Briefing Paper 8.44

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Removal and Right of Access to the Courts

1 A recent decision of the High Court on judicial review has excited a considerable amount of media attention and criticism. Judgment was delivered by Mr Justice Silber on 26 July 2010 in the case of ***R. on Application of Medical Justice v. The Secretary of State for the Home Department*** [2010] EWHC 1925 (Admin.).

2 Administrative removal as opposed to deportation is covered by paragraphs 395A to 395F of the Immigration Rules. The circumstances in which a person becomes liable to administrative removal are:

- failure to comply with conditions of leave to enter or remain or overstaying;
- obtaining leave to remain by deception
- being the spouse, civil partner or child under 18 of a person in respect of whom removal directions have been given.

All relevant factors are to be considered before a decision to remove is given – age, length of r esidence, strength of connections with the UK, personal history, domestic circumstances, previous criminal record, compassionate circumstances and any representations received on the person's behalf. After notice of a decision has been issues the person may be detained or made the subject of a restriction order, requiring reporting to the police pending removal. An order for removal, unlike a deportation order, does not prohibit re-entry.

3 Persons about to be removed are usually given notice of intended removal and will often be detained in one of the United Kingdom Border Agency's (UKBA – an acronym which includes e arlier titles by which that body was known) detention centres. Frequently, even though in many cases they have already exhausted appeal rights against adverse UKBA decisions they will attempt to prevent their removal by legal means, usually in the form of an application to the High Court for judicial review of the decision to deport. Arrangements for removal involve the making of airline reservations or the allocation of places on special charter flights. Escorts may have to be provided, particularly if persons to be removed may resist removal. Last minute applications, and if they are successful, High Court orders staying removal can cause disruption to all these arrangements and substantial extra costs to the taxpayer. The problems created by such applications were considered in the course of extensive consultations between UKBA and the Administrative Court, the branch of the High Court which deals with judicial review applications. The consultations resulted in an agreement in 1999 known as the Concordat, under which the UKBA agreed to defer enforced removal o an individual for three days in the event of a threat of judicial review so as to enable a court reference number to be obtained. If it was confirmed within 24 hours that judicial review proceedings had been initiated, removal directions would be cancelled.

4 The substance of the Concordat was revised following further discussions in 2007 by a document which set out the time periods for notice of removal. This document expressly acknowledged the need to ensure that persons subject to enforced removal had sufficient time between the notification of removal directions and the date of removal to seek legal advice and/or apply for judicial review. The policy set out in the 2007 document was that a minimum of 72 hours (including at least 2 working days) must be allowed between service of notice of removal and actual removal. Furthermore, the last 24 hours of the 72 hour period must include a working day. Two exceptions to the 72 hour requirement were to be permitted in the interests of persons concerned, being the first two exceptions listed in paragraph 5 below.

5 In 2007 there were major disturbances at the Campsfield House Immigration Removal Centre caused by detainees on whom notice of removal had been served and who incited other detainees to riot. This led to consideration of further exceptions to the 72 hour requirement in the case of persons whose record suggested that they might pose a risk of creating similar disturbances. The following is the list of what are referred to in the judgment as the 2010 exceptions:

- Medically documented cases of either potential suicide or risk of self harm.
- Removal of unaccompanied children in liaison with social services in the United Kingdom and the authorities of the receiving country.
- Where the Home Secretary believed that if the 72 hour requirement was insisted on there was a risk that the person to be removed might harm other detainees if notified of removal, e.g. if a parent were to threaten to harm his or her child.
- Where the Home Secretary considered that reduced notice was necessary to maintain order and discipline at a detention centre either because a person about to be removed had frustrated removal in the past or where there was evidence that he or she was planning action which would be detrimental to the good order and discipline of the centre.
- Where the person to be removed consented to a reduced notification period.

6 The judicial review application was brought not by an individual applicant but by Medical Justice, a charity which acts on behalf of asylum seekers and other immigration appellants. The main contention was that the 2010 exceptions abrogated the constitutional right of access to justice. The right is based on Magna Carta and on numerous decided cases which are quoted in paragraph 43 of the judgment. In support of this contention evidence was adduced to show the practical difficulties which detained persons wishing to contest removal notices had in obtaining legal representation to put their cases. It was often difficult to secure the services of immigration lawyers at short notice and there could be problems arising from the applicant's lack of English. The collapse of the charity Refugee and Migrant Justice, which hitherto provided legal representation to many people, has exacerbated the shortage of lawyers specialising in immigration. The nature of these difficulties was the subject of evidence given at the hearing and is investigated in considerable detail in the judgment.

7 I quote the conclusion on the main issue from paragraph 112 of the learned judge's judgment:

> ..[T]he 2010 exceptions, unlike the standard policy of a minimum 72 hour time frame, failed to include provisions ensuring that there was access to the courts by those against whom it is and would be invoked and there was no safeguard for those subject to the 2010 exceptions so as to ensure that their right of access to justice was preserved. There is no requirement ..... that those subject to the directions should have access to the courts or that removal will not take place if it was impossible for the person concerned to have access to a

> lawyer in the limited time available .....[T]his claim succeeds and the policy under challenge will have to be quashed.

8 The conclusion is adverse to the UKBA, but not so serious as some of the press reports have made out. The 72 hour requirement as set out in the 2007 document quoted in paragraph 4 above survives intact and will continue to cover most cases of persons detained who wish to challenge removal notices. The judgment in the case covers 34 pages of single spaced type and every aspect of the matter in hand has been covered in careful and exhaustive detail by a judge who obviously has considerable experience of immigration cases. Clearly the exceptions listed in paragraph 5 were settled after much experience of dealing with the more difficult removal cases and had considerable justification, but the judge concluded that the constitutional right of access to justice overrode all the difficulties. The judgment is obviously a setback for the efficient handling of removals of illegal immigrants and the Home Office has announced its intention of appealing against it.

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