Public Law Project

Secretary of State for the Home Department
UKVI Judicial Review Unit

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Our ref: RS/MJ
Your ref:
:Date: 22 December 2014

PRE-ACTION PROTOCOL LETTER BEFORE CLAIM

Dear Sirs

Re: Proposed judicial review of Chapter 60 Enforcement Instructions and Guidance, version 8 (as amended 20 October 2014), to be brought by Medical Justice

Proposed Defendant

1. The Secretary of State for the Home Department

Proposed Claimant

2. Medical Justice (registered charity number 1132072), 86 Durham Road, London, N7 7DT.

3. Medical Justice is an independent charity established in 2005 in order to facilitate the provision of independent medical advice and independent legal advice and representation to those detained in immigration removal centres. It was granted charitable status in 2009 (registered number 1132072).

4. Medical Justice is the only organisation in the UK that regularly investigates the adequacy or otherwise of healthcare provision in immigration detention. Medical Justice also advocates for changes to policy and practice within immigration removal centres, including seeking better quality medical care in immigration removal centres. They have acted as claimants and interveners in Judicial Review challenges to government policies which affected their beneficiaries.

5. In 2010 Medical Justice brought a Judicial Review of the Home Secretary's policy to remove individuals without notice (R (Medical Justice) v SSHD [2010] EWHC 1925 (Admin), upheld on appeal: [2011] EWCA Civ 269; [2011]. As a result the policy was quashed.

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6. Medical Justice intervened in challenges to immigration detention by people who had been diagnosed with HIV (R (MD (Angola) v SSHD [2011] EWCA Civ 1238).

7. Medical Justice provided evidence in support of judicial review claims challenging the use of force on immigration detainees in hospital (FGP v Serco & SSHD [2012] EWHC 1904 (Admin)), during enforced removal (R (Z) v SSHD [2013] EWHC 498 (Admin)) and pregnant women and children (R (Chen and Others) v SSHD CO/1119/2013).

8. Medical Justice provided evidence in support of successful claims for unlawful detention brought by victims of torture (R (EO and Others) v SSHD [2013] EWHC 1236 (Admin)).

9. In the context of the detention of the mentally ill, Medical Justice, jointly with Mind, was granted permission to intervene in the Home Secretary's appeal to the judgment of Singh J in R (HA) v SSHD [2012] EWHC 979 (Admin). The Home Secretary abandoned her appeal shortly before the hearing. Medical Justice, jointly with Mind, intervened in the recent case of R (Das) v SSHD [2014] EWCA Civ 45 where the Court of Appeal gave guidance on the meaning of the Home Secretary's policy on the detention of the mentally ill.

Details of the matter being challenged

10. This is a proposed challenge to Chapter 60 Enforcement Instructions and Guidance, version 8 (as amended 20 October 2014), particularly Section 19 of this Guidance ('Chapter 60.19'). It is the claimant's case that the policy set out in Chapter 60.19 is *ultra vires* as being in breach of the rule of law and in breach of the right of access to justice, and that the policy is irrational, arbitrary and in breach of EU law and ECHR procedural obligations.

11. Before setting out the proposed grounds of challenge, we set out below the claimant's understanding of how Chapter 60.19 applies.

12. Chapter 60.19 provides as follows:

> *Single decision cases should not have removal directions served on them, although removal directions will continue to be served on the carrier. The single decision notice includes the country to which a person will be removed, and a period of 72 hours (or five days for NSA cases) following the expiry of their leave during which they will not be removable.*
>
> *Persons receiving self-check in directions will continue to be notified of their flight details. Persons who have been detained for removal will normally be informed shortly before removal of the time when they may expect to arrive in the country to which they are being removed, in case they wish to make arrangements to be met or for onward travel. This will normally be in writing but may in some circumstances be a verbal notification.*
>
> *The information of arrival time will be a courtesy notice; it is not necessary to serve it for the individual to be removable. It will be made clear to individuals who are detained for removal that any legal challenge to removal should be brought forward*

as soon as possible, not held back until the notice is given. Time frames for giving the courtesy notice will be determined on a case by case basis, taking into account factors such as the risk of disruption and the timing of the flight.

Where removal will involve transit in a country which is outside the EEA, the person must have been informed in writing that this is an actual or potential transit point at least 72 hours before their departure. This may be via the courtesy notice above, via the single decision itself or via another letter. A single decision letter notifying a failed asylum seeker of their liability to removal will specify the part of the country to which they will be removed (and any in-country transit point) where this is relevant to the claim.

13. Chapter 60.19 currently applies to *'single decision cases*', defined as those cases to which the new appeals and removals provisions of the Immigration Act 2014 ("2014 Act") apply (i.e. ss. 1, 15, 17(2), and § 3-7 and Part 4 of Schedule 9 to the 2014 Act).

14. The change in policy is said to apply where a new 'single decision' process for removal applies, following the amendment to section 10 of the Immigration and Asylum Act 1999 by s. 1 of the 2014 Act. The new section 10 was brought into force on 20 October 2014 for certain categories of person. Those categories are:

    a. Students who apply (in country) for further leave to remain under Tier 4 of the Points Based System on or after 20.10.2014;[1]

    b. Students' families who apply (in country) for further leave to remain as the partner or child of a Tier 4 migrant on or after 20.10.2014;[2]

    c. People falling within category (a) or (b) who subsequently make a protection claim or human rights claim whilst in the UK (and not at a port);[3]

    d. Certain deportees: those who became 'foreign criminals' on or after 20.10.2014[4] and those in respect of whom a 'deportation decision' is taken on or after 10.11.2014.[5] A deportation decision means a decision to make a deportation order, a decision to refuse to revoke a deportation order, or a decision that a person is liable to automatic deportation under s. 32(5) UK Borders Act 2007;[6]

    e. Family members who are liable to deportation under s. 3(5)(b) IA 1971 because they belong to the family of a person falling within (d).[7]

15. The changes to appeal rights made by the 2014 Act mean that those in categories a. and b. will not have a right of appeal against a refusal of their Tier 4 application, or against any decision to curtail or revoke any leave granted or to remove them as an illegal entrant or an overstayer. They will have a right to apply for administrative

[1] The Immigration Act 2014 (Commencement NO. 3, Transitional and Saving Provisions) Order 2014, articles 9 and 11(1)(a)
[2] The Immigration Act 2014 (Commencement NO. 3, Transitional and Saving Provisions) Order 2014, articles 9 and 11(1)(b) and (c)
[3] The Immigration Act 2014 (Commencement NO. 3, Transitional and Saving Provisions) Order 2014, articles 9 and 11(2)
[4] The Immigration Act 2014 (Commencement NO. 3, Transitional and Saving Provisions) Order 2014, articles 9 and 10(a)
[5] The Immigration Act 2014 (Transitional and Saving Provisions) Order 2014, article 2(1)(b)(i)
[6] The Immigration Act 2014 (Transitional and Saving Provisions) Order 2014, article 2(2)
[7] The Immigration Act 2014 (Commencement NO. 3, Transitional and Saving Provisions) Order 2014, articles 9 and 10(b) and The Immigration Act 2014 (Transitional and Saving Provisions) Order 2014, article 2(1)(b)(ii)

review of the refusal of a tier 4 application. Those in category c. will have a right of appeal, exercisable before any removal, on asylum or human rights grounds against a decision on their claim, unless it is certified. Those in categories d. and e. who have made a protection or human rights claim, or whose protection status is revoked, will have such a right of appeal on protection and human rights grounds, unless the decision to refuse their claim is certified.

16. Chapter 60.19 currently applies to the categories of case set out at paragraph 14 above. We understand that the Secretary of State intends to roll out the new removal and appeals provisions contained in the 2014 Act across all categories of case in the future, and that Chapter 60.19 is intended to apply to all categories of case in which a decision is made under the 2014 Act. The proposed challenge is to the policy as it currently applies, and to the intention to extend it to all types of immigration decision.

17. According to Chapter 50.14 of the EIG, which describes the process to be applied to Tier 4 applicants and their family members (i.e. those in categories (a) and (b) above), the single decision notice will:

    a. "make their status clear and also their liability to removal"

    b. "inform them that they are, or will be, liable to removal if they do not depart voluntarily"

    c. "include the country to which they will be removed"

    d. "notify them that there will be a period of 72 hours, beginning after they become liable to removal, during which they will not be removed, and will advise them of the need to seek legal advice as soon as possible"

    e. Include (or be accompanied by) a section 120 notice informing them of their duty to raise any new matters with the Home Office at the earliest opportunity.

    f. Provide information about voluntary departure

    g. Provide information about the consequences of remaining in the UK illegally.

18. The claimant understands that the same information will be provided in any 'single decision notice' in any other category of case i.e. currently in deportation cases and when the process is rolled out to other categories, to those other categories.

19. Additionally:

    a. Where the decision is appealable, it must comply with the requirements of the Immigration (Notices) Regulations 2003 (as amended) and include notice of the right of appeal and how that right may be exercised;

    b. Where the decision is one which is eligible for Administrative Review, it must comply with the requirements of paragraph 34L of the Immigration Rules, including information about how to apply for administrative review. This currently only applies to a refusal of further leave to remain under Tier 4 (including dependants of Tier 4 applicants).

20. The claimant understands the Secretary of State's position to be that there is no longer any requirement to serve removal directions on an individual to whom the 2014 Act applies because the effect of the amended section 10 of the 1999 Act is

that a person is removable as a consequence of not having any leave to remain rather than requiring any separate decision to be made. It is understood that the Secretary of State considers that the 'single decision notice', containing the information set out above, constitutes sufficient notice of removal to comply with the requirement to ensure that individuals have effective access to the court before removal as set out in *Medical Justice*.

21. The only exception to this set out in Chapter 60.19 is that a person must have been informed in writing 72 hours prior to departure of any transit in a country which is outside the EEA.

22. Please confirm in your reply whether the claimant's understanding of the intended operation of Chapter 60.19 and the 'single decision notice' procedure as described above is correct and if any part of it is not correct, please state which part and set out the correct position.

Proposed grounds of challenge

Ultra vires

23. As acknowledged by Silber J, *"it is a principle of law that every citizen has a right of unimpeded access to a court"* and that, absent specific and clear Parliamentary authority to do so, "*rules which did not comply with that principle would be ultra vires*" (*R(Medical Justice) v Secretary of State for the Home Department*, §43; see also *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198, 210; *Raymond v Honey* [1983] 1 AC.1, 13).

24. In *R (Medical Justice) v SSHD* §45 Silber J found that the right of access to the court required the individual '*to have sufficient time between service of the removal directions and the time fixed for removal to find and instruct a lawyer who:-*

(i) *Is ready to provide legal advice in the limited time available prior to removal which might also entail ensuring that the provider of the advice would be paid;*

(ii) *Is willing and able to provide legal advice under the seal of professional privilege in the limited time available prior to the removal which might also entail being able to find and locate all relevant documents;*

(iii) *(if appropriate) would after providing the relevant advice be ready willing and able in the limited time available prior to removal to challenge the removal directions.*'

25. In *R (Medical Justice) v SSHD* both the High Court and the Court of Appeal found that the Secretary of State's policy of not giving advance notice of removal directions in certain categories of case impeded the right of access to the court to those invdividuals, and was unlawful. Under Chapter 60.19 the Secretary of State will not give *any* notice of removal directions to some, and, we understand, eventually all, categories of case. This policy, like the policy found to be unlawful in *Medical Justice,* impedes the right of access to the court and is unlawful.

26. The categories of case which will be particularly affected include those set out at § 51-58 of Silber J's judgment in *R (Medical Justice) v SSHD*. They are:

a. Where the secretary of state decides to reject further representations without a right of appeal, and schedules removal shortly after service of that decision;

b. Where there were no outstanding representations at the time removal was scheduled, but that removal will, in fact, engage an individual's rights under the ECHR, Refugee Convention 1951 or EU Treaty rights. This could occur where:

    i. There has been considerable delay between service of the single decision notice, and/or the conclusion of any administrative review or appeals process and removal being scheduled, during which there has been a material change of circumstances of the individual; in the country of origin; or in the law, meaning that removal could breach the individual's rights under the Refugee Convention, Articles 2,3, and 8 ECHR, or his EU Treaty rights;

    ii. Arguments against removal have not been put forward earlier because the individual has received inadequate or no legal representation in relation to their immigration matter;

    iii. Those subject to removal may have had their asylum claims processed in the fast-track system - the difficulties of providing proper representation to appellants in the fast track are greatly increased, are well known and have recently been highlighted by the judgments of Ouseley J in *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin), holding that the Detained Fast Track was being operated in such a way as to create an inherent risk of unfairness for vulnerable individuals, and of the Court of Appeal [2014] EWCA Civ 1634, holding that the SSHD's policy since 2008 of detaining individuals under the fast track criteria during the appeals procedure was unlawful.

c. Where the secretary of state certifies an individual's protection or human rights application under ss 94, 94B or 96 Nationality Immigration and Asylum Act 2002, or under Part 2, Schedule 3 Asylum (Treatment of Claimants etc.) Act 2004. The effect of such a certification is to remove an individual's right to an in country right of appeal in cases which raise asylum or human rights grounds, the only remedy for which is judicial review.

d. Where removal directions themselves are subject to challenge, for example in protection cases where a proposed route of return is unsafe.

27. The claimant believes that the policy at Chapter 60.19 EIG itself creates greater obstacles to access to justice than the policy considered in *R (Medical Justice) v SSHD.* Moreover we contend that the purported safeguards do not protect an individual's right to access to the courts. The matters set out at below are of particular concern.

28. Where an individual whose 72 hour notice period has already expired is detained for removal, our understanding is that they could be removed immediately, without being given any further notice. For the reasons explored in *R (Medical Justice) v SSHD,* a lack of sufficient notice between detention and removal will impede access to the courts. The policy at Chapter 60.19 provides for *no* notice. Not providing any notice of a decision that an individual could wish to challenged clearly also creates an

impediment to access to the courts, and in our view, a greater impediment than that challenged in *R (Medical Justice) v SSHD.*

29. The policy challenged in *R (Medical Justice) v SSHD* purported to contain several 'safeguards' to protect access to the court (see §27-28 of Silber J's judgment), which were found to be insufficient by the High Court and Court of Appeal (see in particular §81-104 of Silber J's judgment). The policy set out at Chapter 60.19 contains even fewer provisions that could be identified as 'safeguards.' The 'safeguards' appear to be:

    a. The single decision notice will include details of the country to which the individual will be removed, and if in relation to an asylum claim, details of the part of the country to which they will be removed and any in-country transit point '*where this is relevant to the claim.'*

    b. Suspension of enforcement action for 72 hours after service of a single decision notice or after a person becomes liable to removal;

    c. Notification of the time of expected arrival '*shortly before removal'* in writing or verbally, as a matter of 'courtesy', but not as a mandatory requirement;

    d. Notification in writing of any transit country outside of the EEA will be given at least 72 hours before departure;

30. The position of the Secretary of State, as set out in the letter from James Brokenshire MP to Amnesty International UK Director Kate Allen, appears to be that the 'safeguards' in Chapter 60.19, particularly the suspension of enforcement action for 72 hours after service of the single decision notice, and the duty imposed on individuals to tell the Home Office of reasons why they should be granted leave to remain in the UK, are safeguards sufficient to comply with the requirements of the High Court and Court of Appeal judgments in *R (Medical Justice) v SSHD*. We do not agree.

31. Beyond 72 hours from service of the single decision, an individual could be detained at any time and be removed at any point after detention. There is no long-stop on removal being scheduled after the service of the single decision, and there is no guaranteed period between detention and removal sufficient to enable an individual to access and instruct a lawyer. It will not be possible to know with any accuracy when removal will take place, and therefore, how long an individual will have to find and instruct a lawyer willing and able to challenge a decision that they are liable to removal.

32. Further, while Chapter 60.19 requires at least 72 hours notice to be given of any change in a *transit country* (outside the EEA), it does not expressly require notice to be given of a change in an *internal transit*, or the part of the country to which the person is to be removed. There may be cases in which there is a change to the intended route of return or where it was not possible to identify the route and method of return at the date of the original decision. Following *HH (Somalia)* [2010] EWCA Civ 426 "*in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the [First-tier Tribunal] is required by law to consider and determine any challenge to the safety of that route or method*" on an appeal against a decision to remove a person from the UK. However, where the appealable decision did not contain sufficient information for the route and method of return to be assessed by the Tribunal, or where either the route or the method of

return has changed, there may be a need for consideration to be given to the safety of return by that route and that method. It is possible that the Secretary of State could decide to schedule removal via an internal transit or return destination that an individual would wish to challenge on protection or human rights grounds, but that, absent sufficient notice of the route, the individual will not be able to do so.

33. The provision of the 'courtesy' notice informing individuals of the time of their arrival is plainly not an adequate safeguard. First, it is clear from the policy that provision of this notice is not mandatory: it 'may' be provided as a 'courtesy'. Silber J observes at §85 of his judgment in *R (Medical Justice) v SSHD* that, in relation to the 2010 policy under challenge, "*it is clear that no obligation whatsoever is imposed on those who have to enforce the 2010 exceptions to ensure that there is effective access to the courts. In my view, such an obligation is essential so as to provide and to ensure that those detained have access to the courts".* There is certainly no such obligation in Chapter 60.19; the provision of information about arrival times is non-mandatory and considered nothing more than a 'courtesy'. There is moreover no clarity about when the notice will be given and when it may be withheld.

34. Second, the notice is to be given "shortly" before removal. There is no indication of what this is intended to mean and the policy suggests that the amount of time before removal that it is given will be determined on a "case by case basis", depending on the risk of disruption. This non-obligatory provision of notice "shortly" before removal plainly does not entail an obligation to ensure effective access to the courts.

35. Thirdly, the notice will only give details of *arrival* time. It therefore does not provide any clarity about the time at which individuals will be *leaving* the UK, particularly in cases in which removal will include transit in a third country and in the absence of any information about the length of any stop *en route*. It will also be difficult for individuals, who may have no or only limited experience of international air travel, to work out their departure time on the basis of an arrival time which is likely to be given in the time zone of the destination.

36. The duty on individuals to notify the Secretary of State of any grounds on which they should be granted leave to remain in the UK as and when they arise does not protect the right of access to justice. There is no clarity as to how the Secretary of State expects an individual to put forward any such grounds, or the processes by which they would be recorded. An individual wishing to put forward such grounds is likely to require legal advice and representation. If the individual served with a single decision notice does not know when the decision to schedule removal will be taken, it will be very difficult for them to put grounds to the Secretary of State in advance of that decision. This will be particularly problematic if there is a delay between the service of a single decision notice and the decision to schedule removal. It has been very common in the past for there to be long delays between individuals becoming liable to removal and the actual scheduling of removal. There is no evidence that this is now unusual. The Secretary of State routinely requires representations to be supported by detailed, often expert, evidence which is up to date. Producing such evidence can be time-consuming and costly. An individual seeking to challenge the decision to schedule his or her removal may need to provide updated evidence to the Secretary of State. It is not possible to know when this should be done without knowing when removal will take place.

37. We also believe that the wider context in which this policy is being implemented means that it presents even greater problems in relation to access to justice than the

policy considered in *R (Medical Justice) v SSHD*. The matters set out below are of particular concern:

a. The lawfulness of the policy must be considered in light of the restrictions on appeal rights under the 2014 Act. These restrictions will limit the ability of individuals to raise matters of relevance to the lawfulness of their removal in advance of removal being scheduled.

b. In addition to the restrictions on appeal rights in the 2014 Act, the Secretary of State appears to intend to make greater use of her powers to certify a protection or human rights claim, so preventing the applicant from exercising an in-country right of appeal, absent a successful judicial review challenge to the certification. The Secretary of State's position is set out in the *Immigration Bill Factsheet: Removal directions (clause 1)*, December 2013, in which it is stated that *"we will also use this new process to advise migrants to seek legal advice as early as possible. This will then mean that if someone chooses to wait until such time as they are encountered by an enforcement team and detained before raising grounds why they should not be removed, it is highly likely we will certify these grounds and allow the migrant to be removed, if those grounds could have been raised earlier."*

c. Further restrictions on the availability of publicly funded legal advice and representation will make it significantly harder for individuals to find and instruct a lawyer at short notice who is ready, willing and able to challenge any decision to schedule removal than it was when the matter was considered by the High Court and Court of Appeal in *R (Medical Justice) v SSHD*, or to instruct a lawyer to advise on and assist them to make further representations in relation to any new grounds which may arise between the service of the single decision notice and the actual setting of removal directions.

    i. The Legal Aid Sentencing and Punishment of Offenders Act 2012 removed immigration advice and representation from the scope of legal aid in most cases. Those individuals with such cases will not be able to access publicly funded legal advice unless the Director of Legal Aid Casework agrees, on application, to grant Exceptional Case Funding. Both the High Court and Court of Appeal in *Gudanaviciene and ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin); [2014] EWCA Civ 1622 have found that the guidance to those tasked with considering applications for ECF was unlawfully restrictive, and a challenge to the operation of the ECF system as a whole is to be heard in 2015. There is no urgent procedure for making an application for ECF; applications are considered within 20 working days and an applicant may have to apply for internal review and possibly judicial review may be required before ECF is granted. An application for ECF is very unlikely, therefore, to be processed within 72 hours.

    ii. Providers no longer have "devolved powers" to grant legal aid for urgent judicial review claims, but have to make an application to the Legal Aid Agency, and cannot commence work before the Legal Aid Agency has approved the application and granted an emergency certificate of public funding. The Legal Aid Agency's standard turnaround time for an emergency public funding application for an urgent judicial review claim is 48 hours.

iii. The Civil Legal Aid (Remuneration) (Amendment) (No3) Regulations 2014 place all work done on an issued application for judicial review at risk of non-payment unless permission is granted by the court. This can act as a disincentive to providers to take on urgent judicial review cases, particularly if it is not possible to obtain all of the relevant documents before issue.

iv. Additional factors such as a contraction in the number and capacity of immigration providers to take on cases, and exclusive contracting arrangements for work in immigration detention centres will also affect the ability of individuals to access legal advice and representation.

v. These factors will also be compounded by the uncertainty faced by any legal representative approached to take on a case where no notice of the date and time of removal is to be given, and it is uncertain whether removal may take place immediately or within hours, days, weeks, months or longer. Where such a representative is unable to reasonably predict the urgency or timeframe within which work will be required, he or she may be unable to take on the case by reason of being unable to assess the priority of the particular case in relation to his or her obligations in respect of existing clients.

vi. Furthermore these difficulties are compounded as it will be very unclear to a legal representative whether or when to seek injunctive relief from the court. If it is not known when removal may occur, it will not be possible to assess whether silence from the Home Office (whether after one hour, one day or one week) is something on which the representative ought to act so as to seek an injunction against removal (or indeed whether there is a need to take that step immediately without waiting even for a short period to hear from the Home Office).

38. Based on our understanding of how the policy would be applied, we set out below some examples and identify some relevant factors to illustrate why the policy is of very serious concern and why the safeguards are inadequate.

39. A student whose leave to remain is curtailed would have had a right of appeal against that decision prior to the changes made by the 2014 Act, in which she could have raised asylum and human rights grounds for not wishing to return to her country of origin. She no longer has such a right of appeal, and a curtailment decision cannot be subject to administrative review (even if it could, the Home Office will not consider any asylum or human rights issues raised). She would have to make further representations. If those are refused, she might now have a right of appeal against the refusal of her protection or human rights claim, but if it is certified by the Home Office she will not have that right of appeal. It appears that under the new policy she could be arrested, served with the decision refusing her claim and certifying it so as to deprive her of a right of appeal (either altogether under s. 96, or prior to removal under s. 94), and removed with less than 72 hours' notice, on the simple basis that she had been given notice of her liability to removal in the decision curtailing her leave to remain as a student, after which more than 72 hours had passed.

40. One category of case which particularly concerns Medical Justice is where an individual who is liable to removal and has been served with a single decision notice

has medical issues, whether physical or mental health problems, which may fluctuate over time or deteriorate between service of the single decision notice and their actual removal. The policy in Chapter 60.19 creates great difficulty for such individuals because, beyond knowing that they will not be removed for 72 hours, they have no way of knowing when the Secretary of State will actually seek to enforce removal. It is not practicable for an individual to provide continuous updates to the Secretary of State every time that their health deteriorates or to regularly confirm that their health (whether deteriorated, improved or unchanged) remains a barrier to a lawful removal – neither the individuals concerned, the medical professionals who treat them or may provide evidence about changes in their health, or indeed the Secretary of State, have the resources to deal with a process which requires continuous updating as to the medical position. Moreover, whilst not being given any notice of removal would induce anxiety in a person with average fortitude and no mental health problems, a person who has a mental health condition and who is vulnerable and fragile, would be far less able to withstand the stress of knowing they may be removed without any notice.

41. Silber J, at § 54 of the Medical Justice judgment, specifically identified that one particular practical difficulty that could result in removal directions being challenged where they would still engage a person's rights under the ECHR or Refugee convention was the very extensive delay between the conclusion of a person's case and the service of removal directions. In the report of the Independent Chief Inspector of Borders and Immigration, *'An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK'* [8](17 December 2014), his findings indicate that there is still very serious cause for concern at the ability of the Home Office to progress cases in a timely or efficient manner from the point that a person becomes liable to removal to the setting of removal directions, even where there is no barrier to removal. It is clear that there continue to be extensive delays. Areas of concern which were identified by the Chief Inspector included the following:

    a. Inefficiency in every part of the removals casework department (Removals Core Casework) responsible for concluding the cases of migrants who have been refused leave to remain, notwithstanding a reorganisation and additional casework resource, the aim of which was to enable the Home Office to manage its enforcement caseload more effectively (§ 6.48).

    b. A high proportion of undocumented cases which are hard to progress (§ 6.8) – at least 75% of Removal Core Casework cases are undocumented (§ 6.43) – and time-consuming efforts to re-document individuals were a major source of delay and failure of case progression (§ 6.45)

    c. Nevertheless, even in cases that should have been swiftly progressed or which had no barrier to removal, the Home Office failed to progress these or to progress them as far as possible (§ 6.9 and § 6.20)

    d. Predicted timescales vary depending on the type of case (§ 6.12)

    e. Home Office managers are unable to track overall case progression (§ 6.26)

[8] http://icinspector.independent.gov.uk/wp-content/uploads/2014/12/Overstayers-Report-FINAL-web.pdf

f. Delays in progressing cases because of Home Office inefficiency – namely a lack of communication and shared targets between different Home Office departments involved in the removals process, and a failure to share the resources of those departments effectively (§ 7.29)

42. The findings in the Chief Inspector's report starkly describe the current position being one where Home Office's inefficiency and delay is chronic and the failures to effectively progress cases from the point where they are liable to removal to the setting of removal directions are systemic. Moreover it indicates that there are a high proportion of cases where migrants cannot be removed because they are undocumented, i.e. they do not have any document and therefore their removal is not possible. Therefore it would appear that there continues to be a high likelihood of delay in the setting of removal directions in almost all overstayer cases (which would include tier 4 cases) following the lapse of 72 hours after the single decision is served. However in undocumented cases the likelihood of substantial delay in removal after the 72 hour period is very high indeed. During that period of delay, migrants' circumstances may change significantly such that their removal will no longer be lawful but the Chapter 60.19 policy envisages that they may then be removed without any further notice or, therefore, effective access to the court.

43. The Chief Inspector gave consideration to Home Office strategy on overstayers and the impact of measures which are aimed at reducing barriers to removal. Senior Home Office managers confirmed to the Chief Inspector that the cornerstone of the current approach was the creation of a 'hostile environment' in-country. This approach has three interconnecting strands: reducing barriers to enforced removal; enforcing compliance; and imposition of sanctions (§ 9.3). In relation to the reduction of barriers, the impact of the Immigration Act 2014 and several measures including the single decision regime (§ 9.4) and reducing in-country appeal rights are key parts of that strategy. The Chief Inspector reports that the Home Office expectation is that these measures will 'enable RCC to achieve removals at a faster rate'. However, critically in terms of delivering the Home Office strategy of a 'hostile environment' the Chief Inspector concludes:

> *'Our review of Immigration Enforcement processes during this inspection suggests that the Home Office is not currently resourced to meet this challenge. Significant improvements in the capability to monitor an increasing caseload, more efficient prioritisation of cases, more streamlined caseworking procedures and an increase in caseworking and enforcement resources will all be required if RCC is not to become a point fo failure in the strategy for driving down irregular migration.'*

44. In conclusion it is clear that the Home Office is unable to effectively progress cases from the point at which an individual becomes liable to removal to removal itself and so, as was the case at the time of the Medical Justice case in 2010, it is clear that there will continue to be cases where the removal directions themselves will need to be challenged as a result of Home Office delay in progressing cases to removal on the grounds that human rights and/or asylum grounds may have arisen in the intervening period.

45. The SSHD considers that the safeguard against delay in removing an individual after the initial 72 hour period has elapsed is by notifying migrants that the onus is on them to seek legal advice as soon as possible and by notifying the Home Office as soon as possible as new grounds arise. It also refers to contact management and reporting providing opportunities for an individual to notify the Home Office of any

new grounds. However such arrangements already exist and existed at the time of the Medical Justice case, and these were not considered to provide adequate safeguards precluding the need for adequate notice of removal directions so as to ensure effective access to the court. For example, both at the time of the Medical Justice case and currently there is:

a. a duty on individuals under s120 of the Nationality Immigration and Asylum Act 2002 to state all grounds for an individual remaining in the UK;

b. a system of reporting and contact management.

46. The policy set out at Chapter 60.19 assumes that it is not necessary to notify an individual that her removal has been scheduled. This cannot be the case. That an "*uncommunicated administrative decision"* could bind an individual is, per Lord Steyn in *Anufrijeva*, "*an astonishingly unjust proposition*" [30]. The constitutional principle that requires the observation of the rule of law "*requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system*" [28]. We believe that notice of scheduled removal is an administrative decision of the type envisaged by Lord Steyn in *Anufrijeva,* of which an individual must be given notice.

47. The claimant does not disagree with the proposition that the new section 10 of the 2014 Act makes it unnecessary for a separate decision to be taken to remove a person to whom section 10 applies. However, the setting of removal directions, understood as containing at a minimum the date, time, destination and means of removal including any transit countries, is a decision of which the Secretary of State is obliged to give the individual(s) concerned notice, as to do otherwise would be incompatible with the rule of law and the fundamental right of access to justice.

48. The *'single decision'* regime introduced by the 2014 Act does not release the Secretary of State from her duty to notify an individual of a decision to schedule her removal. Previous practice, practice which continues to apply to those whose cases are not covered by the new section 10 Immigration and Asylum Act 1999, was for an individual to be served, typically, with three decisions: one decision in relation to the substance of an immigration application; an appealable immigration decision as defined by s. 82 of the Nationality, Immigration and Asylum Act 2002 ('2002 Act') against which the individual would have an in or out of country right of appeal, and which would make clear the individual's liability to removal; and removal directions, notifying the individual of the date, time, destination and means of removal including any transit countries. We believe that the '*single decision'* under the 2014 Act contains the first two decisions; an interpretation that is supported by the Explanatory Notes to the 2014 Act (see § 12 and 13 of the Explanatory Note). The '*single decision'* does not however provide notice to an individual that their removal has been scheduled. Failure to provide such notice is contrary to the principle of the rule of law, as articulated in *Anufrijeva.*

49. In addition, before actually setting removal directions, the Secretary of State must decide that the person is in fact now liable to removal. This requires that the person has exhausted any right of appeal before removal under s. 82 of the 2002 Act and any right to seek administrative review. It requires that any applications or further submissions including those made in response to the Section 120 notice served with

the single decision notice have been resolved. The policy set out in Chapter 50.14 and Chapter 60.19 envisages that the single decision notice will give the claimant notice that they may be removed once 72 hours have elapsed after the point at which they become liable to removal. We are unclear as to how this is intended to operate in practice and whether individuals will in fact be given notice that they are now liable to removal once any subsequent applications, appeals or administrative review processes have been resolved, or only be notified in the initial single decision notice that *once they are liable to removal*, they may be removed at any time after 72 hours have elapsed.

50. It is far from clear that, when passing the Immigration Act 2014 Parliament intended to dispense with the need to notify an individual that arrangements had been made for their removal. The Explanatory Note cited above does not refer to any such intention. Any policy which impedes access to justice and is inconsistent with the rule of law in the manner set out above must be *ultra vires* the statutory powers conferred on the Secretary of State unless clearly and expressly authorised by Parliament.

Irrationality

51. In *R (Medical Justice) v SSHD,* Silber J rejected the claimant's additional argument that the policy was irrational. However, at the start of his discussion of the claimant's arguments as to rationality, Silber J noted that:

> *It is not in dispute between the parties that the categories in the 2010 exceptions in which reduced notice can be given thereby curtailing or removing the right of access to court needs to be "clearly delineated" and "strictly justified". ... The case for the Secretary of State is that the categories in the 2010 exceptions reach that threshold as the categories selected were adopted for good reason and indeed were properly formulated. Mr Swift stressed that in the case of each of the categories, there is no obligation to invoke the 2010 exceptions but rather that a discretion was given to invoke them if certain criteria were satisfied so as to justify the need for them in particular cases and therefore that they are remedies of the last resort.* (§113)

52. Silber J went on to conclude that each of the categories contained in the 2010 policy was rational and justified. In so doing he referred to the explanation provided by the SSHD for each category as to the rationale for including that category in the exceptions to standard notice of removal, and the limited circumstances in which each exception was intended to apply: see §114-121 in relation to medically documented cases of risk of suicide or self harm, where the exception would only apply if it was in the best interests of the person concerned and on the basis of professional medical advice; §122-131 in relation to unaccompanied children, where again it was stated that the exceptions would only apply where that was in the best interests of the child and in the light of advice from social services; §132-134 in relation to cases where there was a threat or a risk of harm to other detainees which could not be managed in any other way; §135-140 where necessary in order to ensure good order and discipline, where the risk of disruption could not be managed in any other way and the belief there was such a risk had a documented evidential basis; and §141-145 in relation to consent to removal.

53. This may be contrasted with the new policy in chapter 60.19 which appears intended to apply on a blanket basis to all categories of case on the simple basis that individuals will previously have had 72 hours notice of their liability to removal when served with a 'single decision notice' and that this, together with the obligation

imposed by service of a s. 120 notice, means that there is no need to give any further notice of the actual scheduling of removal directions. This blanket curtailment and restriction of the right of access to justice cannot on any view be described as "carefully delineated and justified" as the Secretary of State accepted any such policy must be in relation to the 2010 policy.

54. The claimant will also argue that, particularly in light of the exceptionally serious consequences it could have for an individual, and the blanket manner in which it is being applied to all cases, there has been insufficient enquiry into the potential impact of the policy, and it is insufficiently clear how it will operate in practice. It is, therefore, irrational as being inconsistent with the *Tameside* duty on public law decision makers to ensure they are properly informed before taking decisions.

Arbitrariness/Uncertainty

55. Further, and even if, contrary to the above, it is lawful for the sole notice of removal given to be the 'single decision notice', the claimant considers that the policy creates an unacceptable degree of arbitrariness and uncertainty. An individual who receives a single decision notice will know that – once they are liable to removal – there will be a period of 72 hours during which they will not be removed. However, beyond that, they will have no way of knowing, once the 72 hours has expired, whether they will be removed immediately, or after a further 72 hours, or 72 days, weeks, or even months. The new policy exposes individuals to considerable uncertainty as to their position and their rights, and unless the SSHD is in a position to remove individuals promptly on the expiry of the 72 hour notice period, there is an inherent risk of arbitrariness. As explained above, the recent report of the Chief Inspector clearly demonstrates that is not the case.

56. This may be contrasted with the position of those who are subject to "limited notice of removal" under the existing policy contained in chapter 60 EIG and elsewhere, who are informed that they will be removed on an unspecified date at least 72 hours and no more than 21 days from the date on which they are given notice of removal. This policy at least affords the individuals concerned some certainty as to the latest date by which they may be removed.

EU Law & ECHR

57. EU law provides for a right to an effective judicial remedy. The rights guaranteed under the ECHR must be practical and effective and there are inherent procedural obligations that accompany those rights and which ensure that there is access to the court and a judicial remedy. Therefore, wherever the EU law right to an effective remedy or ECHR procedural obligations/fairness is engaged, Chapter 60.19 policy also abrogates those rights by impeding access to the court and breaching an individual's right to advance notification of an adverse decision so that he may access the court, for the reasons given above in relation to the abrogation of those same rights protected at common law.

58. In particular Article 39 of the EU procedures directive[9] requires that under EU law an effective remedy be available for the refusal of protection claims (i.e. asylum and humanitarian protection), and Article 47 of the EU Charter of Fundamental Rights requires the availability of an effective remedy whenever EU law rights are engaged.

[9] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status

The ECHR contains a similar requirement wherever a person puts forward a credible case that their rights would be breached by removal. In order to be effective, these remedies must be accessible prior to removal and, at least in protection/Article 3 claims, suspensive of removal.

59. Relevant procedural obligations that are likely to arise under the ECHR will be cases where Articles 3 (protection claims), 4 (trafficking/forced labour claims) and 8 (private and family life claims) are engaged.

Details of the action that the defendant is expected to take

60. The Secretary of State for the Home Department is expected to:

    a. Agree to withdraw Chapter 60.19 of the EIG immediately and confirm that she will in all cases at minimum comply with the notice requirements set out at Chapter 60.2 (subject to the existing exceptions in Section 3 of Chapter 60);

    b. In lieu of the above, agree to suspend the operation of the policy immediately, pending the resolution of negotiations and/or any claim issued.

ADR

61. As far as we are aware there has been no consultation over the policy. If the SSHD considers that there is scope for a consultation or dialogue with our client (and other interested parties such as ILPA), then our client would be willing to meet with the appropriate Home Office officials in order to resolve this dispute, thereby saving court time and expense. In light of our client's position that the policy is *ultra vires*, we wish to make it clear that Medical Justice would only be prepared to agree to any meeting if:

    a. it has confirmation that the operation of the policy is suspended whilst any discussions are taking place; and

    b. it has an assurance that the information requested below will be available sufficiently in advance of any meeting to permit our client and interested parties a reasonable period of time to consider it.

62. In view of our attempt to resolve the matter without recourse to the Court, we would also request confirmation that, if the SSHD subsequently decides to reintroduce the policy she will:

    a. take no time point against our client for delaying issuing a claim against the policy pending the above-mentioned consultation; or

    b. if our client decides it is necessary to issue a claim protectively after the expiry of the time limit in this letter before claim, then

        i. the SSHD will not object to the claim being stayed so that costs are not incurred pending the outcome of the consultation;

        ii. if any costs are incurred during the consultation period or during the stay, the SSHD will not pursue our client for any costs incurred during those periods.

63. If the SSHD is unable to agree to this proposal then we are instructed to commence proceedings.

Details of the legal advisors dealing with the claim

64. The Public Law Project at the above address.

Details of any information sought

Requests for clarification of the policy

65. One of the difficulties with the policy challenged is the lack of clarity as to its practical operation and subject to your response to the questions which follow, which seek clarification as to the practical operation of the policy, the claimant reserves the right to raise a lack of transparency and clarity inherent in the policy as a further ground of challenge.

66. For example, in a letter sent to Baroness Smith during the course of the passage of the 2014 Act through Parliament, Lord Taylor of Holbeach, stated that: *It will not be possible for the notice to say when and how a removal will occur because following service of the original notice it is hoped the migrant will voluntarily depart. In that case the decision as to when and how they depart is the migrant's.* ***There is no possibility of persons being arrested and removed on the same day. Where a person, who has not already been given notification of their removal, is arrested and detained for the purpose of removal, they will be told at point of arrest that they are to be removed not before 72 hours has elapsed.*** *This will ensure that they have a further opportunity to obtain advice and access the courts if it is a long time since they previously took such advice.* (our emphasis)

67. We ask that you clarify what is meant by the statement that '*there is no possibility of persons being arrested and removed on the same day.'*

68. Is it meant that no individual, regardless of whether they have previously been served with a single decision notice or not, will be detained and removed on the same day?

69. If so, please inform us of the minimum time that there will be between detention and removal in the case of an individual who has previously received a single decision notice?

70. In addition to the above we seek clarification as to the following aspects of the operation of the policy:

    a. If an individual who has been served with a 'single decision notice' makes further representations in response to the s. 120 notice contained therein and those representations are rejected (whether or not with a right of appeal), will they be served with a further 'single decision notice', and/or given a further 72 hours' notice of removal at that point?

    b. Where an individual exercises a right to apply for administrative review or a right of appeal where one exists, will the 72 hours during which they may not be removed run from the service of the single decision notice or from the exhaustion of the right of administrative review or of appeal? If the latter, will

the individual be given any further notice at that point of the commencement of the 72 hour notice period?

c. If a person brings judicial review proceedings which are successful and the 'single decision notice' is quashed but when it is re-made, the decision is not to grant leave to enter or remain, will the person be served with a fresh 'single decision notice' and/or given a fresh period of 72 hours before they may be removed?

d. Are 'single decision notices' served on persons who are undocumented and who, notwithstanding their liability to removal, cannot be removed?

Information as to the operation of the policy

71. Please provide us with accurate and up to date figures of the number of individuals subjected to removals under the Chapter 60.19 policy and the date, month or period in which they were removed.

72. Please confirm whether the operation of the policy is being monitored. If it is:

    a. please explain how this monitoring takes place; and

    b. provide us with all of the monitoring reports

73. Please inform us of the time elapsed between the SSHD serving a single notice decision and scheduling removal in each case that has been subject to the Chapter 60.19 policy.

74. Please provide us with accurate figures for the average length of time between the conclusion of the statutory appeals process and the service of removal directions since January 2010 to date.

75. Please provide us with any accurate and up to date figures or estimates for the number of individuals, from January 2010 to date, who are liable to removal and who are undocumented.

76. Please confirm whether it is the intention of the Secretary of State that Chapter 60.19 will apply to all who are to be subject to the single decision regime when the relevant provisions of the 2014 Act are applied to other categories of case.

77. Please provide us with details of the consideration given to the practical difficulties faced by those subject to the Chapter 60.19 policy in accessing the court.

78. Please provide us with details of the consideration given to the SSHD's s55 Borders Citizenship and Immigration Act 2009 duty to safeguard and promote the welfare of children insofar as they or their parents/carers are affected by the Chapter 60.19 policy.

79. What consideration was given to difficulties in migrants obtaining legally aided representation due to there being fewer legal aid immigration law practitioners and since all non-protection claims, in particular article 8 ECHR claims were taken out of scope of legal aid as a consequence of the Legal Aid Sentencing and Punishment of Offenders Act 2012.

80. Please confirm whether any Impact Assessments, including Equality Impact Assessments, were conducted in respect of the Chapter 60.19 policy and if so please disclose those.

81. Please confirm if there was any formal consultation process that took place before the policy came into effect. If so please provide us with details of those consultations, including any consultation papers, consultation responses and the SSHD's responses, that was conducted with interested groups.

Details of documents considered relevant and necessary

82. The pro forma form or a specimen or anonymised example of a single decision to which Chapter 60.19 applies.

83. Any pro forma form or a specimen or anonymised example of the 'courtesy notice' referred to at Chapter 60.19.

84. Please disclose all decisions, documents, minutes, records and submissions, that set out the relevant considerations and justification for the Chapter 60.19 policy.

The address for reply and service of any Court documents

85. The Public Law Project at the above address. However would you please send any reply and documents by email wherever possible to the following addresses: r.singh@publiclawproject.org.uk and p.brendon@publiclawproject.org.uk .

Costs

86. Medical Justice is a small charity with very limited financial resources. If Medical Justice were to instruct us to commence proceedings then it would not be able to do so unless its liability for the defendant's costs in this litigation was to be capped at £7,500. PLP have agreed to act *pro bono* for Medical Justice at the pre-action stage due to Medical Justice's very limited financial resources and the important public interest at stake. Should it become necessary for Medical Justice to commence proceedings then it could only do so if PLP were to act under a CFA (PLP previously acted under a CFA for the *Medical Justice* case).

87. In any such proceedings, because of its financial circumstances and given the public interest in bringing this challenge, our client will be making an application for a Protective Costs Order ('PCO'). A PCO would be justified in accordance with the *Corner House* principles because: the policy which is the subject of this letter clearly raises issues of public importance; the public interest clearly requires that these issues should be resolved; our client has no private interest in the outcome of the case; having regard to our client's limited financial resources it is plainly fair and just to make the order; and without a PCO our client would not be able to bring proceedings.

88. Moreover, if proceedings are issued then there will be a very similar challenge to the one that was successfully brought by our client to the SSHD's previous no-notice removals policy – namely whether such a policy abrogates the constitutional right of access to the court. In that case a PCO was granted by the Court, capping our client's liability for your costs to £5,000. Our counsel rates were capped at Treasury counsel rates and a 43% success fee was payable. The granting of a PCO to our client in that case strongly indicates that the Court would accept that a PCO would be justified for this claim. If our client applies for a PCO it is likely to be in similar terms,

except it is now in a position to raise the cap to £7,500 for the SSHD's costs and a success fee no longer applies.

89. Given the strong justification of a PCO on similar terms to the one previously granted and with a view to saving Court time and public money we request the SSHD to give our client an undertaking that, if our client's claim is unsuccessful the SSHD will limit any costs pursued against our client to £7,500 in total. If so, our client will agree to similar cap as was previously ordered by the Court, namely, limiting counsel rates to Treasury counsel rates (the success fee will not apply).

90. If the SSHD will not agree to this then, in the alternative we request an undertaking from the SSHD not to seek costs from our client in connection with the application for permission and the application for the PCO, which we propose should be dealt with on paper. As we have already indicated, our client will not be able to bring a claim without costs protection therefore in the event that a PCO is not granted, it should not face the risk of an adverse costs order.

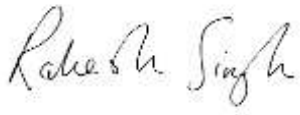
Proposed reply date

91. We require a substantive response to the matters raised by 4pm on 9 January 2015. As the standard 14 days for reply falls across the holiday period, we have allowed additional time for the Secretary of State to respond to this letter before claim.

92. Should further information be required please do not hesitate to contact us.

93. We look forward to hearing from you.

Yours faithfully



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