High Court suspends Home Office's migrant removal policy

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Immigration analysis: Rakesh Singh, senior solicitor at the Public Law Project, explains why the Home Office's removal policy, which affects a very wide range of migrants, unquestionably breaches the constitutional right to access to justice.

Original news

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The High Court has, on 14 March 2019, suspended a Home Office policy which allows for migrants to be forcibly removed from the UK within hours of a case being refused. Suspension of the policy has been granted as interim relief and the full hearing will be in June or July 2019. The policy—part of the government's 'hostile environment' strategy—includes the use of 'removal windows' whereby three to seven days' notice is given to a migrant that they may be removed from the UK in the next three months.

What is the background to Medical Justice's challenge to this policy?

Medical Justice is an independent charity that facilitates the provision of independent medical advice, assessments and reports to immigration detainees. In 2010, it brought a challenge to the Home Office's 'zero-notice' removal policy, which was found to be unlawful on the grounds that it abrogated the constitutional right of access to the court (Public Law Project (PLP) were instructed to act for Medical Justice). In 2015—following a letter before claim sent by PLP on behalf of Medical Justice—the Home Office withdrew the removal policy that pre-dated the removal windows policy. Since then, Medical Justice and PLP have monitored whether the Home Office removal policy denies individuals access to justice.

What is the Home Office policy to forcibly remove unwanted migrants without warning, and how does it operate? Why did the Home Office introduce it, and how long has the policy been in place?

The rationale for the 'removal window' policy is to bring forward the point at which individuals inform the Home Office of any reasons why they wish to stay in the UK. So, they can be given a removal notice even if no arrangements are in place to remove them (removal directions).

Under the removal window policy, the Home Office can serve a removal notice window (RNW) on an individual, which informs them that they are liable to be removed from the UK. Once an individual is served with a RNW, they are then given a short period of between 72 hours and seven days to take a number of steps. These may include:

- finding a lawyer
- gathering evidence and putting forward any reasons they might wish to remain in the UK
- waiting for the Home Office to make a decision on that application
- if refused, then finding a lawyer who can challenge that refusal by applying for a judicial review
- if necessary, separately obtaining an injunction from the court against removal

After the notice period finishes, the individual can then be removed without any further warning during the next three months. If the individual is not removed, then the removal window can be extended by a further month or a new RNW can be served, giving a new notice period and another three-month removal window.

The policy was introduced in April 2015, following a letter before claim sent by Medical Justice against the previous policy (see above). Under the previous policy, after an initial 72-hour notice period expired, the Home Office could remove the person at any time thereafter without any time limit, meaning that it could be possible for individuals to be

removed without any further warning many months or even years later. The policy has been amended a number of times and the version of the policy under challenge was introduced in November 2018.

What are the legal issues with this policy for those being 'removed'?

The policy affects a very wide range of migrants. It applies to people who may have been in the UK for many years and may have British families (eg Windrush cases) or those who have only very recently arrived in the UK. It may apply to individuals who have previously exercised a right of appeal, but it can also apply to people who have not yet had a substantive consideration of their claim (eg on safe third country grounds) or have no in-country right of appeal or any right of appeal against an adverse decision (eg if a claim is 'certified' or in curtailment cases).

It is virtually impossible to complete all of the aforementioned steps that an individual is expected to take within the short notice period. But even if an individual has been in a position to submit an application, no such deadlines are imposed on the Home Office and it is a practical certainty that it will not be able to reach a decision during the notice period. Once in the removal window, it is Medical Justice's position that the policy unquestionably breaches the constitutional right to access to justice. The Home Office can serve decisions that are amenable to judicial review during the removal window and even on the very same day as removal, meaning that individuals and their lawyers are unable to access the court.

Under the policy, individuals have been removed from the UK without warning before they have had proper access to justice. PLP have acted for individuals who were unlawfully removed from the UK where the Home Office were ordered to bring them back and who were subsequently granted leave to remain in the UK. In the present challenge, the court also had numerous detailed examples of individuals with valid reasons to remain in the UK who either by luck or non-legal reasons had their removals aborted and who otherwise would have been removed without having had proper access to justice.

The Law Society, Immigration Law Practitioners' Association, Liberty and other civil society organisations have raised these same concerns with the Home Office about the policy and requested suspension of the policy and a consultation. The Home Office did not accede to this request.

What are the next steps for the judicial review of the policy and what do you expect the outcome to be?

The court has granted permission to proceed with the judicial review. The full hearing will take place in June or July 2019. It would be unwise to prejudge the outcome, but the evidence presented to the court at the interim relief hearing was sufficient to persuade it that the policy should be suspended because of the threat it appeared to pose to the right of access to the court. Medical Justice will ask the court to quash the policy as unlawfully abrogating the right of access to justice, just as it did in 2010.

Can a positive outcome have a retrospective effect on those affected by the policy?

Once a person is removed—particularly if they are being removed to a place where their safety is in danger—then it is highly unlikely that they would be in a position to enforce their rights. Such individuals will either be unaware that they were unlawfully removed, or they may never be heard of again. That is why Medical Justice and PLP argue that the policy is a serious threat to the rule of law.

Rakesh Singh has been a senior solicitor at the access to justice charity, the PLP since September 2013. He was formerly in private practice for many years, specialising in immigration, human rights and judicial review including challenges to Home Office policy. Singh has had the conduct of a number of notable cases, particularly in counter-terrorism law arising from proceedings in the Special Immigration Appeals Commission. At PLP, Singh has taken the lead on its work on Home Office removal policy and access to justice and regularly delivers training on judicial review to both lawyers and non-lawyers. Singh is instructed by Medical Justice in its challenge to the removal window policy.

Interviewed by Kate Beaumont.

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