Neutral Citation Number: [2020] EWCA Civ 1338

Case No: C2/2019/2478

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
THE PRESIDENT AND UPPER TRIBUNAL JUDGE O'CONNOR
[2018] UKUT 428 (IAC)

AND FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON MR JUSTICE FREEDMAN
[2019] EWHC 2391 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/20

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD BURNETT OF MALDON

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE COULSON

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) FB (AFGHANISTAN)
(2) MEDICAL JUSTICE

Appellants

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

- and -

THE EQUALITY AND HUMAN RIGHTS COMMISSION

Intervener

- -
- -

Sonali Naik QC, Alex Goodman and **Ali Bandegani** (instructed by **Duncan Lewis Solicitors**) for the **First Appellant**
Charlotte Kilroy QC, Alison Pickup and **Anthony Vaughan** (instructed by **The Public Law Project**) for the **Second Appellant**
Steven Kovats QC, Deok Joo Rhee QC and **Colin Thomann** (instructed by **Government Legal Department**) for the **Respondent**
Stephanie Harrison QC and **Shu Shin Luh** (instructed by **The Equality and Human Rights Commission**) for the **Intervener** (written submissions only)

Hearing dates: 7-9 July 2020
Further written submissions: 15 September - 16 October 2020
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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. A state has the right to control those who wish to enter or remain in its territory, and consequently to set criteria for entitlement to enter or remain and for the removal of those within its borders who have no right to be there. Where individuals dispute an executive decision that bears upon such entitlement and/or removal, as part of their right to access to justice, they generally have the right to apply to a court or tribunal to challenge that decision.

2. In these claims, the Appellants contend that the Secretary of State's policy for removing those without the right to enter or remain in the UK – which, for those who fall within its scope, after a relatively short notice period in which removal cannot be effected, sets a removal window within which the individual can be removed at any time without further notice – is unlawful as abrogating the right to access to justice in respect of decisions which bear upon their removal. In brief, it is submitted that the notice period is too short for those affected to instruct lawyers to make representations that leave to enter or remain should be granted, for any such representations to be considered by the Secretary of State, and then for an application to be made to a court or tribunal to challenge any negative decision; and so it is inevitable that many negative decisions affecting their right to remain and their removal (including decisions to extend the notice period or defer the removal window) are made after the notice period has ended, so that they become at risk of immediate removal without an adequate opportunity to challenge the material decision or decisions before a court or tribunal.

3. Below, in the claim brought by FB, the Upper Tribunal (Immigration and Asylum Chamber) (the President (Lane J) and Upper Tribunal Judge O'Connor) ("the tribunal") held that the policy, although deficient in a number of respects, was not incompatible with the right to access to justice; and the Secretary of State's decision to remove FB under it was not unlawful (R (FB and another) v Secretary of State for the Home Department (removal window policy) [2018] UKUT 428 (IAC)). In a separate claim brought in the public interest by Medical Justice (a charity which facilitates the provision of advice to those detained in immigration removal centres), Freedman J also held that the policy, as amended following the determination in FB, was not unlawful ([2019] EWHC 2391 (Admin)). In this appeal, the Appellants submit that both the tribunal and court were wrong to hold that the policy does not unlawfully restrict access to justice.

4. Before us, Sonali Naik QC, Alex Goodman and Ali Bandegani appeared for FB, Charlotte Kilroy QC, Alison Pickup and Anthony Vaughan for Medical Justice, and Steven Kovats QC, Deok Joo Rhee QC and Colin Thomann for the Secretary of State. In addition, Stephanie Harrison QC and Shu Shin Luh made written submissions on behalf of the Equality and Human Rights Commission which intervened. At the outset, I thank all Counsel for their assistance.

The Legislative Background

5. To be lawfully in the United Kingdom, those who do not have a right of abode require leave to enter or remain. However, substantial numbers who require leave do not have

it. Some have entered the UK clandestinely. Some have arrived without leave, and have been allowed to enter whilst their application for leave is determined. Some have overstayed their leave. Some have had their leave curtailed.

6. The Immigration Act 2014 ("the 2014 Act") included provisions designed to encourage those who require leave to enter or remain but do not have it ("irregular migrants") to regularise their immigration position by either making a claim for leave or leaving the UK. For example, Part 3 of the Act generally restricted the access of irregular migrants to residential tenancies, employment, NHS facilities, and obtaining bank accounts, driving licences etc (the so-called "compliant environment" or, more usually, "hostile environment" provisions).

7. Section 1 of the 2014 Act has to be seen in that context. It amended section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") to replace diverse provisions with a single power of removal vested in the Secretary of State. (References in this judgment to "section 10" are to section 10 of the 1999 Act as amended by the 2014 Act, unless otherwise appears.)

8. Prior to 20 October 2014, section 10(1) of the 1999 Act provided for "Removal of certain persons unlawfully in the United Kingdom", as follows:

> "A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain;
>
> (ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee); or
>
> (c) directions have been given for the removal, under this section, of a person to whose family he belongs."

Therefore, although notification of a removal decision under the section expressly invalidated any leave to enter or remain in the UK previously given (section 10(8)), under this section a person was liable to be removed from the UK, not because of his or her immigration status, but because one of a number of conditions was satisfied.

9. From 20 October 2014, section 10(1) was amended to replace the previous version (and some other provisions relating to removal of other classes of irregular migrant), as follows:

> "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."

10. Section 10(7) was amended to provide:

> "For the purposes of removing a person from the United Kingdom under subsection (1)…, 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."

Paragraphs 8-10 of Schedule 2 give the Secretary of State and immigration officers the power to give directions to the captain, owners or agents of a ship or aircraft for the removal of an individual. There is no express reference in the 1999 Act, or elsewhere, to any requirement to give notice of any directions to the person to be removed.

11. Section 10(1) in its post-2014 form is a conceptually simple provision. If you have leave to enter or remain, then, under this provision, you cannot be removed. If you require such leave and do not have it, then you are liable to removal. In other words, it generally equates an immigration status (not having leave to enter or remain when requiring it) with liability for removal.

12. By doing so, the Secretary of State hoped and considered that it would open the way to a simplified and more efficient removal process, with less delay, by enabling her to issue a single decision letter which refused or curtailed any leave to enter or remain (or, where appropriate, merely confirmed that the individual had no leave), confirmed liability for removal, and required him or her immediately to bring forward any further ground as to why it was considered he or she was entitled to leave. The Home Office Policy Equality Statement ("PES") for the Bill which became the 2014 Act put the matter thus:

> "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.
>
> …
>
> 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."

In passing, I note that (i) it was the intention of section 10 that an irregular migrant should receive one decision letter covering both leave "and all aspects of the removal process", and (ii) one of the aims of the section was to reduce appeals and litigation costs.

13. That Statement referred to the importance of affording an opportunity for an irregular migrant to put forward any claims for leave to enter or remain on human rights grounds. Given that liability to removal under section 10 is crucially dependent upon immigration status, it is implicit in section 10 as enacted that an irregular migrant must

have an appropriate opportunity to show that that he is entitled to remain in the UK, on whatever basis, prior to being removed. Whether the policy under challenge adequately gives such an opportunity is at the heart of this appeal.

14. However, before turning to that policy, it would be helpful to set out other legislative provisions which make an appearance in the appeal. Again, in these the link between leave to enter or remain and liability for removal is often key. Focusing upon the category of people who require leave to enter or remain but do not have it, these provisions are generally concerned with determining, conclusively and without undue delay, those who are entitled to leave and those who are not; whilst giving an irregular migrant sufficient opportunity to challenge any adverse decisions before a court or tribunal prior to actual removal.

15. First, section 15 of the 2014 Act amended section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to restrict the right of appeal to the First-tier Tribunal ("FtT") to decisions refusing a human rights or protection (i.e. asylum or humanitarian protection) claim and revocation of refugee or humanitarian protection status.

16. Second, section 77 of the 2002 Act and paragraph 329 of the Immigration Rules provide that no person can be removed (and no action taken to require his or her removal) while he has a protection claim pending.

17. Third, section 94(1) and (7) read with section 92(1)(a) of the 2002 Act provide that, in respect of a human rights or protection claim, where the Secretary of State has certified (i) the claim is clearly unfounded, or (ii) it is proposed to remove the person to a country of which he or she is not a national or citizen and there is no reason to believe that that person's human rights will be breached in that country, then any appeal under section 82 must be brought from outside the UK. Certification is not itself an appealable decision: it can be challenged only by way of judicial review.

18. Fourth, section 78 of the 2002 Act provides that no person can be removed (and no action taken to require his removal) while he or she has any section 82 appeal pending.

19. Fifth, section 96(1) of the 2002 Act provides that an appeal under section 82 may not be brought by a person where the Secretary of State or an immigration officer has certified that that person was notified of a right of appeal under that section in respect of an earlier decision (whether an appeal was in fact made or not), the ground of entitlement now relied upon could have been raised in any such appeal, and there was no satisfactory reason for that ground not having been raised in such an appeal. Certification is again challengeable only by way of judicial review.

20. Sixth, under the heading "Requirement to state additional grounds for application", section 120 of the 2002 Act provides (so far as relevant to this appeal):

> "(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."

21. This section therefore requires that, where an irregular migrant has been served with a section 120 notice, he must promptly bring forward any claim of entitlement to leave that he then has, with a continuing duty to make a claim which arises in the future as a result of a change of circumstances. The sanction for a breach of that duty is found in section 96(2), which provides that a person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies that the person has received a section 120 notice, and he or she now relies upon a ground of entitlement that should have been (but has not been) raised in a statement made under section 120(2) or (5) and there was no satisfactory reason for that ground not having been raised in such a statement. Again, any such certification is challengeable only by way of judicial review.

22. Finally, paragraphs 353 and 353A of the Immigration Rules provide, under the heading "Fresh claims":

> "353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn… 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. This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

It is now settled that, where the Secretary of State decides that representations do not amount to a fresh claim for the purposes of paragraph 353, no right to appeal arises: that decision is again challengeable only by way of judicial review (R (Robinson) v Secretary of State for the Home Department [2019] UKSC 11; [2019] 2 WLR 897).

23. This scheme therefore strikes a balance between ensuring that there is a right to challenge every relevant decision before a court or tribunal, without unnecessarily burdening the immigration appeals system (R (BA (Nigeria) and PE (Cameroon) v

Secretary of State for the Home Department [2009] UKSC 7; [2010] 1 AC 444 at [32] per Lord Hope of Craighead DPSC). Looked at as a whole, it can be seen to restrict access to the courts (in which, of course, I include a tribunal) in the form of an appeal (or, sometimes, an in-country appeal); but does not breach the state's obligations in respect of access to justice because of the availability of a challenge to a relevant decision (including a decision which has the effect of denying the person an appeal or in-country appeal) by way of judicial review. In these cases, the right to access to justice thus depends upon a proper opportunity to judicially review a relevant decision.

24. In particular, although section 82 of the 2002 Act generally gives a right of appeal where a claim for leave to enter or remain on human rights or protection grounds is refused, there are several circumstances in which an irregular migrant may have such a claim rejected but have no right of appeal, e.g. where the Secretary of State certifies the claim as clearly unfounded under section 94 of that Act or as late under section 96, or concludes that it does not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules. Where a right of appeal is recognised, then removal does not take place until the appeal is finally determined. However, where such a right of appeal is not recognised, a challenge to the material decision(s) has to be mounted by way of judicial review; and, in those circumstances, it is submitted on behalf of the Appellants that, as a result of the relevant policy (considered below), the right to access to justice is unlawfully inhibited.

The Policy

25. Where an irregular migrant does not voluntarily leave the UK, his or her enforced removal involves the Secretary of State making appropriate travel arrangements. Removal is so often by air that, for the purposes of this judgment, other modes of travel can be ignored (although generally the same principles and practice apply). The arrangements needed for any enforced removal are often extensive, and include arranging travel documents and a place on a commercial flight or charter plane. They frequently involve the person's prior detention. Where those arrangements have to be cancelled (e.g. because of late representations, claim or injunction), substantial cost and delay are incurred; and the migrant may have to be released from detention pending removal whilst the representations and any subsequent claim are considered.

26. As a result, from 1999, the Secretary of State put in place a policy designed to cover arrangements for responding to such late events, in the face of a then-current practice of serving any irregular migrant whom it was intended to remove with notice of removal directions setting out details of the removal flight such as date, time, exit airport and route as part of the single decision letter process.

27. The history of the policy is comprehensively set out in the judgment of Silber J in R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin) ("the 2010 Medical Justice case") at [5]-[30]. For the present appeal, it is sufficient to say that, there was a period when the Secretary of State would defer removal directions on the mere threat of a judicial review; but in many cases proceedings were never subsequently issued, so that irregular migrants effectively had a right of veto against removal, even if they had no real claim to entitlement to leave to enter or remain. The policy was consequently changed so that the Secretary of State would defer removal only if and when a judicial review claim had been issued (as

evidenced by an Administrative Court case number) and she had received the grounds of challenge.

28. The Secretary of State agreed with the President of the Queen's Bench Division that there would be a minimum of 72 hours between the notification of removal directions and actual removal, including at least two working days, with the last 24 hours including at least one working day.

29. How that minimum period was determined is set out in paragraph 9 of the statement of Julia Dolby (who has a post in the Home Office Removals, Enforcement and Detention Policy Team) dated 12 April 2018 and filed by the Secretary of State in relation to FB's claim. The Secretary of State's initial proposal was to have a period of only 48 hours, which, she considered, was "the minimum necessary [to enable the individual] to obtain legal advice and lodge a claim". That rightly acknowledged that most irregular migrants would require legal assistance to formulate submissions and make a legal claim in respect of their removal and any underlying issues; and also that, following a negative decision relating to removal, the policy had to give an irregular migrant sufficient time to instruct legal representatives and for them to make submissions to the Secretary of State and, if necessary, prepare and issue a claim for judicial review.

30. It was eventually agreed that, if the minimum period between the setting of removal directions and actual removal as identified in those directions was 72 hours, the Civil Procedure Rules would be amended to require full grounds to be lodged with any judicial review claim. It was thought that that would (i) give a sufficient period for a judicial review challenging the decision to issue removal directions and/or any underlying decision to be prepared with full grounds, and issued; and (ii) enable the court to deal with the issue of permission to proceed on an expedited basis – within days – which would mean that the Secretary of State could maintain the irregular migrant in detention until the application for permission was disposed of, and removal directions could then be reset promptly if permission was refused. As Ms Dolby put it (at paragraph 5 of her statement: emphasis added):

> "The date of removal had to be set after a minimum of 72 hours, to include 2 working days…, after the individual was notified that removals directions had been set, *in order to allow them time to access justice*."

31. Because some classes of case were considered to be potentially more complex, and therefore the preparation of a claim might take longer, the policy prescribed a five-day notice period for a charter flight, and three days (rising to five days in 2010) for third country and non-suspensive appeal ("NSA") cases.

32. That policy was adopted in 2007. I pause to note that, within the policy, there were several exceptions which allowed for removal less than 72 hours after notification of removal directions was given, e.g. where the Secretary of State considered reduced notice necessary to maintain order and discipline because there had been an earlier frustrated removal. These exceptions were successfully challenged in the 2010 Medical Justice case (in which Silber J was upheld by this court: [2011] EWCA Civ 1710 ("the 2010 Medical Justice case (CA)"); and were then abandoned. In that case, it was assumed that it was not unlawful for the policy to fix 72 hours as the usual minimum removal notice period.

33. However, the policy introduced in 2007 was not entirely successful in eradicating late claims, which were administratively challenging and, in the Secretary of State's view, being used abusively. In paragraph 12 of her statement, Ms Dolby identified the perceived mischief as follows:

> "It was felt that the… process of allowing 72 hours' notice period starting from the point where an individual being given notice of removal directions led to the submission of late claims which could reasonably have been raised and considered earlier in the process and that in some cases this was being used in an attempt to frustrate or delay removal."

34. In other words, instead of making representations as to why they should be granted leave to enter or remain earlier, some irregular migrants were waiting until they received removal directions before taking steps to regularise their immigration status, leading to their representations and any subsequent legal claim having to be dealt with in an unnecessarily short period and removals being cancelled late, with all the attendant disruption and cost that that entailed.

35. Therefore, from 6 April 2015, the policy was changed again. It is clear from the Home Office PES dated 14 September 2015, which assessed the new policy, that it was part of the same suite of measures as section 10. Indeed, that PES was in similar terms to the PES used in relation to the 2014 Act quoted above (see paragraph 12). As the 14 September 2015 PES explained:

> "The aim of the single power [of removal in the new section 10], 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 [i.e. the obligation in section 120(5): see paragraphs 20-21 above].
>
> 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."

36. The new policy envisaged an individual being served with a notice which confirmed liability for removal, and set a short notice period during which there would be no risk of removal, followed by a removal window during which he or she might be removed without service of removal directions or, indeed, any further notice. The PES makes very clear that it was a quite deliberate element of the policy to withhold details of removal (such as time and date) from the person to be removed, on the basis that, in line with the intention of the policy, this would encourage earlier representations and, equally, discourage delay in making representations which were then more likely to be disruptive of the removal process.

37. The new policy was set out in Chapter 60 of the Home Office Immigration returns, enforcement and detention: General Instructions, "Judicial reviews and injunctions",

which gives guidance to caseworkers on notice periods, removal windows and the judicial review process in enforcement cases. We do not have the original 2015 version of the policy. In FB's case, the Upper Tribunal was concerned with Version 15. In Medical Justice's case, Freedman J was concerned with Version 17, which included some relatively minor changes made as a result of the tribunal judgment. Versions 18 to 20 (the current version) have required removal directions (rather than a removal window) to be set, following the Order of Walker J dated 14 March 2019 in the Medical Justice claim in which, when granting permission to proceed with the claim, he imposed an interim injunction on removal without removal directions (with the caveat that, in respect of removal by charter flight, notice of the time of the flight need not be given), which is still in place. There are no other material changes in the later versions. I will consequently focus on Version 17; and references in this judgment are to that version ("the JRI Policy").

38. There are two other relevant General Instructions policy chapters:

i) Arranging removal (Version 2) (4 October 2018), which gives guidance on the powers associated with arranging removal, after leave had been brought to an end and an individual has been notified of his or her liability to be removed ("the AR Policy").

ii) Liability to administrative removal (non-EEA: consideration and notification) (Version 3) (6 April 2017), which gives guidance in relation to those "who may be liable to administrative removal from the UK under section 10… [as to] what factors to consider when deciding whether a person is liable to be removed, when and how to bring someone's leave to an end, how to serve a notice of liability to administrative removal, and how to notify a person of their liability to be detained" ("the LAR Policy").

39. As I have described, prior to the changes in the JRI Policy, notice of removal directions was given to the person to be removed, setting out details of the removal flight. Under the JRI Policy, "notice of removal" can be given in one of three forms.

i) Notice of removal directions: This form of notice remains available and, when given, the scheme is essentially unchanged. The JRI Policy confirms that the notice period is 72 hours (including at least two working days), but five working days in third country and NSA cases.

ii) Notice of a removal window: This is the form of notice with which this appeal is primarily concerned. It is said to be suitable for persons being removed under section 10 and persons being deported, and appears to be the default for such persons. (The argument before us focused upon notice of removal window in section 10 cases, as will this judgment: but similar notices in deportation cases do not raise any significantly different issues.) When such a notice is given, it starts "the notice period" during which the person cannot be removed, which is normally 72 hours (including at least two working days), but seven calendar days if the person is not detained and five working days in third country and NSA cases. During the notice period, although a person remains "liable to removal" under section 10, he or she is not at risk of removal. From the end of the notice period, the person is both liable to removal and also at actual risk of removal. "The removal window" begins when the notice period ends, but it runs

for three months from the date of notice of removal. As the JRI Policy (at page 11) makes clear, although still not having leave to enter or remain and thus remaining liable for removal under section 10: "When a removal window has expired without the person leaving the UK in that time, any further proposal to enforce removal will require a new notice of removal with a completely new notice period".

iii) Limited notice of removal: In some classes of case (e.g. where there has been previous, or the reasonably likelihood of future, non-compliance or disruption), the removal window is reduced to a 21 day period ("limited notice of removal"). (The argument before us focused upon cases involving a removal window, as will this judgment: but, again, limited notice of removal cases do not raise any significantly different issues.)

40. Under the JRI Policy (page 11), a notice of removal window must:

i) include the place and country of return and, where there has been an asylum claim, details of the part of the country to which return will be made: they do not otherwise have to include – and do not in fact include – the flight details, or the date and time of removal;

ii) be accompanied by an immigration factual summary, which must include a chronology of the case history including details of appeals and judicial review claims; and

iii) be copied to any legal representative where the Home Office has details of any representative actively involved in the case or where the person asks for a specified representative to be sent copies.

41. The JRI Policy provides that notices of removal window are not appropriate in respect of certain categories of case: as the 14 September 2015 PES indicated, the Policy includes "a requirement that certain vulnerable groups continue to be notified of the exact time and date of their removal". The Policy states (at page 12) that a notice of removal window may not be used in (a) family cases, (b) "where the person has no leave but has made a protection (asylum or humanitarian protections) or human rights claim, or appeal, pending" or (c) in respect of an adult at risk. Something appears to have gone wrong with the wording of (b); but it appears clearly to provide that notice of a removal window will not be given where a human rights or protection claim or appeal is pending.

42. There was some debate before us as to whether "claim" in this context included or excluded representations even prior to any decision by the Secretary of State as to whether they amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules. I should say that paragraph 3(ii) of the Respondent's Note on Access to Justice dated 9 July 2020 ("Removal directions are only set if there are no outstanding representations, applications or appeals", which seems to reflect the AR Policy (at page 8)) does not necessarily assist in this regard; because it refers to *setting* removal *directions* rather than *notifying* a removal *window*. But, for my part, I am prepared to accept at face value the Secretary of State's assurance set out in paragraph 3(i) of that same Note that: "A section 10 notice is served only after the caseworker has checked that there are no outstanding representations, applications or appeals", i.e. that

a notice of removal window will not be served if any representations are outstanding, even if the Secretary of State has not yet made a decision as to whether they amount to a fresh claim. That is consistent with (i) paragraph 353A of the Immigration Rules (see paragraph 22 above), and (ii) the LAR Policy (at page 28), which provides that a Form RED.0001 (which is the main form used to notify a removal window: see paragraphs 50-51 below) must not be used where the relevant person "has a pending application…". Subject to any administrative review (see below), a notice of removal window may, of course, be served as soon as any decision is made that they do not amount to a fresh claim.

43. In addition to the circumstances in which there are any representations, applications or appeals outstanding, the JRI Policy (at pages 9-10) states that: "The notice [i.e. a notice of removal window] may not be given to a person… during the period within which an in-country appeal or an administrative review may be lodged or is pending". Thus:

    i) Where the individual's application for leave has been determined negatively by a decision which is the subject of an in-country appeal, a notice of removal window cannot be served unless the period during which such an appeal might be filed (14 days after notice of the relevant decision is sent to the relevant individual: rule 19 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No 2604)) has elapsed.

    ii) Where it has been determined by a decision which is eligible for administrative review, a notice of removal window cannot be served unless the period during which such a review might be requested (usually 7 days, but in some circumstances up to 28 days: rule 34R of and Appendix AR to the Immigration Rules) has elapsed; or, if an application for such a review is made, until it is determined. An "eligible decision" that attracts the right to administrative review is defined in paragraphs 3.1 and 3.2 of Appendix AR to include various decisions on applications for leave to enter or remain but not (e.g.) a decision to refuse deferral etc of a removal window (see below).

44. The JRI Policy provides for a various procedures whereby, a removal window having been set, removal will not in the event take place in the window period, namely (a) extension of a removal window (page 15-16), (b) cancellation of a removal window (page 16), (c) deferral of a removal window (pages 18-19) and (d) suspension of removal (pages 29-30).

45. With regard to (a), in addition to being able to extend the notice period (and the removal window period by the same amount) "to ensure the person has a reasonable opportunity to access legal advice" (page 10), if the removal window has not expired, it can be extended, once, for a further 28 days where removal within that extended period is expected (pages 15-16).

46. So far as (b) is concerned, the JRI Policy (at page 10) requires the window to be cancelled: "If the person makes an asylum, human rights or European Union (EU) free movement claim, involving issues of substance which have not been previously raised or considered, or is being removed by the family removal process, or is a relevant adult at risk…". However, it is clear that, where representations are made after the notice has been served, then the removal window will not be cancelled until the Secretary of State has considered them and determined that they involve "issues of substance", i.e.

they amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules. As soon as a decision is made that they do not amount to a fresh claim, then the migrant is at risk of removal within the window period.

47. So far as (c) is concerned, the JRI Policy states that removal will "normally" be deferred where a judicial review claim has been made; but, even where such a claim has been lodged, deferral will not be automatic where the person is being removed by charter flight or other special arrangement, or less than six months have elapsed since a previous judicial review or statutory appeal, or (most importantly for the purposes of this appeal) "the person is within the removal window", i.e. deferral will only be automatic if the judicial review claim is made in the notice period. In respect of circumstances in which deferral is only discretionary, in a section headed "Consideration of deferral of notice period", the Policy says:

> "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 caseworker] 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."

Therefore, despite its heading, this appears to concern deferral of the *removal window* not of the notice period.

48. Finally, as to (d), pages 29-30 of the JRI Policy deal with suspension of removal where removal arrangements are in place or Immigration Enforcement have made a removal request, and judicial review proceedings have been brought "against removal". Removal must be suspended where (i) an injunction restraining removal has been granted, (ii) permission to proceed has been granted in the judicial review claim, or (iii) "this is the first JR challenge to a decision to certify a claim, the result of which being there is either no appeal, or any appeal right is out of country only". Where none of those criteria is met, then the caseworker has a discretion as to whether to suspend removal in the face of a judicial review claim. The Policy (at pages 29-31) sets out three "tests" against which the exercise of discretion should be measured.

i) Qualifying criteria, i.e. whilst it is said that, when judicial review proceedings against removal are brought, removal will normally be suspended, these are criteria for *not* suspending removal, which reflect the circumstances in which the removal window will not be deferred (see paragraph 47 above) including where "the JR is brought while the person is within the removal window". So, removal will not normally be suspended if the judicial review claim is made in the removal window. If a qualifying criterion is not satisfied, then removal

should be suspended. If one or more of the criteria are satisfied, the decision-maker moves on to consider the other two tests.

ii) The "merits test", i.e. whether the judicial review is bound to fail.

iii) The "barrier test", i.e. whether the judicial review raises new grounds and/or evidence that might amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules.

If the judicial review satisfies one of the qualifying criteria and is bound to fail and/or the claim does not amount to a fresh claim, then, under the Policy, removal will not be suspended.

49. Whilst the JRI Policy does not explicitly refer to a person who has been served with a notice of removal window applying for an extension, cancellation, deferral or suspension, because the Secretary of State has these powers, if a migrant makes a request (and, in other appropriate cases, even where no request is made), then the Secretary of State must consider whether to use her powers; and, if she decides not to do so, then that decision is capable of being challenged by way of judicial review.

50. The forms used of course reflect the scheme; and, in particular, the basic form (Form RED.0001: with the dual headings, "Notice of Immigration Decision" and "Notice of Removal") is designed to communicate to the relevant individual, in one go, the following:

i) any decision to curtail or revoke leave so that it expires with immediate effect;

ii) notice that, as the individual has no leave to enter or remain, he or she is liable to removal under section 10;

iii) advice that, if the individual wishes to seek legal advice, he or she should do so "now";

iv) advice as to voluntary return;

v) notice of removal either by way of removal directions or of a removal window;

vi) the consequences of staying in the UK without leave, i.e. that the individual will not be able to access facilities the subject of the hostile environment provisions, will be committing an offence and may face a re-entry ban; and

vii) a section 120 notice requiring the individual to state any reasons he or she has to stay in the UK as soon as reasonably practicable, including the continuing duty to do so in the event of a change of circumstances.

51. In respect of removal, the form begins by stating that the person to whom it is addressed does not have leave to enter or remain in the UK, and has not given any reasons why leave should be granted or why he or she should not be required to leave; and so, "You are liable to removal". Reasons for that decision are then given, followed by a section headed "Liability for removal", under which the effect of section 10 is briefly set out and it is said: "If you do not leave the United Kingdom as required you will be liable to

enforced removal to [country]". Notice of removal is then given. Where removal directions are to be given, the form of words used is: "You will be given further notice of when you will be removed". When a removal window is given, the following form of words used: "You will not be removed before [date and time]. After this time, and for up to three months from the date of this notice, you may be removed without further notice". The form then goes on to set out the consequences of illegally staying in the UK, and a section 120 notice is given.

52. Form RED.0004, which extends a current removal window or gives a subsequent notice of removal window where removal has not occurred in the initial window, is in similar form. Form RED.0002 is a freestanding section 120 notice; and Form RED.0003 is a form for a migrant to complete in response to a section 120 request. Form RED.0005 is notice of the cancellation of a removal window. Form RED.0006 is notice of an extension of the notice period or a removal window.

53. Although under the JRI Policy these forms are also sent to any legal representative who is involved, they are designed to be read by a wide variety of irregular migrants. Mr Kovats submitted that they were written in simple, plain English; and they should be readily understandable by a lay person. Subject to the important caveat that for most migrants English is not their first language and many do not have a good understanding of English, I agree. For example, the Form RED.0001 makes clear both the consequences of not leaving the UK and the obligation promptly to provide any grounds upon which the individual claims entitlement to leave to remain; and gives unequivocal advice that the individual should seek any legal advice immediately. It is therefore uncontroversial that (i) the forms are clear, in this sense; but (ii) an irregular migrant is likely to require assistance from a legal representative to respond to such a notice.

The Policy in Practice

54. There is before us (and there was before Freedman J and, to a lesser extent, the tribunal) a great deal of evidence lodged on behalf of the Appellants as to how the JRI Policy works in practice, in the form of statements from legal practitioners in the field, notably statements of Marcela Navarrete (a partner in Wilson Solicitors LLP) dated 4 February and 5 June 2019 and of Thakur Rakesh Singh (an in-house solicitor with the Public Law Project) dated 4 February, 9 April and 5 June 2019. The statements of Ms Navarrete, Mr Singh and the other practitioners include evidence in the form of about twenty "case studies".

55. The Secretary of State is recorded in the judgment of Freedman J (at [101]) as considering the case studies were "the real foundation of the [Medical Justice] claim"; and, in the judge's view, "if… a case cannot be verified or exemplified by specific case studies, then its weight is very much lessened" (see [103]). Considerable time and effort was thus spent before him on this evidence, and by him in the judgment.

56. However, like all of the evidence as to how the JRI Policy works in practice, the case studies have to be seen in the proper context of the claim. I will come to the Appellants' detailed grounds of challenge shortly; but, in brief, leaving aside FB's individual claim, the Appellants' claim is a systemic challenge to the JRI Policy. It is made on the basis that the Policy is inherently defective because many decisions which bear upon the question of whether an individual who has been served with a notice of removal window is entitled to leave to enter or remain will inevitably be made after the close of the notice

period and in the removal window; with the result that, as soon as an adverse decision is made, he or she is at risk of immediate removal without any opportunity to challenge that decision by way of judicial review. Therefore, on the Appellants' case, the risk that the right to access to justice is compromised arises inherently from the Policy as it is intended to operate: it is not dependent upon the number of cases in which individuals have been (or may, in the future, be) denied access to justice in fact.

57. The case study evidence – less than twenty cases over a period in which the data suggest that over 40,000 irregular migrants were served with a notice of removal window – patently could have no statistical significance, nor could it in itself provide a sound foundation to a legal challenge. Neither Ms Naik nor Ms Kilroy suggested that it did. However, Ms Kilroy submitted that, together with the evidence of the practitioners, the case studies help in painting the backdrop to the claim.

58. Importantly, she says, the evidence clearly shows that, where representations are submitted after notice of a removal window has been served, decisions by the Secretary of State material to removal are overwhelmingly likely to be made in the removal window, at a time when, the decision having been made, the irregular migrant will be at risk of immediate removal. That is a vital building block of her submission that it is inherent in the scheme that the right to access to justice will be unlawfully restricted. Decisions material to removal include not only (i) substantive but unappealable decisions on the immigration status of the person, but also (ii) decisions that deny the person an appeal at all (e.g. a decision that representations do not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules: see paragraph 22 above) or deny him or her an in-country appeal (e.g. a decision to certify a human rights or protection claim as clearly unfounded under section 94 of the 2002 Act: see paragraph 17 above), and (iii) decisions not to extend, cancel or defer the removal window or suspend removal (see paragraphs 44-49 above).

59. On this initial, factual issue, Ms Kilroy's overarching submission was that, on all the available evidence, even in the unlikely event that a person served with a notice of removal window was able to obtain any legal advice in the notice period (whether 72 hours, or five or seven days), it is practically impossible for considered comprehensive representations to be made, for the Secretary of State to respond, and then for a judicial review claim to be drafted and lodged in the event of an adverse decision, all within that period. The evidence she relied upon in support of that proposition included the following (unless otherwise indicated, paragraph references being to Ms Navarrete's 4 February 2019 Statement).

    i) Immigration Removal Centres ("IRCs") are required to make free independent legal advice available in surgeries under a Duty Solicitor Advice ("DSA") scheme, in which solicitors with an appropriate legal aid contract provide advice in 30 minute slots. The Detention Services Order 06/2013: Reception, Induction and Discharge Checklist and Supplementary Guidance ("DSO 06/2013") requires the IRC Supplier Induction Officer to explain to a new detainee on arrival (with an appropriate interpreter, if necessary) both the DSA scheme and his or her entitlement to contact an existing legal representative (paragraphs 25-29 of, and paragraphs 1, 4, 12 and 19 of Annex D and Annex E to, DSO 06/2013); and it normally requires a further induction session with the Home Office Immigration Enforcement Team, including an explanation of access to

legal aid, within 48 hours (paragraph 30 of DSO 06/2013). Although there are exceptions (e.g. where a detainee has already instructed a solicitor who happens to be one of the duty solicitors), legal advice is obtained by booking a DSA scheme appointment slot. The purpose of the first session is to ascertain the basic facts of the matter, to decide whether action can be taken or whether the matter requires further investigation and, on the basis of financial information taken from the detainee and the merits, whether he or she is entitled to legal aid (paragraphs 30-59, referring to paragraph 8.34 of the Standard Civil Contract Specification – Category Specific Rules: Immigration and Asylum). In response to a disclosure request on 10 May 2019 ("the SSHD Disclosure Response"), the Secretary of State disclosed (as Annex 11.2) evidence of the length of time a detainee would have to wait for a DSA surgery appointment: generally, this was 3-4 days, although at Yarl's Wood IRC less (usually the next day) and Morton Hall IRC slightly more (but no more than a week and often less).

ii) Solicitors attend DSA surgeries under the legal aid scheme. Where the detainee wishes to make further representations to the Secretary of State in respect of a matter which falls within the scope of legal aid (e.g. a fresh protection claim), assistance is in the form of Legal Help which a solicitor can generally self-grant. However, (i) in some circumstances (the details of which are unnecessary to explore for the purposes of this appeal), an application for Legal Representation has to be made to the Legal Aid Agency, and (ii) where the matter falls outside the scope of usual legal aid (e.g. a claim on the basis of article 8 of the European Convention on Human Right ("ECHR")), it is expected that the detainee will make representations without legal assistance unless the claim is so complex that he or she cannot properly do so and an application for Exceptional Cases Funding is then made (paragraphs 40-46). Although there is a procedure for urgent work (in which a decision is made by the Legal Aid Agency within five days), in practice a decision for Exceptional Case Funding takes 20 working days or more (paragraphs 47-51).

iii) Following the first DSA session and grant of legal aid, the solicitor has to go on the record with the Home Office, request papers from any previous representative(s), obtain any further relevant documents (e.g. medical records), and take full instructions from the detainee (usually by telephone, and often with an interpreter) (paragraphs 60-64).

iv) Generally, detainees and non-detainees have similar legal aid issues. However, as recognised by the JRI Policy itself (under which, for non-detainees, the notice period is seven days rather than 72 hours), it is more difficult for irregular immigrants who are not detained to obtain prompt legal advice.

v) As a result of the steps that need to be taken before representations are made to the Secretary of State, it is unlikely that it will be possible to lodge them within the notice period. Even if they are, then it is very unlikely that the Secretary of State will respond before the end of that period. Where removal directions have been set, the evidence is that OSCU respond to representations very quickly: in the period April 2018 to March 2019, the median average time from receipt to decision was just over 17 hours (Annex 11.5 to the SSHD Disclosure Response).

However, where removal directions have not been set, "the Home Office may not respond for weeks or even months" (paragraph 99).

vi) Where the decision on the representations is adverse to the individual and there is no right of appeal, then any challenge must be by way of judicial review. Prior to issuing such proceedings, a legal representative has to take the usual pre-action steps, including obtaining instructions, preparation of statements of both client and solicitor, completion of the claim form and grounds of challenge and the claim bundle. Where the issuing of proceedings will not result in automatic deferral of removal, the claim will have to be accompanied by an application for interim relief, including the completion of a Form N463 with justification of urgency.

vii) Although some migrants may have had earlier opportunities to make a claim for leave to enter or remain (and, as Mr Kovats submitted, some of them may make a late claim for leave simply as a device to avoid removal), some will have had no such opportunity prior to service of the notice of removal window. These include those who are potentially liable for return under Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 stateless person ("Dublin III"), or whose leave has been curtailed in the same letter as a removal window is set. They may have to start the process of making a claim (including instructing solicitors) from scratch.

viii) The decisions that may be made in the removal window will in any event include decisions not to extend, cancel or defer the removal window or suspend removal, as well as more substantive decisions on applications for leave to enter or remain.

60. I emphasise that, in relation to events between service of a notice of removal window and filing of a judicial review challenging an adverse decision on further representations, these were not all of the factual propositions relied upon by Ms Kilroy, nor the sum of the evidence prayed in aid – before Freedman J, Ms Kilroy relied upon a table of no less than 34 such propositions, each cross-referenced to evidence in support – but they are sufficient for the purposes of this appeal.

61. To put it at its lowest (from the Appellants' point of view), the evidence clearly shows that, whether the notice period is 72 hours, five days or seven days, in many (indeed, almost all) cases in which an irregular migrant is served with a notice of removal window and wishes to have further representations considered, a decision on the representations will not in practice be made – and could not on any view sensibly be made – until after the end of the notice period and only in the removal window. Similarly, where requests are made by such a person to extend, cancel or defer the window, or to suspend removal, any decision adverse to the individual is almost always going to be made in the removal window period; and, once it is made and served, it will put the individual at immediate risk of removal. Mr Kovats and Ms Rhee did not, as I understood their submissions, disagree. Indeed, in my view, on the evidence it would be impossible to disagree with that broad proposition.

62. Of course, just because a migrant who has an adverse decision made during the removal window is, under the JRI Policy, at risk of immediate removal, does not mean that that he or she will in fact be removed before he or she has in fact obtained relief from either the Secretary of State or the court to prevent removal. The case studies and other evidence suggest that many are not in fact removed, because (e.g.) they obtain legal advice and make an application to the court before they are in fact removed, or removal does not happen because of reasons other than legal proceedings (e.g. a medical condition, or by cancellation of the removal by the destination country, or as a result of disruption by the person to be removed).

63. Nevertheless, in all such cases, as soon as the relevant decision is made and notified, the irregular migrant will become at risk of immediate removal; and the evidence indicates that, at least in some cases, the person is removed very quickly after the relevant decision. For example, in the case of MLF (a case study set out in paragraphs 47-56 of Mr Singh's 4 February 2019 statement), MLF was removed to Sri Lanka the same day as the Secretary of State refused to accept his further submissions for leave on human rights (article 3 of the ECHR) grounds as a fresh claim. In the case of C10, in which details were given by the Secretary of State as part of disclosure, further submissions for leave on protection grounds were refused as a fresh claim on the day of removal, and deferral was refused just five hours before C10 was removed to Bangladesh.

64. However, although Ms Naik and Ms Kilroy made clear that they did not consider the notice period long enough to make an application for leave and then to lodge any necessary judicial proceedings after a rejection, neither submitted that the length of the notice period alone rendered the JRI Policy unlawful: indeed, Ms Naik expressly accepted, at least for the purposes of this appeal, that a policy under which 72 hours' notice of removal directions was given (as occurs currently, following the interim order made by Walker J: see paragraph 37 above) would be lawful.

65. As I have indicated, the crucial point about the length of the notice period for the Appellants' submissions is that it means that most – Ms Naik and Ms Kilroy submitted, almost all – relevant challengeable adverse decisions are in fact notified, not within the notice period, but in the removal window.

66. On the basis of that proposition, they submitted that the Policy is unlawful because, when the Secretary of State makes an adverse decision in the removal window, the Policy allows for no adequate opportunity – or, indeed, any opportunity at all – for the individual to take advice and lodge a judicial review challenging that decision before he or she is at risk of removal which arises immediately upon the adverse decision being taken and notified.

67. Mr Kovats submitted that the JRI Policy is not unlawful for two primary reasons. I will deal with the substance of these submissions when I consider the grounds of appeal: here, it is sufficient briefly to set out his submissions, and the evidence of how the JRI Policy works in practice relevant to them.

68. First, Mr Kovats submitted that, as there is never a legal bar or impediment to an irregular migrant who is served with a notice of removal window seeking redress from the courts, this is essentially a rationality claim; and, in considering rationality, it is legitimate to balance the public interest in having a coherent and enforceable scheme to

remove irregular migrants who do not have any right to be in the UK on the one hand, and the rights and interests of those migrants on the other. It is in the public interest for irregular migrants to be required to make promptly any claim for leave to remain that they may have: late claims are potentially wasteful of time, effort and public money. It is therefore legitimate to take into account opportunities that any particular irregular migrant has had to regularise his immigration status before any notice of removal is served on him – most, Mr Kovats submits, have had more than a reasonable opportunity to put forward any claim for leave they may have, as exemplified by some of the case studies – and also the opportunity they will have to challenge the lawfulness of their removal, after the event, from abroad.

69. As a strand of that argument, Mr Kovats submitted that the evidence adduced by the Appellants did not show that there is any restriction of access to justice in more than a very few cases. In the case studies, although the relevant individuals may have been at risk of removal prior to any legal challenge they could mount, in fact they made such a challenge (and were thus able to access justice) prior to their removal. The Secretary of State has identified only eight cases in the period 2015 to 2019 (in which over 40,000 returns were effected) where she has brought back an irregular migrant removed from the UK and either she (or the court) has later determined that that person has a legal basis to remain in the UK or there are still ongoing proceedings (Annex 12 to the SSHD Disclosure Response). Even in those cases, it was submitted that access to justice was not denied: the individuals had obtained access to justice after removal. In cases identified by the Appellants, from their own case studies or from cases disclosed by the Secretary of State (in, e.g., caseworker training materials), Mr Kovats and Ms Rhee submitted that removal occurred because of caseworker error rather than any systemic defect. The fewness and nature of these cases, coupled with the availability of redress from the courts after removal, undermined any submission that there was a systemic defect with the JRI Policy.

70. Second, as before Freedman J, in respect of an irregular migrant who is served with a notice of removal window, Mr Kovats relied upon the ability to apply to the Secretary of State for deferral of the removal window to show that the scheme, as a whole, does not deny access to justice and is procedurally fair. As I have described, the JRI Policy specifically requires caseworkers to consider deferring the removal window when "during the notice period, an unrepresented person is yet to instruct a legal representative" (see paragraph 47 above); and there is no doubt that the Secretary of State, acting through caseworkers, has a discretion to defer a removal window wherever appropriate and particularly (as the Policy itself says) where deferral is necessary to ensure that "the person has had a reasonable opportunity to access legal advice and recourse to the courts" (*ibid*). Freedman J considered (at [196] of his judgment) that "deferral enables the risk of unfairness to be reduced"; and, further, "it is capable of being controlled by judicial review, so that those caseworkers who operate [it] know that they are answerable for their actions". Thus, "the policy regarding deferral provides some inbuilt flexibility into the system on which the [Secretary of State] relies". In terms of data, in the period 25 May 2018 to 9 March 2019, caseworkers considered deferring a removal window in 71 cases, initiated either on the caseworker's own initiative or on request; and, of those cases, deferral was granted in thirteen.

71. Three further points in respect of deferral requests are worthy of note at this stage. First, as Ms Kilroy emphasised, requests for deferral are not encouraged: there is no reference

to the possibility of deferral because of insufficient time to seek advice, relevant documents etc in any of the RED forms or in the material for IRC detainee induction. Second, as with substantive leave decisions without a right of administrative review or appeal, once an adverse decision on a deferral request is made and served, the individual is at immediate risk of removal. Third, as I have already described, a refusal of a request for deferral can only be challenged by way of judicial review.

The Grounds of Appeal

72. The grounds of appeal are put in various ways; but, before us, as I have indicated, the challenge to the JRI Policy was essentially under two broad heads, namely:

    i) notice of a removal window, without notice of directions, is unlawful, because the common law and/or the statutory scheme require notice of directions specifying date and time of removal to be given; and

    ii) even if removal windows are not inherently unlawful in that way, under the JRI Policy many unappealable decisions adverse to the individual are inevitably made in the removal window period so that, once the decision is made and notified, there is a serious risk of removal before the affected individual is able to access the court to challenge the decision by way of judicial review.

73. I will deal with those two broad grounds of challenge in turn.

Inherent Unlawfulness of Removal Windows: FB Grounds 1 and 2

74. As FB Grounds 1 and 2, and in argument led by Ms Naik but supported by Ms Kilroy and Ms Harrison, it is submitted on behalf of the Appellants that notice of a removal window, without notice of removal directions, is inherently unlawful.

75. Ms Naik submitted that it is the actual removal of a person, not merely liability to removal, that is the "fundamental act" which adversely affects the individual involved. Under the statutory scheme, the operative decision which determines and changes the rights of the individual is therefore not a decision that an irregular migrant is merely liable to removal, but rather the decision actually to remove that person.

76. At common law, there is a public law duty to give an individual notice of any decision which has a direct adverse impact on his or her rights or interests: indeed, relying on the well-known passage from the opinion of Lord Steyn in R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36; [2004] 1 AC 604 at [26], Ms Naik submitted that notice of such a decision to a directly affected person is required before the decision can have any legal effect.

77. Therefore, she submitted, notice of mere liability to removal is insufficient: for the removal procedure to be lawful, notice has to be given of the decision actually to remove an individual on a particular day and at a particular time. Leaving aside the principles of good and transparent administration (see R (Justice for Health Limited) v Secretary of State for Health [2016] EWHC 2338 (Admin) at [141] per Green J, as he then was) which would also favour advance disclosure of removal details such as date and time of removal, such notice is required to enable the affected person to challenge the decision to remove, and thus to give an effective right of redress. The JRI Policy is

therefore unlawful in excluding notice of removal directions in favour of merely notice of a removal window during which the person can be removed at any time without further notice.

78. Although the focus of the submissions was on the obligation at common law to give notice of a decision, Ms Naik submitted that various statutory provisions require (or, at least, assume) that removal directions will be given to the individual it is proposed to remove. For example, whilst paragraph 19(1) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides for legal aid to be available for civil legal services provided in relation to judicial review claims, paragraph 19(6) excludes "services provided in relation to judicial review of removal directions" where the directions are given no more than one year after the making of the decision to remove by way of removal directions or the negative conclusion of any appeal against that decision. "Removal directions" are defined in paragraph 10(10) to include "directions… under section 10…". Similarly, section 24A of the Immigration Act 1971 provides that a person is guilty of an offence if he or she secures or seeks to secure "the avoidance, postponement or revocation of enforcement action against him", and subsection (2)(a) includes, within the definition of "enforcement action", "the giving of directions for his removal from the United Kingdom under… section 10…". These statutory provisions therefore recognise the legal importance of, not liability to removal, but the act of removal itself; and the necessity of making a decision to remove and giving the affected person notice of that decision.

79. However, I am unpersuaded by these submissions.

80. As I have indicated (paragraph 10 above), there is no statutory requirement for notice of removal directions to be given to a person whom it is proposed to remove. Section 10(7) concerns giving directions for removing a person, but it imposes no *duty*: it only gives the Secretary of State or an immigration officer the *power* to give directions, and then not to the person it is proposed to be removed but only to the captain, owner or agent of the aircraft etc. Where, within the statutory immigration scheme, there is an intention that notice is given to an individual then that intention is express and clear (see, e.g., section 4 of the Immigration Act 1971, which provides that certain powers to refuse leave to enter or remain, and to vary and cancel such leave, "shall be exercised by notice in writing given to the person affected").

81. At common law, it is well-established that there is generally a public law duty to give an individual notice of any decision which has a direct adverse impact on his or her rights or interests; but that duty is neither absolute nor stand-alone. It is a duty associated with the obligations of procedural fairness. As Lord Steyn (with whom Lords Hoffmann, Millett and Scott agreed) put it in Anufrijeva, at [26]:

> "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….".

Thus, in that case, it was held that a decision to refuse an asylum claim, which would disentitle the claimant to income support, had no effect in that regard unless and until it was notified to the claimant, because it was only then that it could be legally challenged.

82. However, that is far distant from this case.

83. Ms Naik characterised the notice received by irregular migrants (including FB) in Form RED.0001 as a mere "inchoate notification of liability to removal". However, as I have described (paragraphs 50-51 above), the form is headed "Notice of Removal" (not "Notice of Liability for Removal"); and it gives not only notice of liability to removal but also, discretely, notice of removal in the form of a notice of a removal window in which the Secretary of State intends and expects removal will take place. Although, in respect of the removal window period, it uses the phrase "you *may* be removed without further notice" (emphasis added), that merely reflects the wording of section 10. It clearly indicates an intention on the part of the Secretary of State to remove the person in that period. The JRI Policy read as a whole makes that clear. For example, a removal window period can be extended for 28 days, but only "where removal within that period is expected" (see paragraph 45 above).

84. It was faintly suggested by Ms Kilroy that materials dated May 2018, disclosed by the Secretary of State as used for training immigration decision-makers, which refer to Form RED.0001 "[providing] an option to remove a person within a 3 month window without the need to serve any further removal notice" supported the contention that the form is no more than a notice of liability for removal; but it is clear that that refers, not to removal being an option after the service of a notice of a removal window, but rather to a notice of a removal window being an alternative to notice of removal directions as a notice of removal.

85. Although some underlying decision(s) affecting the immigration status of an irregular migrant may fall within the scope of section 82 of the 2002 Act, the decision to remove is not, in itself, appealable – but, whether in the form of removal directions or a removal window, it is subject to judicial review. Therefore, if, for example, contrary to the JRI Policy, notice of removal is given in the form of a removal window in circumstances in which the relevant person has representations outstanding, then, subject to usual pre-action procedures, the decision to give that notice is open to judicial review. Similarly, if, for example, further representations are made and rejected within the removal window period, then, in addition to any right to challenge the underlying decision by way of appeal or judicial review, it is open to the applicant to seek a stay of removal within those proceedings; or, if an application for a deferral is rejected, then that decision would be open to challenge by way of judicial review. Judicial review is always available as a back stop. Of course, the remedy open to the applicant must be effective, including effective access to the court; but that is a different issue, which is at the heart of the second broad ground of challenge.

86. The statutory provisions upon which Ms Naik relies are, in my view, of no assistance to her cause. Each provision was enacted at a time when all notices of removal under section 10 were by way of removal directions; but, in my view, neither is dependent upon a notifiable decision to make removal directions.

    i) Paragraph 19(1) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 denies public funding to those who seek to challenge "removal directions… under section 10…"; but, as I have described, section 10 only gives a power to give directions to the captain, owners or agents of a ship or aircraft. Paragraph 19(1) cannot be referring to a challenge to such directions.

When seen in context, it can only mean a challenge to a decision to remove made under section 10. Under the JRI Policy, such a decision can be made in the form of notice of a removal window.

ii) The definition of "enforcement action" for the purposes of section 24A of the 1971 Act also includes (by subsection (2)(c)) "his removal from the United Kingdom *in consequence of* directions…" (emphasis added) which is wide enough to include removal as a result of directions for removal not notified to the individual.

87. FB Grounds 1 and 2 therefore fail. For the reasons I have given, it is not unlawful for the Secretary of State to effect removal of an irregular migrant where that migrant has been given notice of removal in the form of a notice of a window of time during which it is intended to remove him or her, even if no notice of the exact intended date and time of removal, in the form of removal directions, is given.

Breach of the Right of Access to Justice: Introduction

88. It is submitted on behalf of both the Appellants and the Intervener that, even if notice of removal in the form of a removal window is not inherently unlawful, as a result of the JRI Policy, many adverse decisions bearing upon removal (including decisions on applications for leave and on requests for deferral etc) are inevitably made after the notice period and in the removal window itself, when the individual becomes at immediate risk of removal as soon as the decision is made and notified. In those cases, it is submitted, in breach of the right to access to justice, there is a serious risk of the individual being removed before the affected individual is able to access the court to challenge the decision.

89. Although they mutually supported each other's submissions, in the formal grounds of appeal, the Appellants put their case in different ways. For FB, it is submitted that the tribunal erred in proceeding on the basis that section 10 permits the abrogation of, or the imposition of hindrances to the enjoyment of, the right to access to justice (FB Ground 3); whilst, for Medical Justice, it is submitted that the serious risk of removal before the affected individual is able to access the court to challenge the decision that is inherent in the JRI Policy amounts to an unacceptable risk of a breach of the right to access to justice at common law which renders the Policy *ultra vires* (Medical Justice Ground 1), but also irrational given that it is the express aim of the Policy to maintain the right to access to justice by giving every person served with a notice of removal window sufficient time to raise a claim and for such a claim to be properly considered (Medical Justice Ground 2). Furthermore, whenever such a decision is made in the context of (i) Dublin III, and/or (ii) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive") (together, "the European Directives"), and/or (iii) the ECHR, it is unlawful as failing to acknowledge the rights to legal advice and/or an effective remedy under those instruments (Medical Justice Ground 3).

90. The submissions before us focused on the common law right of access to justice, and Medical Justice Ground 1. After some introductory points, I shall deal with that ground first.

91. The importance of the rule of law, and the role of access to justice in maintaining the rule of law, was recently considered by Lord Reed JSC (with whom the rest of the Supreme Court agreed) in R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409 at [68]:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade…".

Thus, the right to access to justice is an inevitable consequence of the rule of law: as such, it is a fundamental principle in any democratic society which more general rights of procedural fairness are to a large extent designed to support and protect (see, e.g., R (CPRE Kent) v Dover District Council [2017] UKSC 79: [2018] 1 WLR 108 at [54] per Lord Carnwath of Notting Hill JSC, and R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812; [2018] 4 WLR 123 at [83-[84] per Singh LJ).

92. The right of access to justice means, of course, not merely theoretical but effective access in the real world (UNISON at [85] and [93]): it has thus been said that "the accessibility of a remedy *in practice* is decisive when assessing its effectiveness" (MSS v Belgium and Greece (European Court of Human Rights ("ECtHR") Application No 30696/09) (2011) 53 EHRR 2 at [318], emphasis added). This means that a person must not only have the right to access the court in the direct sense, but also the right to access legal advice if, without such advice, access to justice would be compromised (R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532 at [5] per Lord Bingham of Cornhill; and MSS at [319]). For these rights to be effective, as the common law requires them to be, an individual must be allowed sufficient time to take and act on legal advice.

93. So, where tribunal rules set a "timetable for the conduct of.. appeals [that was] so tight that it [was] inevitable that a significant number of appellants [would] be denied a fair opportunity to present their cases…", those rules were held to be unlawful (The Lord

Chancellor v R (Detention Action) [2015] EWCA Civ 840; [2015] 1 WLR 5341, the quotation being from [38] per Lord Dyson MR).

94. Even closer to this case, in the 2010 Medical Justice case at [43], Silber J said that effective legal advice and assistance requires sufficient time to be given between service of notice of a decision by the Secretary of State which puts the individual at risk of removal (in that case, notice of removal directions) and removal itself:

> "… 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 removal which might also entail being able to find and locate all relevant documents; and
>
> (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." (emphasis in the original)

On appeal, upholding Silber J, Sullivan LJ said (the 2010 Medical Justice case (CA) at [19]):

> "I refer to 'effective' legal advice and assistance because the mere availability of legal advice and assistance is of no practical value if the time scale for removal is so short that it does not enable a lawyer to take instructions from the person who is to be removed and, if appropriate, to challenge the lawfulness of the removal directions before they take effect."

95. In that case, the challenge to the part of the Secretary of State's policy which allowed for removal less than 72 hours after notification of removal directions was a systemic challenge, i.e. it contended that the risk to the right of access to justice was inherent in the policy itself and it was not dependent upon the claimant showing that particular irregular migrants who fell within the scope of this part of the policy had in fact been denied access to a court. As Sullivan LJ put it (at [21]):

> "On the assumption that legal advice would be available Silber J was concerned with the practicalities of obtaining that advice in sufficient time for it to be effective. Would there be a sufficient time between the service of the removal directions and the removal itself to enable a legal adviser to challenge the lawfulness of the removal directions? If the answer to that question was no, time would not be sufficient, then the… policy abrogates the right of access to the courts to challenge the lawfulness of the removal directions."

96. I will pick up this issue of the nature of the challenge when I consider Medical Justice Ground 1 (see paragraphs 119 and following below).

97. However, before I deal with the key submissions on the application of these uncontroversial principles to this case, it would be helpful to clear the decks. There are five preliminary points, which I will deal with in turn, as follows:

    i) the ways in which the common law right to access to justice may be restricted (paragraph 98);

    ii) the stage, during the immigration process as a whole, at which notice of removal in the form of notice of a removal window is given (paragraphs 99-101);

    iii) the scope of the right to access the court, including the scope of the right, if any, to bring a bad claim/application (paragraphs 102-106);

    iv) the requirement, if any, for automatic suspensory effect of proceedings on removal (paragraphs 107-114); and

    v) the extent, if any, to which the right to access to justice has to be balanced against other aspects of public interest such as that of having an effective immigration scheme including an effective removals policy, and of discouraging abusive claims/applications (paragraphs 115-118).

98. First, the common law right to access to justice may be restricted, but only by Parliament and then only by clear authorisation in the form of express statutory provision or necessary implication (see UNISON at [76]-[85]). Substantial submissions were made on behalf of both Appellants which emphasised the limited ways in which a restriction of the right to access to justice might be authorised, and how such restrictions should be construed: but the Appellants were here pushing at an open door, because it is not the Secretary of State's case that Parliament has given any such authorisation. She does not, for example, suggest that section 10 of the 1999 Act contains words authorising any restriction on the right of access to justice. Rather, it is her case that the JRI Policy does not involve any such restriction. Insofar as it is suggested in FB Ground 3 that the tribunal erred in proceeding on the basis that section 10 permits interference with the right to access to justice, I deal with that below (see paragraphs 153-155).

99. Second, Ms Kilroy submitted that, when notice of removal was in the form of removal directions, it was served at a relatively late stage in the immigration process, by which time any substantive issues relating to leave to enter and remain had usually been determined; whereas the JRI Policy of giving notice of a removal window as part of a single decision letter is given at a relatively early stage in the process when it is far more likely that there will be outstanding issues concerning leave.

100. However, as I have described (paragraph 36 above), it was the deliberate policy intention of both the change made to section 10 by the 2014 Act and the subsequent JRI Policy in respect of removal windows to encourage prompt representations with regard to any asserted claim for leave to enter or remain and discourage late representations which would be more likely to be disruptive of the removal process and wasteful of public money. Although Ms Naik submitted that it was unreasonable to withhold the

details of removal, in my view, there is nothing arguably wrong as a matter of principle with such a policy, which can be justified on the ground that it is in the public interest to have an effective and efficient system for removing irregular migrants who have no right to be in the UK.

101. I accept that for some irregular migrants (e.g. those who are subject to Dublin III, or who have had their leave curtailed), the single decision letter will include, for the first time, notice to an individual that he or she does not have appropriate leave to enter or remain (and thus is liable for removal); as well as, again for the first time, notice of removal. The receipt of the notice will therefore be the first trigger for any, or any further, representations. Consequently, the Policy will inevitably lead to more post-notice representations that will require a decision by the Secretary of State than would otherwise be the case. However, in my view, that is justifiable and unobjectionable, so long as the person served has an appropriate opportunity to challenge the decision before a court or tribunal.

102. Third, the right to access to the court is not restricted to a right to access the court to pursue a good claim: it is a right to bring any claim or application, no matter how abusive or even repellent it might be, subject only to those who repeatedly bring such claims having to satisfy any leave requirement imposed by the court as part of a civil restraint order under CPR PD 3C. Even those who are subject to a civil restraint order are not denied access to the courts.

103. However, the right to access to the court to seek interim relief in the form of a stay on removal does not, of course, guarantee that the court will accede to the application. The High Court has a general inherent power (now supported by the CPR) to control its own procedure so as to prevent it being used to promote injustice (Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Limited [1981] AC 909 at page 977D-F per Lord Diplock). Therefore, as well as being able to refuse an application for a stay on the basis that the underlying claim for leave to enter or remain is unarguable, the court is not bound to hear in full and rule on the merits of an application for interim relief where it considers that the application or underlying claim amounts to an abuse of process (see, e.g., Hunter v Chief Constable of West Midlands Police [1982] AC 529 at page 536B-C per Lord Diplock, and Johnson v Gore Wood & Co [2002] 2 AC 1 at page 22C-E per Lord Bingham of Cornhill). The court may therefore refuse to determine the merits of an application for interim relief in the form of a stay on removal because it considers the application to be an abuse.

104. The authorities provide examples of cases in which not only do late representations that an individual should not be removed have arguable merit, but there is also a good reason for the claim not having been made earlier. However, it is also true to say that the court also has well-documented experience of cases in which an application for a stay on removal of no merit has been made by legal representatives to disrupt removal operations and to buy more time in the UK for the irregular migrants who are their clients. The courts have given guidance to legal representatives emphasising their professional obligations to take steps to challenge removal as early as possible, and with maximum notice to the Secretary of State (R (Madan) v Secretary of State for the Home Department (Practice Note) [2007] EWCA Civ 770; [2007] 1 WLR 2891, R (Hamid) v Secretary of State for the Home Department [2013] EWHC 3070; [2013] CP Rep 6 and R (SB) v Secretary of State for the Home Department (Practice Note) [2018] EWCA

Civ 215; [2018] 1 WLR 4457). However, none of these cases has questioned the inviolable right to access the court: rather, they have emphasised the rights of the High Court to control its own procedure including the consequences for legal representatives of bringing and pursuing meritless applications.

105. Before us, it is not suggested that the procedures of the court are inadequate to provide an effective remedy to an individual who is at risk of being removed. In addition to the procedures available during court opening hours – including the availability of a High Court judge (and, if necessary, a Court of Appeal judge) to deal with applications immediately – there are facilities to make an application by telephone out-of-hours, immediately and at any time. Even in cases to which we were referred in which, the court found, the Secretary of State had deliberately notified a material decision (e.g. to give notice of removal directions, or to refuse to defer directions which had been set) at a time when the courts would not be open prior to the actual removal, the legal representatives had nevertheless made an out-of-hours application and removal had been prevented (R (Collaku) v Secretary of State for the Home Department [2005] EWHC 2855 (Admin) and R (Karas and Miladinovic v Secretary of State for the Home Department [2006] EWHC 747 (Admin)). There had been no difficulty in those cases in approaching a judge to hear the application, even in the middle of the night.

106. The focus of the Appellants and Intervener before us was not on our court procedures, which appear entirely consistent with guaranteeing an effective remedy, but on the alleged failure of the JRI Policy to afford an irregular migrant who has had an adverse decision material to his or her removal notified in the removal window any time to challenge that decision in a court or tribunal prior to being at risk of removal.

107. Fourth (and closely related to the previous point), Ms Harrison and Ms Luh for the Intervener submitted that judicial review can only be an effective remedy in respect of a non-appealable decision if it has automatic suspensive effect until the court or tribunal has had the opportunity of considering the question of relief. They relied on ECtHR authorities in relation to the right to an effective remedy for a violation of ECHR rights guaranteed by article 13 of the Convention, such as Čonka v Belgium (ECtHR Application No 51564/99) (2002) 34 EHRR 54 and De Souza Ribeiro v France (ECtHR Application No 22689/07) (2014) 59 EHRR 10.

108. In the former case, the availability of an "extremely urgent procedure" before the Belgian Conseil d'État to stay the deportation of Romany families to Slovakia was considered insufficient to amount to an effective remedy because article 13 was in the form of a guarantee: and the implementation of the remedy by way of application to the Conseil d'État was "too uncertain to enable the requirements to be satisfied" (see [83]). The ECtHR emphasised that article 13, as well as article 6, is an absolute right in this sense: it does not allow for the right to access to the court to be balanced against (and possibly outweighed by) the risk of abuse of process or overloading the court, but rather imposes on Contracting States "the duty to organise their judicial systems in a such a way that their courts can meet its requirements" (see [84]).

109. De Souza Ribeiro concerned a Brazilian national who was deported from French Guiana at 4pm on the day after his detention, despite his having lodged an application for judicial review in the Cayenne Administrative Court challenging the lawfulness of removal on article 8 grounds together with an urgent application to stay removal, in the

meantime. Later that same day, a judge refused the application for a stay on the basis that it was devoid of purpose, the applicant having already been removed. The Grand Chamber held that effectiveness of remedy for the purposes of article 13 required that "the person concerned should have access to a remedy with automatic suspensive effect" where removal exposes him or her to a real risk of exposure to treatment that would breach articles 2 and/or 3 of the ECHR; but not where there was exposure to a risk of a breach of only article 8 (see [82]-[83]).

110. Ms Harrison and Ms Luh submitted that, because removal windows are used under the JRI Policy in cases in which representations may be made that removal would breach article 2 and/or 3 of the ECHR, and/or the non-refoulement provisions of the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 and 16 December 1976 ("the Refugee Convention") and the European Directives, a judicial review of the lawfulness of removal where a removal window has been notified must have automatic suspensive effect.

111. However, I do not consider that, in this regard, the European jurisprudence materially adds to the common law; and I do not accept that the mere issue of judicial review proceedings challenging removal must automatically suspend the removal it challenges, irrespective of merit. For these purposes, I readily accept that the test for effectiveness of remedy at common law is as rigorous as it is for the purposes of article 13 of the ECHR: where the Secretary of State makes a decision in respect of an irregular migrant that is material to his or her removal, then he or she must have access to an independent court or tribunal which must consider whether removal should be stayed prior to removal in fact taking place. Again, I am not here referring to access to a court that is merely theoretical, but access that is available in practice in the real world. However, for the reasons I have already given, on the Appellants' case, in respect of any interference with the right to access to justice, the alleged mischief is not (as it appeared to have been in both Čonka and De Souza Ribeiro) any deficiency in the court in considering an application for relief sufficiently promptly, but the failure of the JRI Policy to afford sufficient time for an irregular migrant to seek advice and make a claim or application involving a stay on removal.

112. That is also the answer to Mr Kovats' submission that a requirement that removal must be automatically suspended upon the issue of judicial review proceedings challenging the right to remove would amount to an effective veto on removals exercisable by the irregular migrant irrespective of the merit of the challenge; and that would fatally undermine the policy objectives. It is for the court to determine whether, in the light of all the circumstances, removal should be stayed.

113. As recognised in De Souza Ribeiro, in addition to whether the application is unreasonably (and, possibly, abusively) late, one factor material to the question of whether removal should be stayed is the nature and extent of the risk on return, an issue considered by this court in SB (Afghanistan). Giving the judgment of the court, the Lord Chief Justice said (at [80]):

> "… [I]f SB had shown that he faced a real risk of being persecuted on some ground covered by the Refugee Convention or killed or subjected to ill-treatment contrary to the article 3 standard if returned to Afghanistan, we are doubtful that his

> removal there could nonetheless be justified on the grounds of a decision by the court to refuse relief in the exercise of its discretion in order to impose a penalty to deter abuse of its process. The relevant rights under the Refugee Convention and the ECHR are unqualified and it does not seem to us that it would be open to a Contracting State or, domestically, a public authority to seek to justify infringing them on the basis of the public interest in deterring abuse of process in the courts. The position might be more open to debate in the context of claims under article 8…".

114. Therefore, whilst an application for judicial review to challenge removal will not have automatic suspensive effect, unless the court can summarily dismiss the challenge on its merits (e.g. by refusing permission to proceed), where it is alleged that the claimant's return will risk him or her suffering treatment in breach of article 2 and/or 3 of the ECHR, and/or the Refugee Convention, the court will usually be bound to grant a stay on removal by way of interim relief. As the Lord Burnett indicated in SB (and see paragraph 199 below), the position may be different if the risk is only of, say, a breach of article 8 of the ECHR.

115. Fifth, the Appellants submit that both the tribunal (at [158]-[188] of its determination) and Freedman J (at [212]-[223] of his judgment), referring to (i) limitation rules and (ii) the line of cases including Madan, Hamid and SB (Afghanistan) (see paragraph 104 above), erred in proceeding on the basis that the right to access to justice has to be balanced against the public interest of having an effective immigration scheme including an effective removals policy – and concluding that the JRI Policy struck an appropriate balance. In particular, it is submitted that the tribunal and judge were wrong to suggest that the right of access to the court progressively diminishes, eventually disappearing, as removal approaches (see tribunal determination at [162] and Freedman J's judgment at [212]).

116. Looked at discretely, I am not persuaded by the particular submission, because it seems to me that the tribunal at [162] and Freedman J at [212] were perhaps making a different point. They do not refer to the *right* to access to the court diminishing as the time for removal approaches, but rather "the *ability* to access the courts…". It is that which the tribunal considered was authorised by section 10. On its face, that appears to be no more than the trite proposition that an irregular migrant's ability in practice to access a court may be reduced as the time for removal approaches, e.g. when he or she is in the plane on the runway ready for take-off, or even on the way to the airport at a time when he or she may not have ready access to a telephone.

117. However, in my view, the broader submission has substantial weight. As I have described, although the court may summarily refuse an application that removal be stayed on the grounds that it could and should have been made earlier and is thus an abuse of the process, the right to access the court is an absolute and inviolable right, subject only to the inevitable practical constraints to which I have referred. The UK's obligation not to remove an irregular migrant where to do so would result in a risk to him or her of treatment contrary to article 2 and/or 3 of the ECHR and/or the Refugee Convention and European Directives has been expressly held by this court to remain binding until the moment of return (R v Secretary of State ex parte Onibiyo [1996] QB

768 at page 781E-G per Sir Thomas Bingham MR giving the judgment of the court). It seems to me that that is clearly so. But, in any event, the right to access to the court is not a relative right to be balanced against other rights and interests, the convenience of the executive or the courts, or the risks of abuse of process. As much as the right to an effective remedy under article 13 of the ECHR (see Čonka at paragraph 106 above), the common law right to access to justice is not susceptible to being outweighed by factors such as other rights and interests, the convenience of the executive or the courts and the risks of abuse of process. To the extent that the tribunal (see, e.g., [163] of its determination) or Freedman J (see, e.g., [220]-[222] of his judgment) considered such an exercise legitimate, I disagree. The court must organise its systems in such a way that it can meet the requirement for an effective remedy, no matter when and the circumstances in which an application to prevent removal on the grounds of unlawfulness is made. As I have indicated, there is no suggestion in this appeal that the court does not organise itself in such a way. The question in this appeal is whether the Secretary of State, through the JRI Policy, has organised her systems to the same effect.

118. Reference to the limitation rules are of no assistance to the Appellants in this regard: those rules are set out in statutory provisions and, if and insofar as they do restrict access to justice, they have Parliamentary sanction for doing so. As I have indicated, there is no Parliamentary authorisation in section 10 or elsewhere for restricting the right to access to justice in the context of immigration challenges, the only restriction (exercisable at the discretion of the court) being that of CPR rule 54.5(1) which requires a claim challenging an executive decision to be filed promptly and no later than three months after the date of the decision. Nor does the line of cases including Madan, Hamid and SB (Afghanistan) assist. Those cases are concerned with the consequences (primarily for legal representatives) of issuing and pursuing abusive claims and applications: they do not limit the right to access the court in any way.

119. Having dealt with those preliminary matters, I can now turn to the main submissions of the parties on the primary ground of appeal, i.e. Medical Justice Ground 1.

Breach of the Right of Access to Justice: Medical Justice Ground 1

120. This ground involves a systemic challenge to the JRI Policy itself. Although systemic unfairness may be illustrated by what has happened in individual cases, such a challenge does not focus upon the consequences of unlawfulness for a particular individual or group as do most judicial reviews, but rather upon the administrative scheme itself and the risk of unfairness in a public law sense arising from that scheme as a scheme. As Lord Dyson MR said in Detention Action, at [27], "a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself"; or, as Sedley LJ put it in R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219, at [7], it is sufficient for the claimant to show that there is "a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself". As I observed in R (Woolcock) v Secretary of State for Justice [2018] EWHC 17; [2018] 4 WLR 49 at [68(iv)], there is a conceptual difference between something inherent in a system which gives rise to an unacceptable risk of unfairness, and any number (even a large number) of decisions that are simply individually aberrant.

121. Where it is contended that a scheme is in itself unfair, the correct approach was described by Sedley LJ, giving the judgment of the court, in Refugee Legal Centre (which concerned the fairness of a pilot scheme of fast-track asylum judicial determination), at [7], as follows:

> "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."

Sedley J considered that "provided that [the system] is operated in a way that recognises the variety of circumstances in which fairness will require an enlargement of the standard timetable – that is to say lawfully operated – the… system itself is not inherently unfair" (see [20]), i.e. provided the system was operated with appropriate flexibility, it was not inherently unfair: it could operate without an unacceptable risk of unfairness.

122. R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827; [2014] 1 WLR 4620 involved a challenge to the Secretary of State for Justice's policy for the review of prison licence conditions on the basis that it failed to give the prisoner an appropriate opportunity for input. Richards LJ (giving the judgment of the court) rejected the contention that "unacceptability of risk" in this context required a consideration of the degree of risk, the consequences if the risk materialises, the extent of anything that minimises the risk and the cost of minimising the risk. Rather, he said (at [35], emphasis in the original):

> "In my judgment, the question to be asked in the present context is a more straightforward one, namely whether the system established by the guidance in the policy documentation is *inherently unfair* by reason of a failure to provide the offender with a fair opportunity to make meaningful representations about proposed licence conditions. If it is, then the guidance itself may be found to be unlawful; but if it is not, the correct target of challenge is not the guidance but any individual decisions alleged to have been made in breach of the requirements of procedural fairness."

He later described the nature of the "unacceptable risk" as "a risk of unfairness inherent in the system itself rather than one arising in the ordinary course of individual decision-making" (see [38]); and approved the approach in Refugee Legal Centre as to the potential for the reduction of risk to an acceptable level as the result of flexible operation of the scheme (see [49]).

123. There is a substantial amount of jurisprudence about the situation where a scheme on its face may be unexceptionable, but there is a contention that it is being (or, in the future, will be) applied or implemented in such a way that it will give rise to a risk of

unfairness to at least some who fall within its scope. For example, R (Bibi and Ali) v Secretary of State for the Home Department [2015] UKSC 68; [2015] 1 WLR 5055 concerned the application of the "exceptional circumstances" exemption to the requirement for the production of a certificate of knowledge of the English language to a prescribed standard for entry clearance to the UK, which was challenged on article 8 grounds. The Supreme Court held that that policy would be unlawful if a breach of ECHR rights (or other similar right) would occur in a "significant number of cases" (per Baroness Hale at [54] and [61], and per Lord Neuberger at [101]). R (BF (Eritrea)) v Secretary of State for the Home Department [2019] EWCA Civ 872; [2020] 4 WLR 38 concerned the application of the Secretary of State's policy/guidance with regard to age assessments in the context of administrative detention for the purposes of removal. It was held that the policy/guidance would be unlawful "if but only if the way that [it is] framed creates a risk of more than a minimal number of children being [unlawfully] detained" (at [63] per Underhill LJ with whom, on this issue, Simon and Baker LJJ appear to have agreed).

124. No doubt reflecting the fundamental nature of the right, the courts have used somewhat more circumscribed terms when considering policies (including those incorporated into secondary legislation) which potentially impact adversely upon the right to access the court. UNISON concerned a fees order in respect of employment tribunal proceedings, which, it was contended, imposed fees of such amount as effectively to discourage many potential claimants from bringing claims at all. Having referred to the approach of earlier authorities (notably R v Lord Chancellor ex parte Witham [1998] QB 575 and R (Hillingdon London Borough Council) v Lord Chancellor [2008] EWHC 2683 (Admin); [2009] 1 FLR 39, both also court/tribunal fee cases), Lord Reed said (at [87]):

> "It follows from the authorities cited that the Fees Order will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice."

It would be *ultra vires*, of course, because Parliament has not sanctioned any fees order that would compromise the right to access to justice. Lord Reed suggests that, without Parliamentary authorisation, it is unlawful for a measure to deny *any* person access to justice.

125. Similarly, as I have described (paragraphs 94-96 above), in the 2010 Medical Justice case the court did not consider how many irregular migrants were in fact denied access to justice as a result of falling within the scope of one of the exemptions to the usual requirement of 72 hours' notice of removal directions: it focused on the risk to the right of access to justice that was inherent in the policy itself. In respect of that category of people, this court held that it was sufficient for the claimant to show that the policy abrogated the right of access to the court to challenge the lawfulness of removal by showing that the policy gave insufficient time between notice of removal and the removal itself to enable a legal adviser to be instructed and thereafter to challenge the lawfulness of the removal directions.

126. I respectfully agree that that is the correct approach in such cases as this. It is the approach that the Appellants have adopted. Essentially, Ms Kilroy submitted that, so far as those in respect of whom notice of removal is in the form of a notice of a removal window are concerned, the abrogation of the right to access to justice in the JRI Policy

is materially indistinguishable from the defect identified in the 2010 Medical Justice case as it then applied to those who fell within an exemption to the 72 hours' notice requirement. The right is infringed because, following an adverse decision material to their removal which is notified in the removal window, like those who fell within an exemption, as a result of the Policy itself, those involved are at risk of removal without any opportunity to challenge the relevant decision in a court or tribunal, i.e. they are at real risk of effectively being prevented from having access to justice. As I have described (paragraph 61 above), the evidence clearly shows that almost all decisions material to removal which are made in respect of applications and representations made following service of the notice of the removal window are made within the window period itself. As the unfairness is inherent in the Policy itself, Ms Kilroy submitted that the focus of the tribunal and (particularly) Freedman J on the case studies and evidence of numbers of cases in which an irregular migrant's access to justice had in fact been interfered with was misplaced. I agree.

127. As I have indicated (paragraphs 67-70 above), in response, Mr Kovats relied upon two overarching reasons why the JRI Policy is not unlawful. I am afraid I am unpersuaded by either.

128. First, he submitted that, as there is never a legal bar or impediment to an irregular migrant who is served with a notice of removal window seeking redress from the courts, this is essentially a rationality claim; and, in considering rationality, it is legitimate to balance the public interest in having a coherent and enforceable scheme to remove irregular migrants who do not have any right to be in the UK on the one hand, and the rights and interests of those migrants on the other.

129. However, Medical Justice Ground 1 is not a rationality claim: it is a claim that, without Parliamentary authorisation, the JRI Policy abrogates or restricts the right of access to the court for those who have been notified of a removal window and wish to make a new claim that removal would be unlawful. I accept that there is a legitimate public interest in encouraging irregular migrants to make any claim for leave to enter or remain that they may have promptly and to discourage late claims (see paragraph 100 above): but (i) whilst the failure to take earlier opportunities to make such a claim may be relevant to the question of whether the court should grant or refuse interim relief, it cannot restrict access to the court (see paragraph 104 above), and (ii) unless sanctioned by Parliament, the right to access to justice cannot be ousted by other rights and interests, the convenience of the executive or the courts/tribunals, or the risks of abuse of process (see paragraph 117 above).

130. Nor am I persuaded that the opportunity that irregular migrants who are removed may have to challenge the lawfulness of their removal, after the event and from abroad, is a compelling argument in favour of Mr Kovats' submission that the scheme is lawful. The Secretary of State herself recognises in the JRI Policy that access to justice prior to removal may be important if not imperative: the reason why she set the periods between notification and the risk of removal as she did was to enable access to the court prior to the risk of removal arising (see paragraphs 29-31 above). Whilst I accept that the opportunity to challenge underlying decisions relating to leave to enter or remain, and the lawfulness of the removal, out-of-country following removal is a factor which the court can take into account in deciding whether interim relief should be granted, it is not a factor that bears on the issue of access to the court prior to removal. A migrant

must be entitled to access to a court prior to removal, if only to contend that out-of-country proceedings would be ineffective in his or her case; although, for the reasons I have already given, it is open to the court to conclude that the Secretary of State was not legally obliged to consider very late, lengthy submissions prior to removal and/or that any form of interim relief is not appropriate.

131. The potential difficulties for out-of-country challenges are well-known, having been considered by the Supreme Court in R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] 1 WLR 2380 (especially at [60]-[78] per Lord Wilson JSC giving the judgment of the court) and subsequent cases such as R (Ahsan) v Secretary of State for the Home Department [2017] EWCA Civ 2009; [2018] HRLR 5. For example, once removed, an irregular migrant may be "lost"; and continued, effective legal representation may be difficult, and the individual may lose the ability to give oral evidence which might be crucial. Furthermore, unlike Kiarie and Byndloss (an article 8 claim) and Ahsan (a claim for indefinite leave to remain, refused as a result of the Secretary of State suspecting dishonesty), notice of removal in the form of a removal window is used in cases where the irregular migrant contends that removal will subject him or her to treatment contrary to article 2 and/or 3 of the ECHR and/or the Refugee Convention. Therefore, the consequences of an unlawful removal may be grave, and irremediable after the event. Subject always to Parliamentary intervention, it is the role of the court (and not of the executive) to balance such factors against the public interest in having an effective and efficient immigration system including an effective and efficient scheme for removing those who have no right to be in the UK.

132. In support of this part of the defence, Mr Kovats submitted that the evidence adduced by the Appellants in the form of case studies etc did not show that there was any restriction of access to justice in more than a very few cases. However:

i) The general difficulties in a claimant obtaining statistically significant data in support of a contention that an administrative scheme is systemically defective are well-known (see, e.g., R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55; [2005] 2 AC 1 at 91] per Baroness Hale; and R (Howard League for Penal Reform) v Lord Chancellor [2017] EWCA Civ 244; [2017] 4 WLR 92 at [53] per Beatson LJ giving the judgment of the court).

ii) In this case, the collection of such data is even more difficult, because it is the Appellants' case that irregular migrants are removed without having had an opportunity to access legal representation yet alone the courts. It is understandable that the case studies provided by practitioners involve irregular migrants who have managed to instruct legal representatives and have thus, in the main, prevented removal prior to the courts adjudicating upon an application for interim relief. However, these cannot be regarded as necessarily representative.

iii) The Secretary of State has given disclosure; but does not keep full records of those who may have been removed without having had the opportunity to access a court prior to removal.

iv) In any event, the Appellants' primary case is not based upon numbers of irregular migrants who may in fact have been unlawfully removed: as with the 2010 Medical Justice case, it is based on the JRI Policy being inherently defective. That case is not dependent upon showing that any individual irregular migrants have in fact been deprived of access to justice. It is sufficient that it is inherent in the JRI Policy as it applies to those who are notified of adverse decisions in the removal window, that they – indeed, *all* those who have negative decisions made within the removal window – are at immediate risk of removal without an opportunity to access the court.

v) Insofar as actual inability to access justice is relevant, the evidence clearly shows that at least some of those who fall in that category have been (and, in the future, will be) deprived of access to a court prior to removal (see paragraph 61 above). It is no answer to say that these are merely aberrant individual decisions: if the scheme is to afford an effective remedy at common law, it is requirement that irregular migrants have access to a court to challenge adverse decisions of the Secretary of State, aberrant or not, that bear upon their removal including decisions not to defer etc removal. In this regard, the JRI Policy fails to respect the common law right to have an effective remedy in the form of access to a court.

133. That brings me to the second strand of Mr Kovats' submission in defence of the JRI Policy.

134. This relied upon Lord Dyson's observation in Detention Action at [27(v)], drawing on the passages from Refugee Legal Centre and Tabbakh referred to above (paragraphs 121-122), that the "core question" in a systemic challenge 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").

135. With that in mind, Mr Kovats submitted that there were adequate safeguards within the scheme of which the JRI Policy forms a part to avoid the right to access to justice being undermined. He submitted that the safeguards included both opportunities to apply to the court earlier in the immigration process and after removal, as well as discretionary powers in the Policy itself to (e.g.) defer removal.

136. Freedman J was impressed by this safeguards argument, concluding that there are a "whole series of safeguards" (see [234]) which "are real and operate so as to preserve rather than impede access to justice" (see [284]) and which mean that the system has "the capacity to react appropriately to avoid unfairness" within the meaning of Lord Dyson in Detention Action (see [234]). The judge identified four safeguards relied upon by the Secretary of State before him, and now before us, as follows:

i) the requirement of the JRI Policy that a notice of removal window should not be served where there is an extant human rights or protection claim or appeal (see [227]);

ii) the requirement of the Policy that the removal window should be cancelled when a person makes a human rights, protection or EU free movement claim (see [227]);

iii) the discretion in decision-makers to defer a removal window, which the judge considered to be the most important safeguard in relation to the suggestion that the notice period was short (see [162], [262] and [285]); and

iv) the availability of judicial review to correct erroneous decisions, in particular in respect of a refusal to defer the removal window (see [194], [196], [219], [271] [290] and [335]).

137. However, as to (i), that is of no assistance to the category of irregular migrants with whom we are concerned, namely those who have been served with a notice of removal window and who may have a claim that removal is unlawful. Nor is Mr Kovats' submission that, in considering whether the right to access to a court has been infringed, it is appropriate to take into account earlier (but untaken) opportunities to approach the court: as I have indicated, whilst untaken earlier opportunities may be relevant to the exercise of the court's discretion to grant interim relief in the form of a stay of removal, they do not diminish the right of access to the court (paragraphs 102-106 above). I have also dealt with the issue of post-removal opportunities to access the court (paragraphs 130-131 above).

138. As to (ii), as Freedman J himself acknowledged, the requirement to cancel the removal window only applies when the Secretary of State considers the representations amount to a non-certifiable fresh claim, and an adverse decision which removes the right to an (in-country) appeal is only challengeable by way of judicial review. I deal with the judge's reliance on the supervisory nature of judicial review in this context below (see, especially, paragraph 142).

139. As to (iii) and (iv), it is clear that Freedman J considered that these – the availability of the discretion to defer within the terms of the JRI Policy, and the availability of judicial review to challenge any refusal of deferral – to be crucial. He said (at [196]) that "deferral enables the risk of unfairness to be reduced"; and "it is capable of being controlled by judicial review, so that those caseworkers who operate [it] know that they are answerable for their actions". Thus, "the policy regarding deferral provides some inbuilt flexibility into the system on which the [Secretary of State] relies". This was equally the thrust of Mr Kovats' submissions to us.

140. However, I am unable to accept that the discretion to defer, supervised by judicial review, is able to bear the weight of this argument.

141. In terms of data, as I have indicated (paragraph 70 above), in the period 25 May 2018 to 9 March 2019, caseworkers considered deferring a removal window in 71 cases, initiated either on the caseworker's own initiative or on request; and, of those cases, deferral was granted in thirteen. Those data show that (i) there were few cases in which deferral was considered, and very few in which it was granted; and (ii) in the vast majority of cases in which it was considered, it was refused, such refusal being open to challenge only by way of judicial review.

142. In my view, the fatal flaw in Mr Kovats' submissions (and in the analysis of both the tribunal and Freedman J) on this issue is that an irregular migrant who applies for deferral (or, I should add, extension, cancellation or suspension of the window: see paragraphs 44-48 above) and is refused within the removal window – as will almost always be the case – will be at immediate risk of removal without having had an

opportunity of challenging the refusal in a claim for judicial review (supported by an application for interim relief) before a court or tribunal. For the reasons I have given, contrary to Freedman J's conclusion, judicial review is not in practice immediately available to challenge a decision of the Secretary of State material to removal (including a decision not to defer etc) prior to the relevant person being at risk of immediate removal without further notice. There is, at that point, a real risk of denial of access to justice.

143. In response, Mr Kovats made two particular submissions, neither of which in my view provides an answer to the point.

144. First, he submitted that the JRI Policy throughout stresses to decision-makers that they should ensure that those who are served with notices of a removal window are given an appropriate opportunity to access justice, notably in the section of "Consideration of deferral…", quoted at paragraph 47 above, where it is said that:

> "A key consideration [on consideration of deferral] is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts".

However, that does not answer the point; because, if (as is statistically very likely) a decision is made not to defer, it is then when the right of access to justice may be called upon but, in practice, is not available.

145. Second, Mr Kovats submitted that the point was undermined by the fact that in most cases the individual will not, in fact, be removed prior either to having that opportunity or to the removal being cancelled or deferred because of some extraneous reason, such as ill-health. However, the fact that many irregular migrants in these circumstances are not removed is not as a result of the JRI Policy, which puts them at the immediate risk I have identified; it is despite that Policy. On the basis that the Secretary of State does not deliberately delay notifying decisions until immediately prior to removal is due to take place (and, as I understood the submissions, no party suggested that she now does: although see paragraph 105 as to previous practice), whether an irregular migrant is removed before he or she has had an opportunity to obtain legal advice and apply to the court is a matter of pure happenchance. It is, in the legal sense, arbitrary and thus in any event unlawful.

146. Third and finally, Mr Kovats submitted that notice of removal in the form of a removal window leaves the relevant person in no worse position than if given 72 hours' notice of removal directions with a fixed date and time, and the Appellants do not argue that such notice is unlawful. However, unless accepting that it would be appropriate and necessary for any person served with a notice of removal by way of removal window to issue judicial review proceedings – which he did not expressly accept, and which would be contrary to the intention of the Policy to reduce appeals and save costs (see paragraph 12 above) – I do not see any force in this submission. In practice, there is a significant difference; because, where the irregular migrant knows the date and time of his or her removal, that focuses not only his mind, but also the minds of both his legal representatives and the Secretary of State. It is noteworthy that (i) although the Secretary of State responds to representations within hours if removal directions have been set, it takes weeks or even months when they have not been set (see paragraph 59(v) above), and (ii) the Secretary of State does not suggest that, as a result of the

Policy, every irregular migrant served with notice of a removal window who may wish to make representations should issue a protective claim and application for interim relief to be considered by the court prior to expiry of the notice period. As I have said, that would be contrary to the express aim of the Policy to save costs.

147. For those reasons, in my view, the JRI Policy with which we are concerned (Version 17) incorporated an unacceptable risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on article 2 and/or article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal.

148. Consequently, I would allow the appeal on Medical Justice Ground 1.

Breach of the Right of Access to Justice: Other Grounds of Appeal

149. I can deal with the remaining grounds briefly. In short, I consider they add nothing of substance to Medical Justice Ground 1.

150. As Medical Justice Ground 2, Ms Kilroy submitted that the serious inherent risk in the JRI Policy that removal will be effected before the relevant individual is able to access the court to challenge the decision amounts to an unacceptable risk of a breach of the right to access to justice at common law which renders the Policy not only *ultra vires* but also irrational, given that it is the express aim of the Policy to maintain the right to access to justice by giving every person served with a notice of removal window sufficient time to raise a claim and for such a claim to be properly considered. Whilst it may be that a policy which abrogates the right to access to justice without Parliamentary sanction is, in law, irrational, I do not consider that this adds anything to Medical Justice Ground 1.

151. As Medical Justice Ground 3, Ms Kilroy submitted that, whenever a decision is made to give notice of removal in the form of a notice of removal window in the context of (i) Dublin III, and/or (ii) the European Directives and/or (iii) the ECHR, then, in addition to that being in breach of the common law right to access a court, it is unlawful as failing to acknowledge the rights to legal advice and/or an effective remedy under those measures. I accept that the European jurisprudence in relation to those instruments emphasises the need for, and scope of, an effective remedy. However, given my conclusion in relation to the common law right, again I do not consider that this ground adds anything of substance.

152. Similarly, although not the basis of a ground of appeal, Ms Harrison and Ms Luh submitted that the JRI Policy failed properly to take into account vulnerable groups who might be subject to it. Again, given my conclusion on the primary ground, it is unnecessary to say anything further on the position of such groups.

153. Finally in relation to the systemic challenge, Ms Naik submitted that the tribunal at [157]-[169] of its determination erred in proceeding on the basis that section 10 permits the abrogation of, or the imposition of hindrances to the enjoyment of, the right to access to justice.

154. For the reasons I have given (paragraphs 10 and 74 and following), neither section 10 nor any other legislative provision authorises any restriction in the right of access to

justice. The tribunal, at [162], said that it authorised the progressive diminishing of the *ability* to access to the courts, in the sense I have explained (at paragraph 116 above); which may be a somewhat different proposition from authorising the diminishing of the right to access the courts.

155. Given my conclusion in relation to the Medical Justice Ground 1, it is unnecessary to comment further on this ground, other than to say that, as it is framed, I am unconvinced that the ground has been made good.

FB's Individual Claim

156. I can deal with FB's individual claim briefly, because, irrespective of the risk that irregular migrants in general might face, the tribunal held (at [183] of its determination) that FB was not in the event denied access to justice as a result of the operation of the JRI Policy or otherwise; and FB does not seek to challenge that conclusion in this appeal.

157. FB is an Afghan national who, it appears, was removed from the UK to Afghanistan on 29 March 2011, his asylum claim having been refused in December 2010. In April 2011, he again left Afghanistan for Turkey and then Germany, where he lived until September 2017. That month, he travelled via Calais arriving in the UK clandestinely in the back of a lorry on 30 September 2017.

158. That evening, he voluntarily attended Wembley Police Station. The following day he was interviewed by an immigration officer, with a Dari interpreter, when he said he had come to the UK because Germany were going to return him to Afghanistan. Although this is not accepted by the Secretary of State, he claims that he also indicated at that interview that he wished to claim asylum here. In any event, that day, he was served with a number of documents including Form RED.0001 in the usual form, in which he was given notice of a removal window beginning on 5 October 2017 and ending three months from the date of the notice.

159. On 2 October 2017, FB was transferred to Campsfield IRC. The following day, he made an oral request to claim asylum, and obtained and attended a DSA surgery slot with a lawyer from Duncan Lewis. On 4 October 2017, he was told by an immigration officer that, having been refused asylum in 2010, he would need to put his further submissions into writing. It was noted that FB was unable to write in English, and that he would require legal assistance to make those representations.

160. FB's notice period duly expired on 5 October. Unfortunately, due to capacity issues, Duncan Lewis did not internally allocate FB's case until 19 October. That day, the firm went onto the record with the Home Office as solicitors acting for FB. They asked for a copy of the decision refusing asylum in 2010, which was provided on 24 October. That day, Duncan Lewis made a full disclosure request and subject access request. On 14 November, they asked for the removal window to be cancelled pending full disclosure; and, the following day, they sent a letter before action which was treated by the Secretary of State as further submissions.

161. On 22 November, the Secretary of State set FB's removal for 24 December, but, in accordance with the JRI Policy, did not disclose that to FB or to his legal representatives.

162. On 28 November, Duncan Lewis issued judicial review proceedings in the Upper Tribunal on the basis that removal following only notice of a removal window under the JRI Policy was unlawful, with an application for urgent consideration and interim relief to prevent FB's removal pending the outcome of the claim. The following day (29 November), the Secretary of State refused FB's further submissions; but, that same day, Upper Tribunal Judge Craig granted the application for interim relief staying FB's removal. On 30 November, removal was deferred; and, on 5 December, FB was released from immigration detention.

163. FB thus complains that, from 5 October to 29 November 2017, he was at risk of removal. However, as Ms Naik accepts, in the event he was not in fact denied access to justice; and, so, no relief specific to FB's individual case is required or appropriate.

164. For the sake of completeness, I should say that, on 18 October 2018, Duncan Lewis made further representations in support of FB's claim for international protection, which was treated by the Secretary of State as a further claim and rejected as such on 16 December 2019. However, in a determination promulgated on 6 August 2020, the FtT (First-tier Tribunal Judge Povey) allowed FB's appeal on asylum grounds. As I understand it, FB is currently awaiting formal confirmation of his refugee status from the Secretary of State. That has an initial period of five years leave to remain attached (paragraph 339Q(i) of the Immigration Rules). That is the result of the access to justice which he in fact obtained; but has no direct bearing upon his appeal.

Disposal

165. For the reasons I have given, I would allow the appeal on Medical Justice Ground 1 (which, of course, FB supported); and, having considered the parties' written submissions on relief, I would make a declaration that the JRI Policy was unlawful insofar as it gave rise to a real risk of preventing access to justice.

166. In respect of FB, as I have indicated (paragraph 3 above), the tribunal found the Policy before it to have been deficient and declared it unlawful in a number of respects (none of which is material to this appeal); but, in paragraph 4 of its Order of 8 November 2018, "subject as aforesaid", simply dismissed the application for judicial review. In my view, in the light of the conclusion to which we have come on Medical Justice Ground 1, that Order looked at as a whole cannot properly stand without some amendment. Therefore, whilst none of FB's specific grounds of appeal has succeeded, I would allow his appeal, and order that the tribunal's Order be amended by the insertion of a new paragraph 3A as follows:

> "It is declared that Chapter 60 is unlawful insofar as it gave rise to a real risk of preventing access to justice."

With that amendment, it is not necessary to alter paragraph 4 of the Order in any way.

167. Finally, I have had the benefit of reading the Lord Chief Justice's judgment, with which I agree. In particular, I would associate myself with his observations on Kiarie and Byndloss.

Lord Justice Coulson:

168. I agree that, for the reasons given both by my Lord, Hickinbottom LJ, and the Lord Chief Justice, this appeal should be allowed on the basis of what has been called Medical Justice Ground 1, namely that inherent in the JRI Policy is an unacceptable risk of interference with the common law right of access to justice. I also agree to the disposal of the appeals which Hickinbottom LJ proposes.

169. I reject the Appellants' submission that a system based on the giving of a notice of a removal window (a critical element of the JRI Policy) is inherently unlawful, or that an irregular migrant is additionally entitled to receive separate removal directions specifying the date and time of the proposed removal. As Hickinbottom LJ explains at [74]-[87], there is no legal basis for either submission. An irregular migrant in receipt of the Notice of Removal, in RED.0001 form, will know that, if he or she does not take their own steps to leave the UK, they will be removed during the removal window period. That is sufficient. There is no right to another notice giving details of how and when the Secretary of State will remove that individual if he or she refuses to leave of their own volition.

170. Where, however, the JRI Policy goes wrong is that it does not allow sufficient opportunity for the individual to challenge (in court or tribunal) any adverse decision relevant to the removal which may have been made/notified during the removal window period itself. In such circumstances, the individual could only bring such a challenge when he or she was at risk of imminent removal or might even have already been removed. That would deny the individual a fair – or perhaps any – opportunity to present their case: see Lord Dyson MR in The Lord Chancellor v R (Detention Action) [2015] EWCA Civ 840 at [38].

171. It should perhaps be emphasised that the Secretary of State's case on this crucial issue was very limited. On her behalf, Mr Kovats accepted that only Parliament could authorise any restriction to the common law right of access to justice, and he agreed that no such authorisation existed here, whether express or implied. His only argument, therefore, was that the JRI Policy did not amount to such a restriction. For the reasons given by Hickinbottom LJ at [120]-[148], I consider that that submission is unsustainable.

172. I should add that, at the hearing of the appeal, Mr Kovats devoted much time to an argument that there was no restriction on access to justice because the irregular migrant could still challenge the lawfulness of their removal after it had happened, making their case from another country. In my view, that submission is contrary to the JRI Policy itself (which appears to recognise expressly the importance of access to the court prior to removal). Moreover, although I consider that the practical problems that affect such out-of-country challenges were perhaps over-stated by the Appellants, I respectfully agree with the Lord Chief Justice's analysis at [196]-[199] below, that there are readily identifiable categories of case where the harm might be irredeemable.

Lord Burnett of Maldon LCJ :

173. Two issues arise for determination in this appeal. First, whether irregular migrants must be given notice of the date, time and mechanism of their removal. Secondly, whether the policy of the Secretary of State in issue in this appeal ("the JRI Policy") denies access to justice to some of those to whom it is applied and is thus, without amendment, unlawful to that extent.

174. I am grateful to Hickinbottom LJ for setting out the background to the appeals before us, the relevant statutory provisions, such evidence as bears on the questions we have to decide together with the parties' submissions.

175. Like Hickinbottom and Coulson LJJ, I am satisfied that there is no basis in law for requiring the Secretary of State to give an irregular migrant notification of the date, time and mechanism of removal.

176. I should like to add a few words on the second ground.

177. In 2007 the Secretary of State introduced a policy to give 72 hours' notice of removal to many irregular migrants, to others five and seven days. Provisions within the policy which truncated the time scale to fewer than 72 hours in limited circumstances were challenged successfully in R (Medical Justice) v. Secretary of State for the Home Department [2010] EWHC 1925 (Admin) and [2011] EWCA Civ 1710 on the basis that the shorter time frame denied many an effective opportunity to challenge the decision in question before removal. Shorn of those offending provisions that policy continued in operation until April 2015 when the underlying statutory provisions were amended and the policy under challenge in these proceedings was introduced. The notice periods, whilst tight, provided sufficient time in each of the applicable circumstances for those affected to challenge the removal decision. It is no part of the Appellants' case that the time limits in these notice periods themselves deny access to justice.

178. Any system of removing irregular migrants must operate in the sure knowledge that some are reluctant to leave the United Kingdom, even when there is no basis for remaining here, and will take whatever steps are permitted by the legal and administrative arrangements in place to resist, delay or frustrate removal. Late claims raised shortly before the known date of removal have been endemic, many fanciful or entirely false. Whilst there is no suggestion of any such conduct in these proceedings, it is a matter of regret that a minority of lawyers have lent their professional weight and support to vexatious representations and abusive late legal challenges. The courts have developed controls which provide some protection for its own processes and for the proper functioning of immigration control (e.g. Madan, Hamid and SB, cited at paragraph 104 above); but the practical and administrative problems for the Home Office in dealing at speed with substantial new representations in the days and hours leading up to a removal are legion. Some of those difficulties are summarised in SB at [54]-[57].

179. The changes wrought by the statutory amendments in 2014, together with the JRI Policy, were in part designed to bring forward any arguments and thus avoid last minute wrangling, possible delays in removal and even the interruption of flights. The policy has been subject to many revisions and updates. As Hickinbottom LJ has explained fully, the practice of giving notice of removal directions, was later discontinued. Instead, an irregular migrant would be given a notice which explained that he had no right to remain in the United Kingdom, with accompanying reasons, and encouraging immediate representations if the migrant disagreed. To that end, the policy created the dual concepts of a notice period (which mirrored the old periods of the 2007 policy, amended to take account of the successful 2010 challenge) and a removal window of three months which followed immediately upon the notice period. Nobody would be

removed within the notice period but might be removed without further notice during the currency of the removal window.

180. The need for expedition in challenging the decision to remove is made plain by the documentation served upon the migrant. None can have a legitimate complaint if removal follows swiftly at the end of the relevant notice period and they have remained silent. That conclusion follows from the consensus underlying this appeal that those periods, whilst tight, do not deny a migrant a reasonable opportunity to challenge the decision to remove of which he has been notified. The essential problem identified by the Appellants was that the version of the policy with which we have been concerned enables a migrant to raise new arguments within the time scale of the initial notice period, but for a decision to be made in the removal window and removal to follow so quickly that there is no opportunity for an in-country challenge in cases where the right to access to justice includes the right to mount such a challenge.

181. This appeal is concerned with three sets of circumstances which might lead to removal very shortly after an adverse decision during the removal window:

i) representations are made during the notice period seeking to persuade the Secretary of State that the migrant has a right to remain in the United Kingdom, but an adverse decision is taken after the end of that period, during the removal window;

ii) such representations are made after the end of the notice period (i.e. during the removal window itself) with an adverse decision following;

iii) a timely request to extend, cancel or defer the removal window is made but refused.

182. The reality is that, even if representations are made within the notice period, relevant decisions are likely, indeed more than likely, to be made after the notice period has expired and therefore during the removal window; and representations supporting the contention that the migrant does have a right to remain can, and often will, be made during the removal window even when there has been no calculated delay.

183. It is in those circumstances that the Appellants argue that an adverse decision might be made and an irregular migrant removed without an effective opportunity to obtain legal advice and take steps to challenge the decision, including seeking injunctive relief from the court to restrain removal pending resolution of a claim. The Appellants point to the possibility of having a request to extend the removal window, envisaged by the JRI Policy itself, refused and removal following immediately without any possibility of challenge.

184. Something of the order of 40,000 removals were made between 2015 and 2019 applying the JRI Policy in its evolving iterations. Its operation so far as removal windows was concerned was then suspended in these proceedings in the limited respect described by Hickinbottom LJ in paragraph 37 above. Of those 40,000, the Secretary of State has identified eight individuals who were removed but were returned either because a court ordered return, or the Secretary of State later recognised their right to be in the United Kingdom. The various solicitors who have given evidence of their experience have identified about 20 individuals who would have been removed but as a result of prompt

action were protected. That illuminates the risk, but does not help to establish how many it might apply to. There is some evidence of individuals being removed very promptly following adverse decisions. What is missing from the evidence is any indication of the numbers of migrants who were removed more quickly after an adverse decision than the equivalent times used for the notice period (72 hours or five or seven days as the case may be). That information would provide a more reliable estimate of those who were likely to have had too little time to get advice and challenge the decision before removal, although not, of course, the numbers of those who would have done so.

185. A challenge to a policy, or statutory instrument, on the grounds that it deprives those affected by it of a realistic opportunity to challenge an adverse decision, and thus deprives them of effective access to justice, must demonstrate not a theoretical impediment but something more concrete. The vice must result from something inherent in the policy itself rather than its aberrant application: Lord Dyson in Detention Action at [27].

186. R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409 concerned fees introduced by statutory instrument which had the effect of dramatically reducing the number of claims issued in the Employment Tribunal. The Supreme Court decided that the statute empowering the Lord Chancellor to set fees did not provide the *vires* to impede access to justice, although it did not question the principle that fees could be charged. Between [74] and [84], Lord Reed traced the right of access to the courts long recognised in English law from one of the few extant provisions of Magna Carta through to modern times. A provision which prevents access to justice will not survive scrutiny unless expressly authorised by statute. Moreover, the common law has arrived at the position that even an interference with access to the courts, which is not insurmountable, will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective (see [89]).

187. In the context of removals of irregular migrants, tight timescales for mounting challenges before removal are clearly necessary to meet the legitimate objective of controlling immigration even though they provide a limited temporal opportunity to secure access to justice.

188. There was a wide range of challenges in the UNISON case but the central argument was that the adverse impact on access to justice rendered the Fees Order unlawful.

189. Lord Reed, with whom all members of the court agreed, framed the question as "whether the Fees Order effectively prevents some persons from having access to justice" (at [90]). The Lord Chancellor contended that, in the absence of distinct proof of individuals who had been prevented by fees from bringing claims, the Fees Order could not be unlawful. He relied upon fee remission for those of very limited means together with a residual discretion to remit fees. He argued that those who did not bring proceedings were making choices about how to spend their money. In the context of fees, at [91], Lord Reed explained that "in order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission." The evidence was not conclusive in demonstrating that the fees had prevented people from bringing claims, but conclusive evidence was not required. Citing R (Hillingdon London Borough Council) v Lord Chancellor [2008] EWHC 2683

(Admin); [2009] 1 FLR 39, he said that "it is sufficient in this context if a real risk is demonstrated."

190. The evidence in UNISON demonstrated the general risk and also the adverse impact on bringing low value claims and claims where monetary redress was not sought. The Lord Chancellor's discretionary power of remission did not save the Fees Order from illegality because the problem was systemic. The Fees Order "effectively prevents access to justice, and is therefore unlawful" (at [98]).

191. In the context of other statutory rules and policies that are said to prevent access to justice or otherwise inherently give rise to a risk of unlawful decisions (by contrast with individually aberrant decisions), formulations of words have been used in the authorities which are to the same effect as the "real risk" identified in the UNISON case. They are discussed in the judgment of Hickinbottom LJ between paragraphs 92 and 95, and 120 and 125, above.

192. The Appellants' core submission on this point is that the JRI Policy inevitably results in many decisions which bear upon the question whether an individual served with a notice of removal window is entitled to leave to enter or to remain being made during the removal window. The result is that removal is possible without any opportunity to challenge the decision.

193. There is no escaping the conclusion that the Policy puts irregular migrants at risk of removal immediately following an adverse decision made, or notified, during the removal window which thus deprives that group of a proper opportunity to challenge the decision before removal.

194. There is a distinction to be drawn between, on the one hand, notified decisions with removal to follow almost instantly; and, on the other hand, decisions (including decisions at the time the notice period and removal window are set) which are notified with sufficient time for fresh representations or an application for an extension of time or a legal challenge to be made but the migrants in question fail to take prompt steps to do any of these things, only seeking to take such steps when confronted with the reality that removal is imminent. In the latter case, any difficulties in accessing justice arise from the migrants' own choice not to do anything promptly. Whilst, for the reasons set out in Hickinbottom LJ's judgment at paragraph 102, that does not impact on the migrants' legal right to access the court, in those circumstances *the policy* has not in any way impeded the migrants' ability to make fresh representations or challenge a relevant decision.

195. In the class of case where it is the policy which denies a reasonable opportunity to challenge a decision before removal, the question then becomes whether any of the safeguards of ameliorating factors identified by the Secretary of State meet the underlying objection.

196. Like Hickinbottom and Coulson LJJ, I consider that whilst in many cases the safeguards built into the policy go some way towards avoiding the risk of peremptory removal without a realistic chance of challenging an adverse decision made during the removal window, they do not meet the central vice of denial of access to justice before removal of a readily identifiable subset of irregular migrants. Between paragraphs 44 and 47 above, Hickinbottom LJ considers four aspects of the policy itself which are prayed in

aid by the Secretary of State. In their various ways, they are concerned with circumstances in which removal will be deferred, or the notice period or removal window extended, to enable representations to be considered or to facilitate an opportunity for a migrant to take advice or challenge a decision. But none meets the distinct problem identified in this appeal. There is no general requirement to delay removal in cases within the three categories I have identified to provide an opportunity to seek advice and make a challenge.

197. Mr Kovats placed significant reliance of the opportunity of any migrant who has been removed to mount a challenge from abroad. The Appellants cite R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] 1 WLR 2380 in support of a broad proposition that out-of-country appeals or judicial review claims are inadequate for the purposes of satisfying access to justice. That is not what the Supreme Court held nor a correct proposition of law. The Supreme Court was faced with two fact-specific cases in which two foreign nationals convicted of serious criminal offences were subject to deportation. Each relied upon article 8 of the European Convention on Human Rights ("the ECHR") and their private and family life to argue that their deportation would violate Convention rights. They raised an issue under the procedural obligations which attach to article 8 resulting from the legislative regime requiring them to pursue their appeals from abroad. There were questions concerning certification under section 94B of the Nationality, Immigration and Asylum Act 2002.

198. The practical consequences of having to pursue an appeal from abroad were considered by Lord Wilson beginning at [60] of his judgment (three other members of the court agreed with his reasoning). It was an appeal heard in February 2017 in the Supreme Court and in September 2015 in the Court of Appeal. It considered the practical and technological arrangements available at that time. Even so, as Lord Wilson explained at [67] in connection with giving evidence from abroad, "it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way is open to him." The focus was on giving oral evidence. Plainly, that will rarely be a consideration in judicial review claims. The consideration of the practicalities that followed were rooted in the technology available to and used both by the First-tier Tribunal and appellants. In the intervening years both have been transformed and their use has become ubiquitous in courts and tribunals the world over, a process accelerated by the effects of the Covid 19 pandemic which has swept around the globe since the beginning of this year. Lord Wilson discussed the cost of hiring video conference rooms and equipment, for example, which have long ago become an irrelevance in holding online video meetings. From the point of view of a litigant, whether discussing a case with legal representatives, attending a hearing or giving evidence all that is required is video enabled device attached to the internet, with widely available commercial software installed in it. The position in courts and tribunals is entirely different from how it was even three or four years ago.

199. As Lord Carnwath put it at [85], it was necessary to distinguish between the substantive and procedural aspects of article 8. Practical arrangements for hearings from abroad bore upon the procedural aspect. It is clear from both the judgment of Lord Wilson and, for example, [103] of the judgment of Lord Carnwath that the conclusions were dependent on evidence of the practical arrangements available when the Secretary of

State made the original decision in connection with the two appellants. There was material in an agreed note that had been placed before the Court of Appeal and further evidence before the Supreme Court to which he refers at [85]. Whilst agreeing with the result in the cases before the Supreme Court Lord Carnwath said (at [103]):

> "I see no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad. So long as the necessary facilities are available."

I respectfully agree and would add that the position has become clearer as time has gone by.

200. Nonetheless, that does not provide a complete answer to this aspect of the appeal. Whilst it is true that the ability to challenge a decision from abroad will mean that there is no unlawful impediment to access to justice in many cases, there are readily identifiable classes of case where that will not be so. The most obvious are those where removal itself exposes the migrant to immediate risk of harm; cases raising articles 2 and 3 of the ECHR or under the Refugee Convention, for example. Like Lord Wilson and Lord Carnwath, I do not consider that the same is true as a matter of principle in article 8 cases.

201. Mr Kovats raised the prospect of irregular migrants being in a position endlessly to raise arguments at the last moment which would always require a deferral of removal to enable a challenge to be made, thus cynically manipulating the system to make removal impossible. The protection of a right of access to justice does not entail anything so impractical. Examples were given in paras 72 and 73 of SB of circumstances where the Secretary of State would not be obliged to defer removal to consider very late representations and, as I have explained, a distinction must be drawn between the operation of the policy and the lack of action by a migrant.

202. Whilst on analysis the number of migrants who would be denied a proper opportunity to challenge a decision as a result of the inherent operation of the policy may be small, to the extent that the policy does so, I agree that it is unlawful and would require some modification to make good that deficiency.

203. For those reasons, subject to any submissions as to the precise form of relief, I agree to the disposal of these appeals proposed by Hickinbottom LJ at paragraphs 165-166 above.