Europe and information about conditions in those countries is readily available.

311. In *R (Salah Ali Eisa) v Home Secretary (Dublin; Articles 27 and 17)* [2017] UKUT 00261 (IAC), Collins J upheld the legality of a framework requiring an applicant, within a set number of days, to institute a request for suspension of transfer by way of judicial review, where this was resisted, rather than mandating such suspension automatically. He said at [9]-[11] (i) that it is clear that one of the purposes of Dublin III is to try, so far as possible, to ensure that there is a speedy process leading to transfer, if transfer is appropriate, so that there can be speedy consideration of an application for asylum; (ii) that Article 4 of Dublin III incorporated a number of safeguards, including a requirement that the Member State inform the individual to be alerted to the prospect of transfer, in a language he understands, as soon as the protection application is lodged, including the objectives of the Regulation, the criteria for determining Member State responsibility, personal interviews, the possibility of challenge and of applying for a suspension where applicable, the fact of data exchange and the right of access to data; (iii) and that the purpose behind giving that information was to enable the individual to put forward any matters that may be relevant to whether there should be a transfer.

312. There is evidence before the Court in Navarette WS1 [93-98 and 124-130] and most of Navarette WS2. There is no evidence in response from SSHD, but there is a quite a detailed response in the Detailed Grounds of Defence. That is not satisfactory, and represents a confusion between pleadings and evidence. It would have been preferable for these matters to be addressed by way of evidence: the Claimant has responded through Navarette 2.

313. The Claimant refers to its reduced rota slots in the Morton Hall DDA surgery, and this has been referred to above: see Navarette WS2 [12]. It affects Wilson Solicitors LLP, but there has been a very significant increase in the number of providers who have been given slots, so overall this is not evidence of a reduction in access to justice. The Policy is in breach of Article 27 of Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

314. Ms Navarette gives evidence about Wilsons slot at the DDA surgery at Morton Hall in the week of 4 February 2019, where there were 46 individuals seen over the 5 days of that week: see WS2 [12-13]. That was a time when there was the ability to seek a deferral of a case (which post-dated the amendment in version 17.01 of JRI in in November 2018). This is a large number of individuals relative to the overall number of deferrals sought between 25 May 2018 and 9 March 2019 when there were 71 requests for extensions of time. In respect of 14 of the clients seen that week who had Dublin III cases, the evidence is that in 8 out of the 14 cases, a 7-day notice period had expired by the time that Wilsons saw the client at the DDA surgery.

315. However, there is no explanation as to why the client was seen at the DDA surgery after the notice period had expired. There is no evidence to the effect that by then it was too late, and that there was nothing that could be done for them. There are specific instances cited without comment about action taken after a notice period had expired which led to action being taken e.g. Navarette WS2 (16 vii), where someone was released from detention because of a pre-action protocol letter sent well after the notice period had expired. Further, there is no evidence given about requests in respect of any of the

individuals for extensions of time or that any request had been refused (it seems that none were made).

316. There is evidence through Ms Ni Chiunn's statement exhibited to Ms Navarette's second statement to the effect that the certification of the clients was sometimes weeks after the decision to certify, but there is no account of what steps were taken prior to certification both to raise new asylum and human rights claims and to access legal advice.

317. There is the same lack of detail about cases where there were previous lawyers acting as has been referred to above in connection with the evidence relating to access to justice above. It is said in broad terms at Navarette WS2 [60] that in some cases clients sought to instruct them because of dissatisfaction with previous representatives. As noted above, access to justice does not entitle an individual to a choice of representative, and this is addressed in JRI and in the decision in *FB* cited above at [184]. In those Dublin III cases where there was certification, there will have been a significant period of time prior to certification for the individual both to raise new asylum and human rights claims and to access legal advice. It is not apparent from the failure of the SSHD to adduce evidence about Dublin III whether it would have availed itself of a longer opportunity, but the evidence in Navarette WS2 may have been too proximate to the hearing itself for it to have been practicable. The responses to Navarette WS2 have come largely from a note prepared on behalf of SSHD, with the permission of the Court, on 25 June 2019, but the comments might have been more specific and more authoritative if they came through evidence.

318. The cases generally in respect of Dublin III do not contain evidence of denials of access to justice, but matters which gave rise to a concern about the possibility that such a denial might have occurred, but did not. There is evidence about caseworker errors and concerns as to the extent to which the caseworkers understand the policies.

319. Having considered the material before the Court, there is a system in place which is designed to comply with the international obligations of the UK Government as regards Dublin III. There are safeguards in place of the kind described earlier in the judgment, and specifically in respect of Dublin III as detailed in this part of the judgment. There are serious shortcomings in the evidence as described above of the Claimant missing out important information regarding matters such as previous representation of the individuals. Whilst it is regrettable that there was not evidence served in response, this is not a case where a case has been made out by the Claimant in respect of the Policy being in breach of Article 27 of Regulation 604/2013/EU, and accordingly, just as the case has failed in respect of Ground 1 and Ground 2, so it must fail in respect of Ground 3.

320. There is a matter of concern which has emerged in the course of the preparation of this judgment. In accordance with their duty of candour, the SSHD has revealed a matter which has just been discovered. It is described in a witness statement of Hannah Honeyman dated 29 July 2019. Ms Honeyman is the head of Asylum Operations South and Special Operations including having responsibility for the Dublin Cessation Team ("DCT")(formerly the Third Country Unit). In the course of preparing for a third country charter flight in the week commencing 8 July 2019, it became apparent that Immigration Enforcement and DCT in UK Visas Immigration were interpreting the provisions

differently. It is most clearly described in a letter of 24 July 2019 from the GLD to the Court in the following terms, namely "*If, following initial certification of the asylum claim on third country grounds and the provision of 5 days' notice of removal, TCU [Third Country Unit] then received a fresh human rights or protection claim (for example raising a claim based on reception conditions in the EU state of removal or a medical condition), which it considered clearly unfounded, the TCU then proceeded to certify that claim under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. It did not however, give a further 5-day notice period (or suspend removal so as to allow for the 5-day notice period) following that second certification decision.*" By contrast, the Removals, Enforcement and Detention Policy team interpreted this part of the Policy to require the provision of 5 days' notice in all cases where the appeal right is certified and applies any time a fresh certification decision is made prior to removal; the result being that they considered that a minimum 5 working days' notice, between the decision and the removal, will apply regardless of whether it is a Third Country decision/certification or whether it is a separate decision/certification of an ECHR claim. On this basis, there would be required a further 5 days' notice in every certification case, so that it would not suffice to rely on the original 5 days' notice in the event of a subsequent certification in respect of a human rights or protection claim.

321. The Claimant is very critical about this discovery. It says that in the event that its case and evidence had been properly considered, and answered, the SSHD would have identified this difference of interpretation. The difference of interpretation demonstrates that the policy is not written clearly, such that it admits of more than one interpretation. It is also said to show a very limited understanding on the part of the Defendant whose case had been in the Grounds of Defence [68], the Skeleton Argument [95] and in oral submissions that *"a new notice of removal window is then required to be given, providing a notice period of at least five working days."*

322. The response of Ms Honeyman is that pending clarification, the further 5-days' notice is being provided in every certification case. A clarification is clearly required at the earliest stage, and then in the next version of the policy. One would expect that that clarification would mirror the additional 5day notice period in every certification case. This is either because it would mirror what has been submitted to the Court: alternatively, if there is really scope for two interpretations, one would expect that the interpretation most favourable to the individual would be preferred. One would expect to have some proposed solution of this aspect from the SSHD before the order arising out of this judgment is entered.

323. The criticisms of the Claimant are understandable, but they are pitched too strongly. It does not follow that if there is a matter which is not clear about one aspect of the policy that the entirety of the policy or significant other parts of it are unclear. Nor does it follow that the people applying it have limited understanding. It does illustrate why it is important for the SSHD to continue to engage with the solicitors and charities and other interested persons, and to share information working at all times for improvements and as much clarity as possible in the policy. It has added to the need for scrutiny of the case of the SSHD. However, in the end, it does not lead to the challenges being successful. In the meantime, the clarification is required.

324. The Claimant contends that, even if it fails on Grounds 1 and 2, it can and should succeed on Ground 3. The SSHD agrees that this is a logical possibility, but denies that the

evidence before the Court leads to that conclusion. It also submits that even if the Claimant succeeds on Grounds 1 or 2, the Court should dismiss Ground 1. In view of the matters set out above, the Court concludes that Grounds 1 and 2 must fail. There is no evidence to support a conclusion that the claim should succeed on Ground.

Ground 4: Procedures Directive

325. The United Kingdom has opted in to Article 39 of the Procedures Directive, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status: recital (32). Article 39(1) states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against inter alia: a decision not to further examine the subsequent application pursuant to articles 32 and 34 (further representations and subsequent applications). Article 34(2) states that the conditions in respect of examination of subsequent applications "*shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access*". Article 39(2) requires Member States to provide for time limits and other necessary rules for the applicant to exercise his right to an effective remedy pursuant to paragraph (1). Member States shall provide for rules dealing with "*whether*" this remedy shall have the effect of allowing applicants to remain in the Member State pending its outcome: paragraph (3)(a).

326. As explained above, the removal window policy does not apply to applicants with pending claims for asylum in non-Dublin cases. Accordingly, Ground 4 is concerned with failed asylum seekers who are now making further representations on asylum grounds, which representations have not been accepted by the defendant as amounting to a fresh claim for asylum.

327. If the defendant rejects the applicant's further representations as not amounting to a fresh claim for asylum, there is no right of appeal. The test for a fresh claim for asylum is whether the further representations are significantly different from the material previously considered and create a realistic prospect of success: paragraph 353 of the Immigration Rules; *R (Robinson) v Home Secretary* [2019] UKSC 11 [2019] 2 WLR 897.

328. If the defendant accepts that the representations amount to a fresh claim for asylum but one that is clearly unfounded, the SSHD may certify the case under s.94 of the 2002 Act, in which case the right of appeal is out of country. In that latter situation, the removal window is 5 working days.

329. Further representations on asylum grounds fall within the scope of the Procedures Directive whether or not they are accepted by the SSHD to meet the paragraph 353 test: *R (ZO (Somalia)) v SSHD* [2010] UKSC 36 [2010] 1 W.L.R. 1948. In such cases, and in cases which are certified as clearly unfounded, the right to an effective remedy under Article 39 is met in the United Kingdom by the possibility of an application for judicial review.

330. There is no identified basis on which the claimant could fail on Grounds 1 and 2 and yet succeed on Ground 4. Ground 4 therefore adds nothing to Grounds 1 and 2, and it too fails.

Ground 5: Articles 3 and 8 ECHR

331. Paragraph 83 of the Grounds of Claim refer to this ground, but almost in passing relative to what has been submitted since the intervention of the EHRC. In *Medical Justice* at [169]-[170] Silber J noted that the Claimant did not develop its submissions on the ECHR and he considered that this was probably a recognition that Medical Justice could not succeed on the ECHR grounds if it failed on its access to justice ground. That was the case about the application as drafted. In this case, the Intervener has sought to major on this ground. It is therefore to the submissions made by the EHRC that this judgment now turns.

332. It is submitted by the EHRC (skeleton [10-11]) that since there is permission to extend for 28 days if notified prior to the expiry of the window, this can then be done repeatedly, so that a person could be exposed to a no-notice removal of 356 days out of 365. This point is both theoretical and a bad point. It is theoretical in that there is no instance of this extension having been used in this way. It is a bad point because it would be obvious in such a case that the use of the power would be abused unless there were extraordinary reasons to rely upon such extensions and so the abuse would be subject to the availability of judicial review. Further, the ability to have one extension of 28 days to be used in an appropriate position is a fall-back position which is not without justification.

333. It is submitted by EHRC that there are no preconditions for the use of an RNW (skeleton [12] and following]). It is not therefore necessary to have been a history of disrupted removals or abusive applications. The answer to this point is that the policy is justified generally in that it forces claims to be made at an earlier stage rather than on the proximate to the removal. In that sense, it enables that matters can be dealt with an orderly and non-disruptive way. In many cases, that will operate in cases with histories of disruption or lack of success. Critically, it does not apply to fresh claims as set out above and to a variety of matters outside the RNW policy pending protection (asylum or humanitarian protections) or human rights claims, or appeals.

334. There is criticism (EHRC skeleton [14] and following) of the fact that it is for the individual to raise a challenge, as said in the Defendant's policy equality statement ("PES") of 14 September 2015, at a stage when it can be properly considered rather than withhold it until removal is imminent. For the reasons above set out, it has not been shown that this is not a legitimate purpose of the RNW.

335. There is an emphasis by the EHRC as regards the power to extend time that this is not the same as a guarantee. However, there is a duty to consider an extension properly, and there is no evidence to the effect that this duty is ignored. Further, as regards the certification under section 120 notices, this is susceptible to judicial review. The suggestion that if there is no judicial review, there will be no scrutiny is not an answer. It must in the first instance be for the SSHD to exercise their discretions properly; they are subject to judicial review, and the fact that claims are commonly brought for judicial

review will keep the SSHD having to account for their actions. It does not follow that since some will not exercise this right that the policy is therefore a bad one.

336. There is criticism of the same day removal policy (EHRC skeleton [16] and following). However, as set out above, this has not been operated since it was stopped with effect from 1 August 2018. It does not therefore arise for consideration. It was previously considered by the Upper Tribunal as being reasonable and proportionate at [188].

337. It is said (EHRC skeleton [18-19] and following) that there is no different treatment of vulnerable applicants as regards the period of notice, only in respect of the period of the window itself. However, the answer to this is that if the period is not sufficient for a reason related to vulnerability, then an application can be made to extend the relevant time. The citation of authorities concerning very different circumstances from the instant ones such as *R(VC) v SSHD* [2018] EWCA Civ 57 at [171] and *AM Afghanistan v SSHD* [2017] EWCA Civ 1123 does not advance the analysis. It is not ruled out that if there was substantial evidence in respect of this such as to identify as a particular problem such that extensions were not an answer, but there were other possible answers that there might be a case to consider in respect of the foregoing. However, this does not render the RNW policy as a whole unlawful, nor has unlawfulness been established in respect of this part of it, having regard especially to a lack of an evidential basis and to the ability to request an extension.

338. It is said by the EHRC that the safeguards of extension of the notice period or the deferral of the removal window and access to lawyers are not safeguards because they are not guarantees. They are safeguards properly so called. As noted above, access to justice does not involve the process being risk free so long as risk is kept to an acceptable minimum. Further, there appears to be a suggestion that it is not sufficient that an individual has to make a request for an extension or deferral of the notice period l rather than it being by the SSHD of her own motion. There is no explanation as to how this would work in practice: it must be for the individual to have the rights and the ability to exercise those rights, and not for the SSHD to have to make enquiries with the many thousands of people with whom it deals each year and to make the enquiries for itself. If there is a case to this effect, it is one that has not been developed and is not evidentially based as to how it could operate.

339. It is suggested by the EHRC (skeleton [23]) that there should be an obligation to defer the RNW where an individual has not been able to obtain an appointment with a lawyer through the DDA. It suffices, in my judgment, to say that it "should normally be deferred", because there is a problem about people changing or removing lawyers precisely to obtain further time, and so the judgment of the SSHD is required rather than making this an automatic reason for an extension. In a community case, it is not up to the SSHD's officers to procure a lawyer: an extended period of notice is allowed here, and extensions of time can be sought if there is a difficulty in obtaining the services of a lawyer or in making the representations in time. As is apparent from the cases noted above, frequently there is a lawyer who has already provided services to the applicant because the notice of the removal is usually served at or towards the end of the process.

340. The EHRC says (skeleton [24]) that the provisions in the JRI concerning changes of legal representatives do not allow for the new legal representatives to get sufficient documents. There is no evidence of this being a problem in practice. The matter concerning same

day removals is again referred to (skeleton [25]), but the same-day removal practice has been stopped with effect from August 2018.

341. EHRC complains about the fact that a judicial review claim with detailed grounds filed at Court has no automatic suspensive effect (skeleton [25]). Whilst true, that statement does not set out the full position, namely that "the Home Office will normally defer removal where a JR application made in England and Wales has been properly lodged with the Administrative Court or the Upper Tribunal in accordance with the relevant procedure rules. However, removal will not automatically be deferred where there has been less than 6 months since a previous JR or statutory appeal or the person is within the removal window, or the person is being removed by special arrangements (including by charter flight) (see special arrangements)" at pages 18 - 19 of the JRI version 18.0.

342. There is a criticism by the EHRC about the absence of adequate monitoring arrangements (skeleton [26-31]): this has been considered above. Despite the amount of the information provided, it is suggested that there is scope for further information still in order to provide better monitoring of the removal policy at work. It is likely that more could be provided, and Mr Pompa's evidence acknowledges that this is an area which is actively being considered with a view to increasing the amount of monitoring. It is an area where it does not suffice for the SSHD internally to take such steps as it thinks fit, but actively to engage as it did in the letter of 10 May 2019 in the concerns expressed to it, and to take such steps as it can to improve the monitoring. If it unreasonably withheld some information which ought to be provided, then there could be consideration of what ought to be done. However, the Claimant is not able to show by any shortcomings in monitoring in respect of an evolving policy where there is a determination to improve the scope and extent of monitoring that there the policy of RNW or LNR is unlawful in the manner contended for by the Claimant.

343. The EHRC expresses a concern (skeleton [32-36]) about an aspect of the information provided on 10 May 2019 by SSHD in response to a request from the Claimant for disclosure. Reference is made to some of the detention centres where there is an average waiting time for DDA appointment of 3-4 days, but this is subject to the ability of individuals to seek extensions of the time, and the policy referred to above that "*if an unrepresented person (in detention) wishes to obtain legal advice and cannot be given an appointment at an LAA advice surgery within the initial 72-hours notice period, the removal window should normally be deferred to enable an appointment to be arranged."* It is not an answer to this that less than half the requests made on the basis of inability to access legal advice have been granted. There are not examples given to show that, going beyond caseworker error in isolated cases, that there has been an endemic failure as regards unrepresented persons. As noted above, there are often cases where the individual has not referred back to the lawyer who has been advising them and where there is no good reason to change legal representative.

344. There is a criticism of the EHRC (skeleton [36] about the average time between the SSHD making an adverse decision and scheduled removal being 1 day 4 hours and 35 minutes). This is about a third of the 72-hour minimum timeframe in detained cases. However, this fails to take into account the fact that the SSHD has been able to turn around the decisions such that the average time between the receipt of the further submission and the decision is 19 hours and 50 minutes. Thus, there is time within the notice period thereafter to make the application. The overall context is that as explained

in Annex 11.5 to the Defendant's First Disclosure Response [3/F/435-6], of 5362 decisions referred to OSCU between April 2018 and March 2019, there were some 2693 decisions (52.2%) in which removal directions were maintained. In those cases, the median time between receipt of further submissions and removal was 2d 10 40m, and as just noted, the time between receipt of further submissions and decision was 19h 50m.

345. Further, as rightly said by the SSHD, at that stage, the individual can then make the decision as to whether to translate those submissions into an application for judicial review. There does not have to be built in a time to consider a wholly new basis of application. The SSHD rightly draws attention to the observation of the Upper Tribunal in FB at [186] that "*with any power of removal, there will inevitably come a time when an individual is at the point of removal. Short of having a rule that precludes any submission being made by or on behalf of the individual at that point (which would be problematic, not least because of section 6 of the Human Rights Act 1998), it must in theory be possible to assert, up to the last minute, that removal should not go ahead. But that does not mean the individual is entitled, at that point, to have a lawyer advance any case the individual sees fit…*"

346. The Claimant submits that it is well established that there must be an effective remedy in respect of decisions which may interfere with Article 3 ECHR (see *Chahal v UK* [1997] 23 EHRR 413 at [151-2]) and Article 8 ECHR and that a person affected by such decisions has to be involved in the process to a degree which is sufficient to provide them with necessary protection of their interests (see *R (Gudanaviciene & Ors) v Director of Legal Aid Casework* [2015] 1 WLR 2247). It is submitted by the Claimant that the RNW policy fails to comply with the SSHD's obligations in this regard, and creates a serious ongoing risk that individuals will be removed in breach of those rights. Indeed, as explained in the Grounds of Claim [57(5), (6)] removal in breach of Articles 3 and/or 8 ECHR has occurred in three cases, and only been averted by accident in several more.

347. It is right of the Claimant to remind the Court that some of the cases have the potential to send detainees to countries where they may be subjected to torture or inhuman or degrading treatment or punishment, and therefore the system be judged with this in mind. Nevertheless, the policy has the safeguards referred to above. Those safeguards are then to be examined to see whether in practice those safeguards are real and work in practice, not such as to make the system risk-free, but to contains risk of unfairness to an acceptable minimum. The Claimant has not been able to show to the level required that the system is inherently unfair, particularly having regard to the case studies and to the statistics provided by the Claimant.

348. The Claimant submits that the problems are particularly acute in the case of vulnerable detainees, whom the SSHD has accepted are likely to be particularly adversely affected by it, but for whom, it is submitted that the safeguards are inadequate. It is to be borne in mind that under the JRI, limited notice should not be used "*where a medical or social work professional has advised that it may not be appropriate*". Whilst there is no mechanism whereby this is routinely sought, it is a matter for caseworkers on a case by case basis to take steps as appropriate. There are statements to the effect that this may not be happening effectively, but the evidence referred to above is limited. The Immigration Factual Summary referred to above includes information relating to the medical history of the individual including any medical conditions, any medication or

treatment currently being received and any evidence of risk of harm. It is a matter of which the SSHD must be vigilant, working out if there is more that can be done to identify such cases. It does not seem practicable for the SSHD to provide medical and social work professionals to each applicant, and therefore the burden is on the individual and solicitors to draw information to the attention of the SSHD and for caseworkers to be vigilant when they are given information to ensure that the policy of not giving limited notice of removal is used. It may be that there is a possibility in the future of a specifically targeted criticism in this regard, with recommendations as to what could be done specifically to improve the system in this regard. However, on the material before the Court, the Claimant has not established a systemic inherent unfairness in respect of vulnerable people such as to render the removal policy unlawful.

349. Despite these risks, the SSHD has not monitored the impact of its policy on these vulnerable groups; does not keep records of unlawful removals; and has not carried out a further equality impact assessment since 2015 in the light of experience or of the changes in the policy (which have, in particular, heightened the evidential threshold for a person to be accepted as vulnerable, and increased the categories of case in which an LNW may be used). Reference is made to the comments on the submissions of EHRC at (skeleton paragraphs [26-31]) and how the scope for greater monitoring, which is actively being considered. Such scope for greater monitoring which is currently being addressed does not establish that the RNW or the LNR policy is unlawful.

350. The Claimant points to the case of A referred to in Mr Singh's statement [57-95] as a "*stark illustration*" of the risks of the policy in connection with a vulnerable individual with a severe mental health condition. It is a case where the Home Office has admitted that the detention of A on 29 and 30 November 2017 involved a misuse of its powers. It is a lamentable history of unlawful removal. He was returned to the UK, and there was an agreed order to pay to him damages of £35,000 and costs of his application for judicial review. This was a shocking case, but there is no evidence to show that this is a "stark illustration" of some broader malaise of deceit on vulnerable victims. The consent order and the subsequent return of A to the UK show that it was an appalling deviation from the system rather than a symptom of a shortcoming of the system.

351. There is reference in the Grounds of Claim to special legal aid arrangements in Article 8 cases which caused some difficulties in *R (AT) v SSHD* [2017] EWHC 2714. As noted above by reference to FB [172-173], any difficulties in the legal aid arrangements went outside the remit of these proceedings in *FB*, as they do in respect of the current claim. There is not a point which has been made that shows that this causes such an unfairness in the system as to render the RNW policy unfair.

352. Reference is again made in connection with safeguards by the Claimant to the concern about SSHD caseworker errors, but that is not a fault which is inherent in the policy. The evidence does not establish such widescale errors as to make the system inherently unfair. The risk of human error is unavoidable. The question is how the system then learns from those errors and applies them in practice so as to diminish the risk of repetition, and there is evidence that this is done, particularly by reference to training slides referred to above.

353. The EHRC then made submissions about European law in respect of Articles 3 and 8 of the ECHR. It is emphasised that it is the responsibility of the national authorities to ensure that not only are there protections, but that they are practical and effective, and

not theoretical and illusory: see *Soering v UK* (1989) 11 EHRR 439 at [87]. There is a duty to ensure access to a fair and effective procedure to vindicate Convention rights: see *R v United Kingdom* [2012] ECHR 1796 at [61] and [72]. This substantially accords with the rights of access to justice at common law.

354. Attention is drawn to the absolute nature of the protection under Article 3, not to be balanced against the conduct of individuals and countervailing public interest: see *Saadi v Italy* [2008] 24 BHRC 123 at [125-131] and [138-142]. However, the cases here do not involve such a balancing exercise being undertaken. There has first to be established the risk of torture and inhumane treatment, and if that is established, then there is not to be a balancing exercise.

355. The skeleton of the EHRC identifies many cases about the procedural safeguards relating to Article 3 rights. Useful though the reference to the numerous cases is, this does not indicate how these rights are more extensive than the rights at common law or establish any breach of Article 3 right in respect of the particular challenge. The EHRC is right to say that cases turn on their facts, and therefore do not point to particular unlawfulness for the purpose of this case. The principles operate at a high level of generality. The matters relating to how the removal window operates and the treatment of fresh claims were properly considered in FB (e.g. [162-163] and have been considered above, and the matters in the skeleton of the EHRC [e.g.44] do not render these matters wrong.

356. Similarly, the references to cases in different contexts in connection with Article 8 rights do not show unlawfulness about the policy in this case. Article 13 has no direct application, but does assist in interpretation. Here too the analysis of EHRC does not demonstrate unlawfulness in the policy. Further, the broad statements that EHRC views the terms and the operation of the policy are considered to give rise to an unacceptable risk of infringement of Articles 3 or 8 and Article 13 to accessible and effective remedies is not accepted in the light of the matters set out above, particularly in the context of the more detailed evaluation of access to justice referred to above.

357. The submissions of the EHRC have been useful to remind the Court about germane aspect of law of the Convention and its interpretation under the applicable law of the European Courts. There is a level of generality, and Ms Harrison QC rightly accepted that each case was fact specific. In all the circumstances, it has not been shown that the policy and in particular the concept of the removal window or the notice periods are unlawful under the ECHR as interpreted under European law, just as it has not been shown that they are unlawful at common law. The challenges have failed on the common law bases referred to above. The result is no different under the ECHR, and accordingly the challenge under Ground 5 too fails.

Conclusion

358. It follows from the above that all five grounds are rejected, and that accordingly the relief sought is denied and the claim is dismissed.

359. The claim has involved a root and branch attack on the RNW policy both as regards the concept of a notice window and the period of notice. Each of the safeguards have been the subject of challenge. Unlike in the case of *FB*, there has not been an alternative challenge on the basis of seeking to have changes to specific wording of the policy or

matters which would enhance its operation. Notwithstanding this, there is a matter where clarification is required, as above. When that clarification is provided, the parties may wish to consider whether an appropriate declaration is required.

360. In the context of this judgment, there has been reference to the dynamic between the solicitors, charities, activists and the SSHD which is very beneficial in the evolution of the policy. There are clearly many dedicated professionals in the field. Whilst some progress may come from public interest challenges, there is an additional respect in which cooperation of the parties is of value to the public. This judgment has been critical of the SSHD for its initial lack of cooperation when asked questions in January 2019. In the event, the Court has dismissed the application for the reasons which it has given.

361. The fact that the focus was on having the policy declared ultra vires and like relief should not detract from the scope for the sharing of and reacting to information between the various parties involved with a view to assisting the evolution and the next versions of the current JRI. That has happened in the past, and if it happens in the future, that will assist all persons affected by the policy.

362. The Court is mindful of the imminent appeal in *FB* to the Court of Appeal, and that FB has been followed in this case, which may have certain consequences. Thus, without the need for detailed written submissions in the first instance, the Court can be informed what is pre-occupying the parties, and give such assistance as it is able to provide in the way forward.

363. It only remains for the Court to thank the respective Counsel, solicitors and parties for their assiduous preparation at all times and for the assistance which they have provided to the Court before, during and following the hearing.