

PRESS SUMMARY

R ((1) FB (Afghanistan) (2) Medical Justice) v Secretary of State for the Home Department [2020] EWCA Civ 1338

The Court: Lord Burnett of Maldon CJ, Hickinbottom LJ and Coulson LJ

Hand-down date: 21 October 2020

1. By section 10(1) of the Immigration and Asylum Act 1999 as amended by the Immigration Act 2014, a person may be removed from the UK if he or she requires leave to enter or remain but does not have it. The mechanics of removal are a largely matter of policy for the Secretary of State.
2. The relevant policy, which formed part of Chapter 60 of the General Instructions to Home Office caseworkers, was in effect from April 2015 to March 2019 when it was suspended pending determination of the Medical Justice claim and then this appeal. Under it, in respect of migrants without the right to enter or remain in the UK (“irregular migrants”), the Secretary of State could give notice of removal under which, after a short notice period (usually 72 hours) during which removal could not be effected, a removal window (usually three months) was set during which removal could be effected at any time without further notice. The policy was introduced to encourage migrants to make promptly any application for leave to remain they might have, and not to wait to make an application until removal was imminent which often resulted in removal which had been arranged being postponed at the last minute, with the attendant disruption and cost. The notice period was originally assessed as the period that was necessary to allow a migrant who had been served with notice of removal to instruct legal representatives and make any further representations to the Secretary of State as

to why he should be allowed to remain in the UK and, if necessary, prepare and issue a claim following a negative decision.

3. The appellants (a charity which facilitates advice to those administratively detained pending removal from the United Kingdom, and an individual who fell within the scope of the relevant policy) made a systemic challenge to the policy on the basis that removal windows are inherently unlawful; and, even if they are not, the policy unlawfully interfered with the right of irregular migrants to access to justice.
4. The appellants did not challenge the lawfulness of the length of the notice period. However, they produced evidence which showed that, where a migrant had been served with a notice of removal in this form, any decision on further representations (or on an application for deferral, extension or suspension of the removal window pending ultimate determination of such representations) would in almost all cases be made after the notice period had expired.
5. At first instance, the Upper Tribunal (the President and Upper Tribunal Judge O'Connor) in FB's claim and the High Court (Freedman J) in the Medical Justice claim concluded that the policy was lawful in material respects. The appellants appealed to the Court of Appeal on two main grounds.
6. First, it was submitted (primarily on behalf of FB) that notice of a removal window, without more, is unlawful because the common law and/or the statutory scheme require notice of directions specifying date and time of removal to be given to the irregular migrant it is proposed to remove. On appeal, this ground failed. The court held that there was no statutory or common law requirement for notice of such removal directions to be given: notice of removal in the form of a short notice period during which the

migrant could not be removed followed by a removal window period during which he or she might be removed without further notice is not, in itself, inherently unlawful.

7. However, as a second ground, Medical Justice contended that, even if that be the case, the policy was unlawful because, as soon as the Secretary of State had made a negative decision on outstanding representations or on an application for deferral etc, the irregular migrant became at immediate risk of removal without any opportunity to make an application to a court or tribunal to challenge that decision.
8. The court accepted that, for many irregular migrants with further claims (e.g. under article 8 of the European Convention on Human Rights), the right to bring a challenge from abroad after removal might be sufficient to satisfy the right to access to justice. However, it concluded that, by placing migrants at immediate risk of removal once the relevant decision was made, the policy incorporated an unacceptable risk of interference with the common law right of access to the court by exposing a category of irregular migrants, including those who have claims that to remove them would put them at risk of death and/or torture, inhuman or degrading treatment and/or persecution in breach of article 2 and/or 3 of the European Convention on Human Rights and/or the Refugee Convention, to the risk of removal without any proper opportunity to challenge that decision in a court or tribunal. Whilst the court accepted that that category might be numerically small, there was evidence that some irregular migrants who fell within it were in fact removed without having had an opportunity to make an application to a court or tribunal; and the policy did nothing to reduce that risk, let alone reduce it to an acceptable level. The court consequently found that ground had been made good.
9. The court considered that the remaining grounds of appeal added nothing of substance.

10. Medical Justice's appeal was consequently allowed on that single ground. As the policy had not been in effect since March 2019, by way of relief, the court made a declaration that the removals window policy as it stood pre-March 2019 was unlawful insofar as it gave rise to a real risk of preventing access to justice, but only to that extent. The appeal of FB, who supported Medical Justice's appeal, was allowed on the same basis, but otherwise refused.

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.