



Neutral Citation Number: [2010] EWHC 1925 (Admin)

Case No: CO/4321/2010

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 July 2010

Before :

**THE HONOURABLE MR JUSTICE SILBER**

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Between:

**THE QUEEN (ON THE APPLICATION OF  
MEDICAL JUSTICE)**

**Claimant**

- and -

**THE SECRETARY OF STATE FOR THE  
HOME DEPARTMENT**

**Defendant**

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**Dinah Rose QC and Charlotte Kilroy (instructed by Public Law Project) for the Claimant**  
**Jonathan Swift QC and Joanne Clement (instructed by Treasury Solicitor) for the**  
**Defendant**

Hearing dates: 15 and 16 June 2010

Further written submissions and further evidence supplied from 7 June 2010 until 2 July 2010

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**Approved Judgment**

**Mr Justice Silber:**

**I. Introduction**

1. This application is a challenge to the lawfulness of the policy of the Secretary of State for the Home Department (“the Secretary of State”), which came into effect on 11 January 2010 and which is set out in a document entitled “Judicial Review and Injunctions” (“the 2010 policy document”). This policy gives individuals, who fall into certain specified categories and who have made unsuccessful claims to enter or to remain in the United Kingdom, little or perhaps no notice of their removal directions, which are the specific arrangements made for their removal from the United Kingdom. This new policy to a large extent constitutes an exception to its previous policy but it does repeat existing exceptions.
2. The claimant is a charity, which facilitates the provision of independent medical advice and representation to those detained in immigration removal centres as well as conducting research into issues affecting those in immigration detention.
3. The claimant contends that the policy in the 2010 document:-
  - (a) abrogates the constitutional right of access to justice without statutory authority and is therefore ultra vires;
  - (b) cannot rationally be justified;
  - (c) fails to pay due regard to the Secretary of State’s duties under the Race Relations Act 1971 (“RRA”) and the Disability Discrimination Act 1995 (“DDA”);
  - (d) violates article 5(4) and article 6 of the European Convention on Human Rights (“the ECHR”); and
  - (e) discriminates unfairly against those to whom it is applied contrary to article 14 of the ECHR when read together with articles 5, 6 and 8 of the ECHR.
4. Each of these allegations is strenuously denied. Permission to pursue this claim was granted by Judge Thornton QC, who was sitting as a deputy High Court Judge. He granted a protective costs order in favour of the claimants limiting the claimant’s liability for the defendant’s costs to £5000. By judgment dated 21 May 2010 ([2010] EWHC 1425 (Admin)), Cranston J granted interim relief preventing the defendant from relying on the policy under challenge until the determination of the present claim. He also amended the protective costs order to give reciprocal protection to the defendant.

**II. History of the Policy under Challenge**

5. The Secretary of State is charged by Parliament with maintaining immigration control: see sections 1(4) and 3(2) of the Immigration Act 1971 (“the 1971 Act”). She is therefore responsible for granting or refusing leave to remain in the United Kingdom for those who do not have the right of abode in this country in accordance with the Immigration Rules. It is an important aspect of maintaining immigration control that a credible enforcement process is in force and that those with no right to

remain in the United Kingdom are removed from the jurisdiction while not infringing the accepted rights of those about to be removed. Another important countervailing factor is the right of those about to be removed to challenge the removal directions because they infringe their rights under common law, under statute or under the ECHR.

6. This application relates to the way in which the Secretary of State performs those duties and in particular the policy in the 2010 document. Before dealing with that policy, it is appropriate to explain how this policy emerged because this is relevant to understand the policy under challenge and how the Secretary of State seeks to justify it.
7. From July 1999, the Immigration and Nationality Directorate (“IND”) adopted a policy following discussion with the Administrative Court which was known as “the Concordat” and which was designed to clarify the arrangements for responding to last-minute judicial review challenges to removal and thereby reducing the high number of injunctions being sought in such cases. Under the Concordat, the IND agreed to defer enforced removals of 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, the removal directions would then be cancelled.
8. There was a slightly different position in respect of charter flights because the removal directions would not always be suspended in the event of what were considered to be abusive and ill-conceived threats of legal proceedings which were being made only to prevent removal. In those circumstances, the claimant or his or her legal representatives were informed that they would need to obtain an injunction to prevent removal. The reason why charter flights were treated differently was because of the complexities, practicalities and costs of arranging such an operation.
9. By 2002, the permission stage in the Administrative Court was taking on average more than 6 weeks to resolve and IND was unable to hold an individual in detention for that period of time with the result that the individual would be released. Thereafter IND would be faced with the practical difficulties of trying to trace the individual concerned when they subsequently issued further removal directions. Rather than revising the Concordat, new legislation was then introduced for non-suspensive appeals under sections 94 and 96 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), which provided for certain cases to be certified which then precluded in-country appeals and the Administrative Court also agreed to expedite permission applications.
10. By 2005, there were concerns by IND that the judicial review process was being abused for the purpose of frustrating removal because in a significant number of cases, threats of judicial review had been made or a Court Office reference number had been obtained but the application for judicial review was not then pursued. Further, when judicial review proceedings were pursued, permission to proceed was given in an extremely small number of cases and an even fewer number of applications were successful at the subsequent substantive hearing, although in around 100 immigration and asylum cases a month IND withdrew the decision under challenge or conceded the claim. In consequence, according to IND, considerable public funds were wasted in incurring expenditure in respect of detention and escort

costs as well as of flight bookings for removals that did not take place. IND was concerned that it was later unable to trace individuals who had been released from detention as their removal was no longer imminent.

11. Discussions then took place between IND and the Administrative Court and then in May 2006, revised instructions were issued to IND staff confirming that removal directions should be notified to the person being removed in time for legal advice to be obtained and an Administrative Court Office reference number obtained. A draft of the instruction indicates that save in the case of certain charter flights or where prompt removal was in the best interest of the person concerned or refusal to enter at a port, the person concerned would be given at least 48 hours' notice (including at least one working day) between the time at which the person was notified of removal directions and the time when they were carried out.
12. In November 2006, IND announced a further change to the policy whereby removal would no longer be deferred upon threat of judicial review but would only be deferred upon receipt of an Administrative Court Office reference number and of the grounds of claim. The reason for this requirement was to stop the practice of suspending removal directions in response to threats of judicial review, which turned out to be unfulfilled so frustrating a removal. IND subsequently agreed with the Administrative Court Office that there would be a minimum period of 72 hours between the setting of removal direction and actual removal during which time an application for judicial review might be made with two working days being included in the 72 hours.
13. It was also a condition that applications for judicial review would need to be supported by written grounds of claim so that an Administrative Court Office reference number was obtained as proof that the claim had been instituted. Another feature was that IND included a short factual history summary of the history of the case with removal direction and that this would assist in the preparation of the claim for judicial review. The position was then that removal would proceed unless the Administrative Court Office number and grounds of claim were received before the 72 hour period elapsed or an injunction staying the removal directions was obtained. The short factual history recorded applications and decisions but not the reasons for them.
14. The matter was remitted to the Civil Procedure Rules Committee, which carried out a consultation exercise and produced a draft change to the procedural rules which became Practice Direction 54A CPR 54. The Committee was aware that this process would operate within a 72-hour time frame.
15. At about this time, work had begun within IND to prepare a new draft of Chapter 44 of the Operational Enforcement Manual in order to reflect some proposed changes by which the Secretary of State was seeking to reflect the need to ensure proper access to the court and the public interest in establishing a robust system of removal process while encouraging claimants to raise any change of circumstance at an early stage and to discourage late challenges to the removal directions.
16. Meetings took place between IND and the Immigration Law Practitioners Association ("ILPA") who made a number of criticisms of the approach of the Secretary of State relating to reducing the 72-hour notice period and the problems of access by the

person about to be removed to legal advice to factual details and to key documents. ILPA also criticised the exceptions for cases where there was a medically documented risk of suicide or self harm or those concerning the problems of unaccompanied minors. The revised policy was reflected in Chapter 44 of the Operational Enforcement Manual published on 1 March 2007 (“the 2007 document”) and took effect from 12 March 2007.

17. The right of access of those subject to removal directions was expressly states as being on of the aims of periods of notice in the 2007 document as it stated before giving the time periods for notice of removal “*We need to ensure that persons, subject to removal enforced removals have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]*”. This is the right which the claimant contends has been infringed by the introduction of the 2010 exceptions. The 2007 document specified that the standard position was that a minimum of 72 hours (including at least 2 working days) had to be allowed between notification of removal direction to the person being removed and the actual removal. The last 24 hours would have to include a working day. There were exceptional cases dealt with in Chapter 44.2.2 of the 2007 document; exceptions to the minimum of 72 hour notification period were to be permitted in the best interest of the person concerned “*due to medically documented cases of either potential suicide or risk of self harm and in [third country units] removal of unaccompanied children in liaison with social services and the receiving country*”. These exceptions also later formed part of the 2010 exceptions.
18. Two major disturbances occurred at Campsfield House Immigration Removal Centre in 2007, which caused damage and were triggered by detainees with prior notice of removal inciting others to riot. Consideration was then given to creating a further exception to the general rule of 72 hours notice in circumstances where the detainee or a family member, who was also detained, had a history of non-compliance with removal directions and there was strong evidence to suggest an attempt to remove that person with advanced notification posed a risk to the good order and discipline of the Immigration Removal Centre but which could not be managed effectively in another way. A Detention Services Order was drafted to reflect this policy in July 2008 but it was not published. This provoked fierce and powerful criticism from Sir George Newman (who was sitting as a Deputy High Court Judge) concerning the reliance by the Secretary of State on an unpublished authority in the case of **R (N) v Secretary of State for the Home Department** [2009] EWHC 873 Admin in which he ordered the Secretary of State to use her best endeavours to secure the return to this country of somebody removed under these unpublished directions.
19. By the end of 2008 and the beginning of 2009, IND was considering amendments to the enforcement instructions and guidance including (i) an exception for non-compliance and a level of serious disruptive behaviour as set out in the previous paragraph and (ii) a limited exception where prompt removal was in the best interests of another because there was the threat or a credible risk that the removee would seek to harm other detainees if notified of removal, such as a parent threatening to harm his or her child. These concerns were not communicated to the outside world and were not the subject of any consultation.
20. Changes were also suggested to the policy for third country and non-suspensive appeals whereby removal directions were still deferred for three days upon a threat of

judicial review to enable proceedings to be filed with the court and an Administrative Court Office reference number obtained. These cases were previously exempted from the policy in the 2007 document as according to IND, it wanted to be sure that the new 72 hour procedure was working well before applying it to cases where there was no in-country right of appeal. It had, however, become clear that only about half of the threatened judicial review claims had actually led to claims being instituted in cases where claimants were being removed to a third country. There was a significant cost to the public in cancelling removal directions with no benefit if judicial review claims were not then brought.

21. UKBA informed the Administrative Court of these changes by a letter dated 1 October 2007 from the Chief Executive of what is now the UKBA. This letter in so far as is relevant stated that the need to give 72 hours notice of removal was right and proper but that there were exceptional cases when the UKBA wished to vary the notification period. It was said that the circumstances in which the period of advanced notification of removal was to be reduced or withheld would be where there had been attempts to frustrate removal either during or immediately before removal took place and where there was a history of relevant non-compliance (such as an attempt to frustrate removal either during or immediately before removal was due to take place) where there was strong evidence to suggest that notification of removal would pose a risk to good order and discipline of the Immigration Removal Centre which could not be managed effectively. It was also stated that where notice of removal directions was reduced or withheld, UKBA would ensure that the legal representative of the claimant was notified of the removal direction no later than when the person due to be removed was notified.
22. Another point explained was that UKBA would not voluntarily suspend removal unless a judicial review application had been lodged with the court and an Administrative Court Office reference number obtained in all cases where claimants were being removed to third countries under the Dublin Regulations or where their claims had been certified as clearly unfounded.
23. On 15 December 2009, notification of the revised policy was sent to a range of specialist immigration bodies including ILPA. It was stated that UKBA continued to examine their policy in respect of judicial review challenges and that they were now introducing what Mr Clive Peckover, who is a Deputy Director of UKBA, described as:-  
  

*“a few small changes to make the policy clearer and to ensure that it was consistently applied across the UKBA”.*
24. The policy was then outlined and then ILPA objected to the proposals as did other significant bodies with knowledge of immigration practice, such as the Law Society. Nevertheless, the renewed full Equality Impact Act Assessment was completed on 4 January 2010 and the revised policy took effect from 11 January 2010. It is regrettable that no further consultation took place as this would have shown IND and UKBA the crucially important practical difficulties for those receiving abridged notice of obtaining access to justice before the removal directions took effect.
25. In so far as is relevant to the present application, the 2010 document contains section 2 which is entitled “Setting Removal Directions” and which sets out the standard

period of notice of removal directions (“the standard notice”). Section 3 which is entitled “*Where standard notification may not be required when setting removal directions*” (“the 2010 exceptions”) specifies the circumstances in which shorter periods of notice may be given. It is the provisions in that section when read together with the other documents, which is the target of the claimant’s present challenge. There are also relevant provisions to which I will refer shortly in section 4 which relates to “Handling Judicial Reviews” and in section 5 which is entitled “Threat of Judicial Review”.

26. In the 2010 document, the Secretary of State sets out the standard policy for setting removal directions and it provided that:-

- (a) “*When removal directions are served on the individual being removed, they should always be copied to legal representatives where the UK Border Agency has details of any representative actively involved in the case, or where a person asks that a specified representative be sent copies of papers served with removal directions*” (paragraph 2);
- (b) “*Removal directions should also be accompanied by a short factual summary of the case which should include a chronology of the case history, including details of whether any appeal rights were exercised and past applications for judicial review*” (Ibid);
- (c) “*A minimum of 72 hours (including at least 2 working days) must generally be allowed between informing a person of their removal directions and the removal itself. The last 24 hours of this period must include a working day. There are occasions where this will not apply. (see section 3 of this guidance) which you should consider before setting removal directions. People detained for removal should, where possible, be given access to telephone facilities to enable instruction of and ongoing contact with representatives*” (paragraph 2(1));
- (d) This period does not take account of Bank Holidays which must be added in as extra non-working days;
- (e) “*In the case of third country and NSA cases, a minimum of 5 working days notice should be given between setting of removal directions and removal*” (paragraph 2.3) (but that does not take account of Bank Holidays which must be added in as extra non-working days). “*There are instances where standard notification might not be required which would be considered before setting removal directions*” (paragraph 2.5); and that
- (f) “*All claimants being removed by charter flight (with special arrangements) will be given a minimum of 5 working days notice of removal so that they have the opportunity to take legal advice. The purpose of the extended period of notice of removal directions is to minimise the number of last minute applications for injunctive relief and to encourage claimants to inform the UK border agency at the earliest opportunity of any further representations they want to make. It may be necessary for security reasons to withhold the exact details of departure and/or the destination but in those cases claimants would still be given 5 working days notice of removal but*

*they would be informed that they will be removed “no sooner than five working days” from the date when removal directions are issued” (paragraph 2.3).*

27. With effect from 11 January 2010, it was provided in section 3 of the 2010 document that where the 2010 exception applies, “*you do not need to provide standard notification*” when setting removal directions and in those cases (which are described in paragraph 30 below), the instructions state that:-

*“Where an exception is applied you must ensure that you apply certain safeguards:-*

*(i) You must let the legal representatives know by fax as soon as the removee is told and where possible bring the matter to the attention of the legal representatives.*

*(ii) If asked, you must allow the individual to speak to their legal representatives. This may involve providing the removee with a mobile phone.*

*(iii) Where possible, you must schedule the removal for a working day, during office hours.*

*(iv) Where you provide the removee with less than standard notification of removal, you should nonetheless provide as much notice as possible.*

*(v) The application of an exception should where possible only delay service of the removal directions. If possible it should not delay service of a decision to refuse any immigration application or further submission.*

*(vi) You must obtain written authority at Deputy Director level before applying any of these exceptions (other than in Port cases) and send details to the Litigation Management Unit. Where removees are held within an Immigration Removals Centre you should obtain an authority from a Deputy Director from within detention services”.*

28. The 2010 exception also contained a provision on which the Secretary of State places great reliance as showing that those subject to the 2010 exception would and did have access to justice. This provision, which I will call “the access provision”, states that: -

*“This list of safeguards is not definitive, it may be appropriate to build in other safeguards on a case by case basis to ensure that removees have effective access to the courts”.*

29. It is necessary to explain the difference brought in by the 2010 changes and they have been set out by counsel in a helpful table in which the paragraph numbers relate to the 2007 or the 2010 document is set out below: -

<b>From 11 January 2010 (i.e. present policy)</b>	<b>Before 11 January 2010, and with effect from 12 March 2007</b>
<i>Standard notification of removal directions</i>	
<p><u>Enforcement cases</u></p> <p>72 hours minimum between (a) notification of removal directions; and (b) removal. Including at least 2 working days; last 24 hours to include a working day [§2.1]</p>	<p><u>Enforcement cases</u></p> <p>72 hours minimum between (a) notification of removal directions; and (b) removal. Including at least 2 working days; last 24 hours to include a working day[§60.4]</p>
<p><u>Third Country (“TCU”) and NSA cases</u></p> <p>5 working days minimum notice between (a) setting of removal directions; and (b) removal. [§2.3]</p>	<p><u>Third Country and NSA cases</u></p> <p>3 working days minimum between (a) serving certification decision; and (b) removal. [§60.5]</p>
<i>Exceptional cases, notification of removal directions</i>	
<p><u>Categories of exceptional case</u></p> <ul style="list-style-type: none"> <li>• Where service of removal directions will create a risk of suicide or self harm and that risk is medically document [§.1.1]</li> <li>• Best interests of unaccompanied children due to an abscond risk. [§3.1.2]</li> <li>• Best interests of another because threat or credible risk of harm to other detained persons [§3.1.3]</li> <li>• Necessary to maintain order at removal centre. [§3.1.4]</li> <li>• Consent. [§3.1.5]</li> <li>• Port cases [§3.1.6]</li> </ul>	<p><u>Categories of exceptional case</u></p> <p>(1) Where prompt removal is in the best interests of the person concerned due to:</p> <ul style="list-style-type: none"> <li>• Medically documented cases of potential suicide or risk of self-harm [§60.6]</li> <li>• Third Country cases involving unaccompanied children [§60.6] (Suspended for third country cases from March 2010 following the granting of permission in <i>R (AM/BT) v Secretary of State for the Home Department</i>, pending the outcome of a review of the removal of unaccompanied minors under the Dublin II Regulation. Suspended in all other cases from April 2010).</li> </ul> <p>(2) Port cases [§60.6]</p>
<b>From 11 January 2010 (i.e. present policy)</b>	<b>From 11 January 2010</b>
<p>In exceptional cases, notifications may be given in accordance with §3.1 and may be less than 72 hours</p>	<p>In exceptional cases, less than 72 hours notification may be given</p>

<i>When removal will/may be suspended following service of removal directions</i>	
If judicial review proceedings are commenced and issued, and Claim Form and Detailed Grounds received by UKBA, UKBA <u>will</u> defer [§4.1 (1)] unless the exceptions at section 7 apply.	If judicial review proceedings are commenced and issued, and Claim Form and Detailed Grounds received by UKBA, UKBA <u>will</u> defer [§60.8] subject to certain exceptions.
If judicial review proceedings are commenced and issued which do not comply with section II of Practice Direction 54A (e.g. Detailed Grounds are not provided) and the claimant has provided a statements of reasons for non-compliance, UKBA <u>will</u> defer removal if (a) the court decides that good reason has been provided for failure to comply; (b) permission to proceed to judicial review is granted, or (c) the court has not yet considered the matter by the time/date of removal.	If judicial review proceedings are commenced and issued which do not comply with Section II of Practice Direction 54A (e.g. Detailed Grounds are not provided) and the claimant has provided a statements of reasons for non-compliance, UKBA <u>will</u> defer removal if the court has not yet reached a decision on whether good reasons has been provided for failure to comply.
If Administrative Court Office closed, UKBA <u>may</u> defer where a copy of Detailed Grounds is provided to UKBA [§4.1 (3)].	If Administrative Court office closed, UKBA <u>may</u> defer where a copy of Detailed Grounds is provided to UKBA and the person undertakes to lodge them with the court at the earliest opportunity [§60.7].
<u>In a Section 3 Case, if it is also a TCU or NSA case</u>  UKBA should <u>normally</u> defer removal on threat of judicial review proceedings “if there has been no reasonable opportunity to obtain a Crown Office reference number” [§5].	<u>In TCU or NSA cases</u>  UKBA <u>will</u> defer removal for 3 working day son threat of judicial review made orally or in writing by a person due to be removed or their legal representative [§60.7.1].

30. The cases in respect of which the 2010 exceptions apply are:-

- (a) certain medically documented cases where “*service of removal directions will create a risk of suicide or self-harm and that risk is medically documented*” (paragraph 3.1.1). This exception has been in place since March 2007 pursuant to the 2007 document;
- (b) “*where the enforcement officer believes that it is not in the best interests of unaccompanied children because of an abscond risk, this must be considered in liaison with Children’s Services and the receiving country*” (paragraph 3.1.2). Prior to January 2010, this had applied since March 2007

only to third country removals namely removals within the European Union under the Dublin Regulation The Secretary of State is no longer invoking this exception pending the outcome of a review as I will explain in paragraph 123 below;

- (c) where the Secretary of State believes that standard notification is not in the best interests of another because there is a threat or credible risk that the person about to be removed would seek to harm other detainees if notified of removal (such as a parent threatening to harm his or her child) which could not be managed in any other way;
- (d) where the Secretary of State considers reduced notice is necessary to maintain order and discipline at a detention centre either because an individual has frustrated removal in the past or because there is evidence that they are planning actions which seriously threaten the good order and discipline of the detention centre. There are limitations on where that exception can be applied as I will explain; and
- (e) where the removee consented in writing to reduced notification.

### **III. The Issues and Preliminary Points**

31. The issues that have to be considered on this application are whether the 2010 exceptions policy:-
- (a) abrogates the constitutional right of access to justice without statutory authority and is therefore ultra vires (“The Access to Justice Challenge”) (see paragraphs 43 to 113 below);
  - (b) cannot rationally be justified (“The Rationality Challenge”) (see paragraphs 113 to 150 below);
  - (c) fails to pay due regard to the Home Office’s duties under the RRA and the DDA (“The Discrimination Challenge”) (see paragraphs 151 to 168 below); and
  - (d) violates articles 5(4) and (6) of the ECHR and discriminates unlawfully against those to whom it is applied contrary to article 14 of the ECHR when considered together with articles 5, 6 and 8 of the ECHR (“The article 14 Challenge”) (see paragraphs 169 and 170 below).
32. There are five important preliminary matters which I must now consider. First, although Miss Dinah Rose QC, counsel for the claimant, does not accept that the standard policy is lawful, she has not made any submissions to show that it is unlawful. Mr Jonathan Swift QC, counsel for the Secretary of State, submits that in those circumstances, I should determine this application on the basis that it is accepted by the claimant that the standard policy is lawful. I am unable to accept that submission, which is not surprisingly not supported by any authority, because there is no presumption that if a claimant does not dispute that a particular previous policy or that other parts of a particular policy are valid but only challenges the exceptions to that policy, the claimant thereby accepts that the unchallenged parts are valid. After

all, a party need only challenge policies which affect them and need not seek to quash those policies which do not immediately concern them without thereby being deemed to accept the validity of the unchallenged parts of it. The standard policy has its origins in the 2007 document which, as I explained in paragraph 17 above has as its express purpose and aim the “*need to ensure that persons, subject to removal enforced removals have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]*”. The 2010 exception do not have that express aim or purpose.

33. Second, this application is a challenge to a policy rather than a claim by a particular individual claimant, who has been adversely affected by the policy under challenge. This raises the issue of the nature of the threshold that has to be reached before the claimant can succeed on the present application. A similar issue was raised in **R (Refugee Law Centre) v Secretary of State for the Home Department** [2005] 1 WLR 2219, when a challenge was made to a scheme for the fast-track adjudication of asylum applications established at removal centres. In that case, the Court of Appeal had to ascertain a test for determining the legality and fairness of the scheme which compressed the decision-making process into three days. Sedley LJ giving the judgment of the Court of Appeal explained the difficulty of seeking to construct a “*typical*” case for determining the fairness of the scheme and he then stated (with my emphasis added) that:-

*“6...A more appropriate question, in our view, is the one posed by [counsel] for the Home Secretary: does the system provide a fair opportunity to asylum seekers to put their case? This avoids the arbitrariness inherent in [counsel for the claimant]’s alternative approach of seeking to construct a ‘typical’ case. It embraces, correctly, the full range of cases which may find themselves on the Harmondsworth fast track. There will in our judgment be something justiciably wrong with a system which places asylum seekers at the point of entry - that is to say, when no more is known of each one than that he is an adult male asylum-seeker from a country on a departmental ‘white list’ - at unacceptable risk of being processed unfairly. This, therefore, is the question which we propose to address.*

*7. 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. In other words it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects. This is why the intrinsic fairness of the fast-track system at Oakington was dealt with by this court as a discrete issue in R*

*(L) v Secretary of State for the Home Department [2003] 1 WLR 1230, paras 48-51*".

I will apply that approach which is not disputed by either party.

34. Third, the unacceptable minimum risk of unfairness referred to in that case does not mean that a policy would only be unlawful if it would *necessarily* give rise to interference without the right of access to justice or that it would be impossible to operate such policy with causing such interference. The "*proven risk of injustice*" must depend on the consequences, which in this case would include the consequence of the person concerned receiving less than the standard notice of his or her removal and so being unable to have access to justice thereby risking an infringement with his or her human rights (whether under the ECHR, the Refugee Convention or under common law) in circumstances, especially where once removed, it would be too late and impractical to obtain redress because he or she would be abroad with all the problems of instructing lawyers and obtaining legal assistance.
35. Miss Rose seeks to derive assistance from the approach of the Judicial Committee in the case of **Fernandez v Government of Singapore** [1971] 1 WLR 987 where it was necessary to determine the degree of risk that had to be shown by a person about to be extradited that "*he might, if returned, be prejudiced at his trial, detained or restricted in his personal liberty on grounds of race or political opinions*". Lord Diplock, (with whom the other members of the Board agreed) stated the position at common law or under statute in respect of the risk of irreparable harm was that:-
- (a) "*It should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by [the statutory provision] on the one hand of permitting, and on the other of refusing, the return of the fugitive if the court's expectation should be wrong*" (994D) and
- (b) "*...bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or the other, I do not think that the test of the applicability of [the statutory provision] is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel [with the test of] 'a reasonable chance' 'subsequently grounds for thinking', 'a serious possibility' – I see no significant difference between these ways of describing the likelihood*" (994 G-H).
36. In the present case, the focus is on the right of access to justice rather than the consequence of removal but these statements from the **Refugee Law Centre** and **Fernandez** cases show that the 2010 exceptions should be declared unlawful if there is an unacceptable risk or "*a serious possibility*" that the right of access to justice of those subject to them will be or is curtailed.
37. The fourth issue to be considered is how the risk is to be proven. It is suggested on behalf of the Secretary of State that this can only be established by actual proof of

breaches of the right in question. As was explained in the **Refugee Legal Centre** case, it is possible for there to be:-

*“7...judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inherent in the system itself”.*

38. This indicates that a challenge can be brought before the policy has actually been applied and indeed this is consistent with the approach of the courts to grant *quia timet* injunctions to prevent anticipated wrongs. After all, the courts are obliged to ensure that there will be no interference with basic rights and they will therefore quash a policy which would lead to such a position even before it has occurred.
39. In this case, the court is obliged to interpret and assess the policy in the light of all the prevailing circumstances as well as any available actual evidence as to its likely or actual consequences. That entails analysing closely all aspects of the policy including any accompanying guidance or instructions provided to those whose task it is to implement the policy, which would include officials and employees of UKBA and private contractors. The unlawfulness of a policy can be shown in a number of different ways such as if the policy or guidance itself envisages or recommends conduct which would be in breach of the right of those subject to it to enjoy access to justice because then the policy would be clearly unlawful. By the same token, applying the approach in **Fernandez** if there is a “*reasonable chance*”, “*substantial grounds for thinking*” or “*serious possibility*” that the policy, if executed in accordance with its terms, would give rise to such breaches of the right of access to justice, then again it would be unlawful. As I will explain, there is inevitability or at least a high probability that this right will be infringed in many cases when the 2010 exceptions are relied on because of the limited number of lawyers who would be able to advise in the limited time available and the absence of any provision requiring the suspension of removal directions when the person subject to the removal directions has failed to obtain legal advice in the time available despite using all reasonable or their best efforts.
40. In carrying out that exercise, a court has to take into account the safeguards contained in the policy and in any guidance issued in order to ensure that there is no serious possibility or significant risk that such breaches would occur. This exercise cannot be considered in the abstract. It is necessary to consider when the 2010 exception is applied, and this entails considering first the circumstance in which a person subject to removal might realistically wish to challenge the removal directions, second how a person served with removal directions under the 2010 exception could and can obtain access to justice and third whether the safeguards in the 2010 exceptions are adequate to ensure that the right to access to justice is not infringed.
41. It is unnecessary for the claimants to show that by applying the 2010 exceptions, the right of access to justice has *actually* been infringed but in so far as there are cases where this has occurred, the task for the Secretary of State might then become the more difficult one of showing that there is no serious possibility or an unacceptable risk of infringement of the right of access to justice. A more potent form of evidence would be if the Secretary of State could establish by cogent evidence that the 2010 exceptions have been operated in a way in which it has not interfered with the right of access to justice. Indeed that is precisely what happened in the **Refugee Law Centre**

case (see paragraphs 11, 12, 21 and 25) but, although the Secretary of State could have collected and provided information to show that the right of access to justice had not been infringed because those subject to the 2010 exceptions had actually had access to justice, she has not done so as I will explain in greater detail in paragraphs 105 and 106 below.

42. Finally and very importantly, it must be stressed that the access to justice challenge only relates to the 2010 exceptions and not to the standard policy of giving 72 hours notice as there are major differences between the two regimes. First, the standard policy of giving 72 hours notice was based as Ms Lin Homer, the Chief Executive of UKBA explained in a letter of 1 March 2007 in relation to the 72-hour time frame, that “*in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities*”. Thus, the 72 period was considered to be the “*minimum time frame*” to preserve the right of access to justice and it was presumed that this would safeguard the right of those served with removal directions to have access to justice. Second no cogent evidence has been adduced to show the abridged periods permitted under the 2010 exceptions, which can be a few hours, can achieve the same purpose. Third the evidence adduced in the present case does not relate to the 72 hour regime. So nothing in this judgment must be regarded as impugning the 72 hour regime.

#### **IV. The Access to Justice Challenge**

##### *(i) Introduction*

43. It is not disputed that a citizen’s right to access to justice is an important constitutional right and that the 2010 exceptions have to be considered in the light of this right. It is settled law that: -
- (a) “*it is a principle of law that every citizen has a right of unimpeded access to a court*” per Steyn LJ giving the judgment of the Court of Appeal in **R v Secretary of State for the Home Department, Ex parte Leech** [1994] QB 198, 210;
  - (b) rules which did not comply with that principle would be ultra vires (ibid) citing Lord Wilberforce in **Raymond v Honey** [1983 1 AC.1, 13]; and that
  - (c) “*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*” per Lord Steyn with whom Lords Hoffman, Millett and Scott of Foscote agreed in **R (Anufrijeva) v Secretary of State for the Home Department** [2004] 1 AC 604 at 621[26].
44. Miss Rose submits that the constitutional right of access to justice comprises, as Lord Bingham explained, “*three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court, the right of access to a legal adviser under the seal of legal professional privilege*” (**R (Daly) v Secretary of State for Home Department** [2001] 2 AC 532, 537-538 [5]) and, in that

case, Lord Cooke said of those rights that they were “*inherent and fundamental to democratic society*”[38]. The claimant’s case is that the right of access to a lawyer would not be satisfied if the lawyer could not be provided with all the material needed to give proper advice. I agree because, as Lord Hope of Craighead said in **R v Shayler** [2003] 1 AC 247, 283 “73 ...*Access to legal advice is one of the fundamental rights enjoyed by every citizen under the common law*”.

45. Mr Swift disputes these submissions because he points out that **Daly** is concerned with a prisoner’s right to legal advice in the context of the right to search a prisoner’s property which included correspondence with legal advisors. That is correct but a person subject to removal directions has, in Lord Steyn’s words in **Anufrijeva** quoted in paragraph 43 (c) above, to be “*in a position to challenge the decision in the courts*” and that means a genuine opportunity. The importance of having this opportunity was expressly recognised by the Secretary of State in the 2007 policy document, which stated, as I have explained that “*we need to ensure that persons, subject to removal enforced removals have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]*”. Further, as I will explain in paragraph 63 below, the Chief Executive of UKBA stated in respect of the minimum 72-hour time frame that this required UKBA “*to balance the need to ensure proper access to court with the public interest in establishing a robust removal process*”. The correct recognition in those passages of the need for somebody served with removal directions “*proper access to justice*” as well as to “*have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply [to court]*” means that it must be necessary for someone served with any removal directions, which must include those served with abridged notice under the 2010 exceptions and who so wishes to have sufficient time between service of the removal directions and the time fixed for removal to find and instruct a lawyer who:-

- (i) is *ready* to provide legal advice in the limited time available prior to removal, which might also entail ensuring that the provider of the advice would be paid;
- (ii) is *willing and able* to provide legal advice under the seal of professional privilege in the limited time available prior to 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.

(ii) *The issues*

46. The claimant’s case is that the decision to issue directions for removal is a decision likely to give rise to complex legal challenges but that the safeguards put forward in the 2010 exceptions will not ensure adequate access to justice by those subject to it, especially in the light of the evidence which shows the insuperable difficulties for such people served with shortened notice of removal pursuant to the 2010 exceptions in obtaining legal advice in the time available so as to be able to challenge the removal directions.

47. Miss Rose explains that there are a number of reasons why removal directions can be challenged but there are at least five reasons why insuperable difficulties arise in doing so in very many (if not all) of the cases in which the 2010 exceptions are used. First, she says that there are a declining number of immigration law specialists available and they are all heavily over-stretched with work. The number of these specialists has been further reduced by the fact that the leading provider, Refugee and Migrant Justice (“RMJ”) went into administration in June 2010 and no longer functions. In the year to 31 March 2010, RMJ acted in 11,000 cases and has offices around the country. Accordingly there is evidence from Sheona York, who is the Principal Legal Officer of the Immigration Advisory Service (“IAS”) that RMJ and IAS provided about one-third of all publicly-funded immigration and asylum advice in the UK. Second, Miss Rose says that even if the person served with removal directions under the 2010 exceptions has had a lawyer acting for him or her, he or she might find the lawyer has difficulty in obtaining the necessary papers in the limited time available under the 2010 exceptions between service of the removal directions and their implementation. Third, she says that if a lawyer is found, he or she would have difficulties in contacting the lawyer in time to advise. Fourth, Miss Rose explains that to obtain a stay of removal directions, there are difficulties for the lawyers in ensuring that legal assistance is available to cover the cost of legal fees and fifth she points out that drafting the necessary applications is a time-consuming process and with abridged notice, this would not be possible when the 2010 exceptions are invoked. In other words, Miss Rose contends that the right of access to justice is, and will extremely frequently be, infringed when the 2010 exceptions are invoked as there are no adequate safeguards.
48. In response, the Secretary of State contends first, correctly, that there is no principle of common law that leads to the conclusion that giving a person about to be removed less than 72 hours notice leads automatically to a breach of his or her right of access to a court and, second, that the 2010 exceptions do not entail denial of access to a court in accordance with the requirements of common law. Emphasis is placed by Mr Swift on the facts first that the specific instructions are that in all cases “*as much notice as possible*” is to be provided and second that in all cases the access provision (which I quoted in paragraph 28 above) ensures that other steps should be taken so that “*removees have effective access to the courts*”, especially bearing in mind the well-established procedures by which the courts can hear urgent cases if and when they arise. Furthermore, Mr Swift explains that by the time the removal directions are served, the person’s substantive claim for permission to remain in the United Kingdom (including any appeals or judicial review claims arising) will have already been considered and dismissed with the result that the appeal rights of the person subject to removal directions will have been exhausted. The case studies relied on by the claimant do not, according to Mr Swift, support the claimant’s complaints.
49. The issues that have to be considered are:-
- (i) the circumstances in which a person subject to removal under the 2010 exceptions might wish to challenge the removal directions and so invoke the right of access to justice (see paragraphs 50 to 59 below);
  - (ii) how easy or possible is it for a person served with removal directions covered pursuant to the 2010 exceptions to obtain access to justice and how easily is access

available or possible in cases (see paragraphs 60 to 80 below);

(iii) whether the safeguards in the 2010 exceptions are adequate to ensure the right to access to justice of those subject to it is preserved (see paragraphs 81 to 104 below); and

(iv) the practical operation of the policy of giving reduced periods of notice (see paragraphs 105 to 111).

*(iii) The circumstances in respect of which removal directions may be amenable to judicial review*

50. The Secretary of State originally contended in a witness statement made by Mr Peckover that when removal directions are served, the only way in which the removal directions are “ordinarily” likely to be amenable to judicial review will relate first to issues relating to the safety of the route of return and second to decisions to remove being made notwithstanding there was then still an outstanding claim on the basis that he has made further representations that amount to a “fresh claim” under paragraph 353 of the Immigration Rules. I am unable to accept that because it seems clear that a decision to serve removal directions under the 2010 exceptions could and is likely to lead to at least four different types of claim, which arise in existing challenges to removal directions, as I will now explain.

51. The first category would comprise decisions to reject further representations and at the same time imposing removal directions taking effect very soon thereafter and this practice was the subject of criticism by Collins J in **R (Collaku) v Secretary of State for the Home Department** [2005] EWHC Admin 2855 when he was giving judgment in a case in which further representations had been made in May 2004 which were rejected on 22 May 2005 when the claimant was also told that he was to be removed on the following day. He explained that:-

*“14. The Home Office practice involving delay in deciding a claim but then of arresting and serving the refusal at one and the same time with a view to removal within a day or two, often at weekends and frequently early in the morning, is one that is to be deplored this court has deplored it on many occasions. It leads to unnecessary applications to the duty judge. It has the effect of preventing those who are to be removed from seeking proper legal advice to which they may be entitled and, even if the Home Office takes the view that there is no conceivable merit to be both found in any possible challenge, this is not the way to go about it. A reasonable time must be provided to enable representations to be made, if any are to be made, certainly to enable advice to be sought if the person to be removed wishes to obtain it. Quite apart from anything else, the approach to the duty judge will almost inevitably result in an order preventing the removal until the matter can be sorted out, either the following day or the next working day, when an application can be put before the Administrative Court. The*

*result is that the flight ticket has to be given up -- it is often more than one ticket because frequently an official will accompany the person to be removed -- so public money is inevitably wasted."*

52. Munby J agreed with these comments in the subsequent case of **R (Karas) v Secretary of State for the Home Department** [2006] EWHC 747 when the claimants had had made representations that they had "*fresh claims*" in 2001, 2003 and March 2004 but on 10 October 2004, the Secretary of State gave instructions to an airline that the claimants were to be removed at 7.40 am on 12 October 2004. The claimants were not informed until 8.30 pm on 11 October 2004 when they were arrested but fortunately, they were able to prevent removal. Both of these cases show a very disturbing practice before the 2010 document was issued but regrettably the practice has not ceased. In my experience, it was not uncommon for refusal letters to be served at almost the same time as removal directions when the standard directions were given but I am unsure if this was also the position when the 2010 exceptions are invoked.
53. In a witness statement from Mr Peckover made after the hearing he said that the service of any outstanding immigration decision will be delayed so as to coincide with service of removal directions where "*there is an exceptional reason*" which justified that approach but he did not say what that meant or when it would be appropriate to act in this way.
54. Second, removal directions may be subject to a challenge because, even though there may not have been any outstanding representation when removal directions were served and the statutory process has been concluded, removal directions will nevertheless still engage an individual's rights under the ECHR or under the Refugee Convention 1951. This situation may arise in many instances, such as because:-
- (a) very extensive delays occur in very many cases between the conclusion of the statutory appeal process and the service of removal directions. Indeed, these delays can and often do span a number of years and the consequence has been explained carefully by Stephen Symonds, the Legal Officer for ILPA, who states that these delays can lead to a change of circumstances of the person about to be removed in his or her country of origin and that might lead to the article 2 and article 3 rights of the person about to be removed being at risk of being infringed if the removal directions are complied with;
  - (b) the personal circumstances of the individual concerned may have altered in the United Kingdom in the light of the extensive delay between the conclusion of the appeal process and the service of removal directions. The appellate courts have emphasised in recent years the growing significance of personal relationships as constituting a ground for preventing removal because of article 8 rights especially where children of the person to be removed would be adversely affected by the removal of a parent. There are also areas where the law has changed recently such as protection has recently been given to members of the gay community who face persecution in the place to which they are to be removed (see **HK (Iran) v Secretary of State** and **HT (Cameroon) v Secretary of State** [2010] UKSC 31);

- (c) the arguments against removal may not have been put forward earlier in the appeal process because many failed asylum seekers and others subject to removal will have received inadequate or no representation during the course of their initial application and the appeals process. By the same token, others will have had difficulty in obtaining publicly-funded representation at all and in consequence important information has not been obtained. In my work, I have to read many decisions of immigration judges and it is striking how increasingly frequently claimants are not represented. Mr Stephen Symonds the Legal Officer of ILPA explains the difficulties of those subject to removal in obtaining access to publicly-funded legal advice and representation while Joanna Swaney the supervising solicitor at RMJ, which is now in administration, explains that her experience of providing legal advice to those subject to removal directions and those of other solicitors in her team is that they are frequently called on to represent people whose cases had been inadequately prepared and presented to the Immigration Judge or where further evidence has come to light, which undermines findings made against that person by the Secretary of State or by the Immigration Judge; and
- (d) many of those subject to removal might well have had their claims fast-tracked and the difficulties of properly representing people subject to fast-track decisions in the appeals process is greatly increased. Indeed fast-tracking means as with all expedited hearings that there is inevitably an increased risk that important points might well have been missed and significant evidence might not have been adduced.
55. The third area in which those subject to removal directions might have grounds for challenging them is in relation to certification decisions under sections 94 and 96 of the 2002 Act or under Part 2 of Schedule 3 to the Asylum (Treatment of Claimants etc) Act 2004. The effect of certification is to remove an in-country right of appeal (see section 94 of the 2002 Act) or to remove the right to any decision on the claim at all under the Dublin Regulations. In these cases, the only remedy available to the person who receives such a certificate is to seek to challenge it by means of judicial review because there would have been no previous opportunity to obtain access to a court regarding an individual's asylum or human rights claim. It is for that reason that until January 2010, threats of judicial review were sufficient to lead to a deferral of removal directions in non-suspensive appeal or third country cases but not in ordinary cases.
56. The claimant contends that the Secretary of State frequently serves a certification decision at the same time as removal directions as was shown by the example given by claimant's solicitor, Ms Sonal Ghelani, of **R (FF, EQ, and AO) v Secretary of State** (CO/4358/09), which concerned a family from Ecuador who were served with decisions to certify their claims and they were told that they would be removed on the same day but in their case, the removal was fortuitously stayed as a result of the claim being issued. Mr Peckover has said in a witness statement made after the oral hearing, that this will only occur in exceptional cases but as I have explained he did not say what that meant or when it was considered that it would be appropriate to exercise this power.
57. A fourth area where there might well be challenges to removal directions are where they would entail using a particular route. In my experience, this is an important issue

in countries where there are different warring factions in control of different parts of a particular country and this is or has been the position prevailing at different times in Sri Lanka, Iraq, Somalia, the Democratic Republic of Congo and Sudan. In those countries, the safety of a particular route may be critical to the lawfulness of the removal directions. The appropriate way of challenging the safety of a route of return is, as a result of the decision of the Court of Appeal in **GH v Secretary of State** [2005] EWCA Civ 1182, not in the substantive appeal but by way of judicial review proceedings when the removal directions are given. For such a challenge, up-to-date evidence would be needed on the safety of a particular route and this often necessitates instructing an expert to produce a report. It is, as I will explain, almost impossible to do this if the 2010 exceptions are used to abridge the time between giving removal directions and implementing them.

58. It must not be forgotten that the doctrine of internal relocation means that the Tribunals and the Immigration Judges might well have found that while an individual may be at risk on return to one part of his or her country, he or she could safely relocate to another part of that country. Consideration of the background information about an individual's asylum claim and appeal is therefore essential to establish whether a route of return alters the assessment of risk and sometimes further expert evidence may be necessary to bring matters up to date.
59. There are therefore many potential challenges to removal directions, and in my experience and those of my colleagues, they are all regularly invoked successfully to obtain a stay for standard removal directions. The importance of these challenges is very significant as removing somebody is a life-changing decision and to advise on and to make such a challenge requires knowledge by the adviser to the person served with the removal directions of first all the relevant details of that person's immigration history and second of all information on why that person should not be removed which might relate to his personal life or to conditions in the country to which he or she might be returned. I will return in paragraphs 65ff to consider the difficulties for a lawyer who needs to obtain this information in order to advise when the 2010 exceptions are invoked. In addition in paragraphs 108 and 109, I will give details of cases in which abridged periods of notice were given but stays were and should have been granted.

*(iv) The difficulty of obtaining legal representation if the 2010 exceptions are applied*

60. I have already explained that to have access to justice, the person subject to removal (*other than those who wish to be removed and have consented in writing*) need in the limited time available prior to removal to have a genuine opportunity to find a legal adviser who is *ready, willing and able* to provide legal advice and who (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. Otherwise he or she would not have access to justice and. I have already explained in paragraph 45 how this genuine opportunity was something which the Secretary of State explained in the 2007 policy document that the United Kingdom Border Agency needed to ensure.
61. Miss Rose contends that this genuine opportunity is not afforded to those served under the 2010 exceptions and the position has to be considered against the background that in many cases, those about to be removed first speak no or very little

English, second are likely to be heavily stressed at the prospect of being removed against their will and third do not wish to return to the country and place referred to in their removal directions. It is important to understand what the person subject to removal has to do in order in an appropriate case to obtain a stay of the removal directions.

62. Before access to the courts can be achieved, the person subject to removal directions will need first to consult a lawyer, second to provide the lawyer with all the necessary information, third for there to be sufficient time in an appropriate case for the lawyer to be sufficiently aware of the details of the case so as to be able to make an application in court and finally to be able to make the application in the time available. These processes cannot be short-circuited and they usually inevitably take substantial periods of time. Not surprisingly, the 72-hour procedure referred to in the standard directions has been described by Ms Lin Homer the Chief Executive of UKBA as “*quite tight*” in a letter of 26 January 2007. Miss Rose submits that the 2010 exceptions, which reduced the 72-hour period, have to be considered in the light of this statement and the fact that there are now far fewer immigration lawyers available than when Ms Homer made that statement.
63. Ms Homer also explained in a letter dated 1 March 2007 that in relation to the minimum 72-hour time frame between notification of removal directions and removal which came into effect in 2007 that:-

*“in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities”.*

64. Mr David Stobbs, the Law Society’s Director of Legal Policy, has made a witness statement on behalf of the Law Society in which he explained that in the opinion of the Law Society “[*the 2010 exceptions*] will seriously inhibit a person’s access to justice by removing their ability to contact a legal representative, thus inhibiting their right to resort to appropriate judicial remedies”. This statement is strongly supportive of the claimant’s case as showing that in cases in which the 2010 exceptions are invoked, the rights of those served with removal directions will be seriously impaired. The Law Society was also deeply concerned about the lack of consultation by the Secretary of State for Home Department on what he says “*can only be described as significant changes to the existing policy*”.
65. Mr Stobbs sets out the reasons for the Law Society’s concerns which are that:-
- (a) Changes to the legal aid system introduced by the Legal Services Commission since the advent of contracting in 2000 have led to a significant decline in the number of lawyers available to give advice. He explains that the most recent Legal Services Commission (“LSC”) Civil Contracting Report dated April 2010 shows that in 2001/2002, there were 458 solicitors who were immigration and asylum legal aid contract holders but by 2009/2010 that number had reduced to 170. The number of “*not for profit*” immigration and asylum legal aid contract holders had remained the same at 69. The overall reduction is therefore from 527 contract holders in 2001/2002 to 239 contract holders in 2009/2010 which means that the number has more than halved. Mr Stobbs says that this reduction has only

compounded pressures on existing lawyers to meet the demands on them in this highly specialized area. I should add that with the demise of RMJ, this number will have reduced even further because, as I have explained, it together with IAS provided about one-third of all publicly-funded asylum and immigration work in the United Kingdom;

- (b) He queries how a detainee without a legal representative would know how to contact or identify a new legal representative. This is borne out by a report by Dame Ann Owers, HM Chief Inspector of Prisons relating to an announced inspection of Harmondsworth Immigration Removal Centre carried out between 11 and 15 January 2010 (which was significantly just when the 2010 exceptions were coming into effect) in which she found that:- (i) detainees had problems with access to prompt legal advice and representation; (ii) there was inadequate information about legal rights; and (iii) the library had no up-to-date legal reference material. This is a matter of great importance as many of those subjected to the 2010 exceptions are detained in this centre prior to removal;
- (c) Even when a detainee did have a legal representative, it is possible that they would no longer have possession of the contact details of their representative which was particularly likely where they were detained at short notice in a removal centre. Mr Stobbs explained that there was a high level of mental illness, stress and “*low English language ability*” among detainees and these factors were likely to compound their difficulties;
- (d) If a detainee did not have legal representation, there was a risk that a fax was to be sent off randomly to any legal representative without enquiries first being made as to whether they are suitable or able to take on the case. He explained that there was no assurance that the legal representative or the person proposed to be a legal representative would receive the fax and would be able to respond especially as it was questionable how faxes were monitored by legal representatives outside business hours, such as on weekends and on public holidays;
- (e) The effect of a removal taking place at short notice would involve a significant amount of work for members of the Law Society and it would not always be possible for them to take on at such short notice, cases particularly for those who are not existing clients in the light of the legal representative’s pre-existing heavy case load; and that
- (f) Legal aid policy also has a significant adverse impact on the ability of representatives to take on urgent removal cases because in publicly funded cases, the LSC will not pay for work until a legal representative has closed the case. This meant that legal representatives closed their files as soon as they could and then placed the papers in archives. Thus, it is possible that, in the case of people who have had their cases determined a significant period of time previously, that their legal representative will have ceased acting for this client and will also have archived their papers and so they will not be easily accessible. This would make it extremely difficult for an existing legal representative but especially for a new legal representative to obtain the necessary papers in time and to therefore take on the case.

66. These contentions have not been challenged or disputed in any material way by the Secretary of State in the detailed evidence adduced on her behalf. As I will now explain, Mr Stobbs' evidence is supported and corroborated by the evidence of a number of people who have great experience of acting for those who are subject to removal directions.
67. They explain that there are many problems in obtaining access to the documents required by any lawyer who is available to advise somebody about to be removed and to prepare the documents needed to challenge removal directions. Mr Steven Bravery, who is a solicitor and Head of the Deportation and Detention team at Paragon Law, which provides specialist advice and representation on asylum and immigration-related matters with offices in Nottingham and Leeds, has explained that once a case has been closed, the papers will be put in an archive off-site. So there would usually be a delay of a few days before the papers could be made available for a new firm and that is always assuming that the firm that had carried on the previous work had not by then ceased business. Similarly, there would be delays even if the person subject to the removal directions went back to solicitors who had previously acted for him but who then had to recall the papers from the off-site archive. He explained that a person in detention is unlikely to have the papers with him or a complete set of them in a detention centre but, even if the detainee did have that full set, there would still be problems in passing them to a legal representative because Yarl's Wood Detention Centre imposed a limit of 15 pages that could be faxed by any detainee. As is well known, immigration papers very frequently (if not invariably) exceed 15 pages by a large amount.
68. This evidence was also supported by Ms Swaney, who as I have pointed out was the supervising solicitor at the important charity RMJ, which is now in administration, who explained the difficulty of dealing with those who receive removal directions in accordance with the 2010 exceptions because her team struggled to cope with its work and she concluded that removals under the 2010 exceptions "*are almost impossible to take on and represent properly*", if they are not existing clients of her organisation. Ms Swaney explained that in order to represent such persons, an advisor would first have to obtain the papers and second need to carry out time-consuming work to set up the fresh claim. She explained that copies of the person's file could be requested from the Home Office but that those papers would not be received within a timescale which would allow them to advise where less than 72 hours notice of removal has been given. Ms Swaney stated that frequently the cases required the solicitor to travel out of the office to see the client, but in that case and in other cases, there would be deadlines and this would inevitably cause substantial problems.
69. Mr Bravery also explained another difficulty for clients, who seek to obtain legal advice even within a 72-hour notice period and, even where he can find a representative who has a capacity to take on a case as a new matter. He points out first that there is likely to be an extensive immigration history which is only summarised in the factual summary provided by UKBA with the removal directions. In my experience, those factual summaries merely sets out milestones in a person's asylum history without explaining the reasons for the applications and for decisions although these details are matters of crucial importance.
70. Turning to the formalities required of a solicitor seeking to act for a client, Mr Bravery says that in order to obtain the client's file from UKBA, a solicitor would

require an original form of authority and a photocopied or faxed copy would not suffice. In addition, the LSC requires original signatures on legal aid forms otherwise they can and do refuse to pay for work done on an emergency basis. He said that these requirements posed difficulties when the client was detained pending removal even within the standard period and these difficulties would inevitably be much greater if the 2010 exceptions were being invoked. The significance of this, according to Mr Bravery, was that without such an authority, where the previous representative is still on record but not assisting the client to challenge the removal, the UKBA will not routinely treat the new firm as then representing the detainee. Therefore it will not treat any representations forwarded by the new solicitor as triggering an obligation to review the matter.

71. Mr Bravery said that in the light of those practical difficulties, Paragon Law would, and could, not accept instructions from the many potential clients who contact their firm for assistance on a regular basis when they are detained pending removal in detention centres. Thus, they only deal with clients who have been or are then being represented by Paragon Law at the time when they are detained for removal.
72. Mr Bravery also explained that where Paragon Law cannot accept instructions, from a person about to be removed, its staff will try to provide as much practical assistance as they can to enable the person concerned to obtain legal representation whether it be by providing contact details for the Community Legal Service or by giving a list of solicitors' firms or by approaching other possible firms to see if they have the capacity to assist. He says that it is a "*rare occasion*" when someone does actually have capacity to assist. That view was supported by Ms Sheona York, who is the Principal Legal Officer of IAS, which is now the only not-for-profit provider of immigration services since the demise of RMJ and who has much experience of dealing with removals. She also concludes that for detained clients facing imminent removal, the closure of RMJ in June 2010 is "*nothing short of catastrophic*".
73. Another difficulty according to Mr Bravery for somebody facing removal where a minimum period of less than 72 hours notice is given, is that even where his firm is notified, there are often major logistical problems in getting the paperwork served as the client might be in transit from the reporting centre to an Immigration Removal Centre. In those circumstances, it would be very difficult to ascertain where that person is going. In consequence, he says that it is not uncommon for the first 24 hours of the removal window to be lost trying to chase and ascertain the client's whereabouts and to obtain the paperwork with which the client has been served.
74. Mr Bravery then says that once his firm has sight of a decision refusing, for example, further representations, there might well be further information which has come to light since the last set of representations were made with the result that further representations might be required but, as with the initial representations, there is no set timescale for response from the UKBA to any additional representation and they are often sent from different parts of the UKBA.
75. He stresses that the work involved in dealing with urgent removal cases is "*intense and stressful*" requiring regular work throughout the night and at weekends with obvious knock-on effects on other cases.

76. Another major problem relating to public funding arises if a person is served with a removal notice giving less than 72 hours notice pursuant to the 2010 exceptions, and that is because of the conditions which have to be satisfied before public funding becomes available. According to Mr Bravery, there is a need to meet the “*sufficient benefits test*” in order to justify carrying out the work under the public funding regime. This frequently requires an assessment of the previous work done as well as access to the papers from any previous representative and potentially the client’s Home Office file. Mr Bravery says that this presents major difficulties for the legal representative when the Secretary of State has invoked the 2010 exceptions and given reduced notice of removal.
77. A further problem was explained in a witness statement by Sonal Ghelenai, who is the solicitor acting for the claimant in this application and who outlines the difficulties for a solicitor approached to act for a client who has had removal directions served on them as a result of the requirements of the LSC, who require that any work involving litigation is carried out under their Public Funding Certificate (“PFC”). She explains that in urgent cases where it would be prejudicial to the applicant to wait for a PFC to be processed in the usual way because that process would take up to three to four weeks, the LSC grants those providers of public-funded advice whom it considers be responsible with powers to authorise emergency PFC in urgent cases under what is known as “*exercising devolved powers*”. Mr Andrew Elliot, who is Head of Enforcement Policy at UKBA has said that only about 200 firms, which is about two-thirds of the firms providing immigration services, have this devolved power. The solicitor would then have to ensure that the person seeking assistance is financially eligible for public funding and there is also at least a borderline prospect of success in pursuing a claim through litigation. Emergency representation can be granted where limited information is available only if it appears likely on the information available that the criteria as to merit, financial eligibility and urgency will be satisfied but that process would take time and if the 2010 exceptions are invoked, there is no guarantee that there will be much, if any part, of a working day between service of the removal directions and the actual removal. It must not be forgotten that, as I explained in paragraph 27 above, the relevant safeguard states that “*(iii) where possible, you must schedule the removal for a working day, during office hours*” but it does not required removal during office hours or any period of notice.
78. The result is that such a case is then monitored by the LSC. So a responsible solicitor approached by someone, who is not an existing client and who is confronted with a situation where 2010 exceptions are used would then have to decide whether to exercise devolved powers and to authorise funding. The first and critical issue to be considered would be the merits of that case by that solicitor and that requires information normally beyond that given by the client, who is likely to be very distressed and scared at the prospect of being returned to his or her country of origin. In consequence, he or she is unlikely to provide the solicitor with sufficient information to decide whether objectively the claim has sufficient merit to justify the exercise of devolved power.
79. Ms Ghelani then explains that a decision by a solicitor to authorise funding through the exercise of devolved powers in circumstances where the solicitor does not have enough information to assess whether the claim has a border-line prospect of success would be in breach of the standard terms of the contract with the LSC pursuant to

which the law firm or an organisation provided publicly-funded representation. If there is a “*persistent breach*” of such contract which would mean exercising devolved powers incorrectly on three occasions in 24 consecutive months, this would be regarded by the LSC as a persistent breach of the terms of the contract with the result that the solicitor concerned would risk losing the right to do devolved work and the ability to do other urgent work. Mr Elliott disagrees and states that there has to be a combination of several contractual breaches for this to occur but the risk for the solicitor remains if the decision to use the 2010 exceptions means that he has to act very speedily and without the ability to reach a considered opinion on the case of the person about to be removed. Thus any solicitor approached to challenge removal directions given after invoking the 2010 exceptions without knowing the full facts would be in Ms Ghelani’s words “*highly unlikely*” to be prepared to accept the instructions because of the funding difficulties.

80. A. None of this evidence about the difficulties of obtaining legal assistance has been disputed although Mr. Elliott has said that emergency funding can be provided although it is unclear how long it takes to receive it. Indeed the evidence shows that unless there are proper safeguards to prevent removal, there is no adequate right of access to justice because of the absence of a genuine opportunity to be able to challenge the removal directions. Indeed before considering if there were adequate safeguards to prevent removal where reduced notice of removal is given pursuant to the 2010 exceptions, it is very significant that even before RMJ ceased to function, Ms York of the IAS explained convincingly that:-

*“the current policy of [giving] less than 72 hours notice in the categories of cases to which the ‘exception’ is applied has the effect of depriving persons facing removal of the opportunity to obtain access to legal advice and, if so advised, access to the Court”.*

- 80 B. After I had circulated a draft of my judgment, it was submitted by the defendant that even if other parts of the 2010 exceptions were quashed, no such order should be made in respect of the cases set out in paragraph 3.1.5 which arise where “*the individual concerned wishes to be removed and has provided their consent, in writing, to reduced consent*” This point had not been raised in oral argument but in a written skeleton argument submitted by counsel for the Secretary of State after I had circulated a draft of the judgment, it was said that the claimant’s allegations of the duty to provide access to justice did not apply to this category and there is no reason why the policy in paragraph 3.1.5 should be quashed on this ground. I was troubled by this not merely because this had not been argued at the hearing but also because first the consent given might have been to abridging the time for removal but not to overnight removal of the kind referred to in paragraphs 108 and 109 above and second the person concerned might have grounds to challenge the route of return because it was unsafe for the reasons set out in paragraph 57 above. Miss Rose set out other reasons why a person who had initially consented to an abridged period for removal might well wish to consult lawyers in relation to the removal directions. Her main point was that she had not been prepared to make submissions on this point. In those circumstances, it seemed best not to make a special exception from the quashing order for those covered by paragraph 3.1.5 and I do not do so.

(v) *The safeguards*

81. Of course if there were provisions which safeguarded the right of access to the courts of people who received reduced notice of removal pursuant to the 2010 exceptions, the present challenge would fail. Indeed the Secretary of State has accepted in the Equality Impact Assessment that the 2010 exceptions might well curtail or deny the right of access to justice. Her response under the heading “*Possible Adverse Impact*” is that the Secretary of State accepts that “*reduced notice of removal could make it impossible to lodge a judicial review application in time*”. Then in respect of the question “*What were the main findings on the engagement exercise and what weight should they carry?*” her response was (with my emphasis added) that:-

*“Reduced notice of removal does make it harder to lodge judicial review applications. This is a valid issue which we will counter by ensuring that we only reduce notice periods as a last resort and that we ensure that clear safeguards are put in place”.*

82. The importance of safeguards to ensure the recipient of removal instructions has proper access to the courts has long been recognised. As I have explained in paragraph 65 above, Ms Homer explained in a letter of 1 March 2007 in relation to the minimum 72-hour time frame that “*in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities*”. There is no minimum period provided for in the 2010 exceptions and so it becomes necessary to consider whether the “*clear safeguards*” have really been put in place so as to obviate any substantial risk of a real possibility of interference with the right of access to justice of those who receive abridged notice under the 2010 exceptions. The need for clear safeguards in giving much shorter notice than the 72 hour period is fortified by the statements of the Chief Executive of UKBA to which I referred in paragraph 62 above in 2007 that the 72 hour time frame was “*quite tight*”. As I have explained, the Secretary of State attaches great importance to the access provision which, as I have already explained, states (with my emphasis added), in relation to the 2010 exceptions that:-

*“This list of safeguards is not definitive. It may be appropriate to build in other safeguards on a case by case basis to ensure that removees have effective access to the courts”.*

83. This access provision is also repeated in the “*Detention Services Order*” given to Immigration Removal Centres, Short Term Holding Facilities, the Detainee Escorting and Population Management Unit and escorting contractors in relation to the service of removal directions for immigration detainees.
84. Mr Swift has described the access provision as an “*overriding requirement*” and he even suggests that it is a clear requirement. I am unable to agree with the contention that the access provision constitutes an effective safeguard to ensure that the right of access to justice is safeguarded for at least four reasons.
85. First, what is lacking in this provision is any *obligation* to ensure that those about to be removed have effective access to the courts. By stating that “*it may be appropriate to build in other safeguards... to ensure the removees have effective access to courts*”,

it is clear that no *obligation* whatsoever is imposed on those who have to enforce the 2010 exceptions to ensure that there is effective access to the courts. In my view, such an obligation is essential so as to provide and to ensure that those detained have access to the courts. That previous standard policy which I described in paragraphs 17 and 29 above gave much longer period of notice and significantly it was “*a minimum time frame*” and was devised to ensure that those served with removal directions had “*sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]*”. This provision and the much longer and specified periods required for standard notification show why the objections made by the claimant to the 2010 exceptions do not apply to the standard notification provisions.

86. A second objection is that no explanation or instructions are given to UKBA employees or independent contractors as to how the access provision is to be used and, in particular, what steps have to be taken to ensure that the person subject to the 2010 exceptions actually has access or could reasonably be expected to have access to a lawyer, who would be able in the time available to advise and to obtain (if appropriate) a stay of the removal directions.
87. A third defect of this provision is that no explanation has been put forward as to how the 2010 exceptions would apply so to ensure that the right of access to the courts was preserved when the person about to be removed either has no lawyer currently acting for them or has a lawyer who has closed the file and who does not have ready access to the crucial papers. I have already explained the difficulties in obtaining legal representation for those cases where the 2010 exceptions are invoked in the reduced time available and this evidence has not been disputed.
88. A fourth very serious, if not crucial, limitation on the access provision is that it does not state or even imply that removal directions should be deferred if the individual has in the time available between receipt of the direction and the time for removal been unable to obtain legal advice in spite of exercising his or her *best* efforts to do so or perhaps more importantly he could not conceivably have been able to obtain legal advice in the time available.. Indeed there is no obligation or more importantly perhaps even no discretion to defer removal in those circumstances and particularly where the right of access to justice has clearly been infringed.
89. Nevertheless even if the Secretary of State cannot succeed in showing that the access provision ensures effective access to the courts, her case is that the remaining safeguards, which I have set out in paragraph 27 above, still ensure that effective access to the courts is preserved.
90. Mr Swift contends that they do so because a person concerned will have been informed of the possibility of seeking legal advice at each stage of the process, including in the factual summary served with the removal directions. This argument is dependent on first the ability of the person subject to the removal process to have access to and to be able to contact lawyers within the limited and abridged time available between the service of the removal directions and their implementation which could be a few hours with the vast majority of them outside office hours; second the lawyers contacted being able to obtain the necessary papers to give advice within the limited and abridged time available between the service of the removal directions and their implementation; and third the lawyer consulted having the

information necessary to go to court within the abridged time period specified in the removal directions. As I have explained in paragraphs 60 to 80 above, if the 2010 exceptions are invoked when the removal directions are made, there are formidable (if not invariably insurmountable) obstacles to be overcome because of the difficulties of first contacting an immigration lawyer; second the immigration lawyer might be unable to take on the case at such short notice; third the likely unavailability of crucial documents; fourth the problem of obtaining financial assistance and fifth the difficulties of the legal advisor being able to advise and obtain an injunction in the limited time available.

91. This conclusion is significant because it means that the obligation in safeguard (i) (which I have set out in paragraph 27 above) to inform a legal representative of the removal directions does not in itself facilitate access to the court. A similar conclusion applies in respect of safeguard (ii) (which I have set out in paragraph 27 above), which requires a person subject to removal to be allowed to speak to their legal representative if so requested and this may involve providing the person subject to removal directions with a mobile phone. Nothing is stated in the safeguards or in the directions given by the Secretary of State to those responsible for effecting removal about the need for the person to have the right to communicate confidentially with his or her legal adviser which, as I have explained in paragraphs 44 and 45 above, is an important part of the right of access to justice or what happens if the period between receipt of the removal directions and the removal is all in the middle of the night.
92. I agree with Miss Rose that the instruction given to those involved in arranging the removal of those people subject to removal directions under the 2010 exceptions does not attach adequate significance to their right to obtain access to justice. Paragraph 1.3 of the G4S update of 15 February 2010 for its employees merely states that “*if asked by the detainee, all escorts must do what is possible to allow a call within the bounds of it being reasonable and practical and making the call does not pose a security risk*”. This provision thereafter gives the escort of the person about to be removed a wide discretion but significantly and disturbingly, it ignores the crucial fact that the only lawful course to be adopted in the absence of express statutory authority to the contrary, would be to defer the removal until a call can reasonably and safely be made as otherwise the person about to be removed does not have the right of access to justice. Ms Shona York, the Principal Legal Officer of IAS, has explained convincingly that it would be simply impossible for a lawyer to take any effective instructions at all or to give legal advice to a new client, who was calling while he or she was in transit to the airport.
93. A final and very important defect in the safeguards is that there is no provision stating that if a person could not conceivably contact a lawyer in the period between receipt of the removal directions and actual removal or had made all reasonable efforts to contact a lawyer but had failed and had some possible grounds for challenging removal, it would then be deferred. This problem was raised in the letter before action but no satisfactory response was given.
94. The Secretary of State also attaches significance to safeguard (iii), which I have set out in paragraph 27 above and which is that “*where possible, you must schedule the removal for a working day, during office hours*” but to my mind there are at least three serious limitations to the effectiveness of this provision as a safeguard. First, it

is not a mandatory obligation but merely states it should be done “*where possible*”. Second, there is no obligation for removal to take place during court hours as opposed to office hours and third there is no obligation that the time period includes anything other than a minimal period of time during office hours on a working day.

95. It is necessary to stress that there would be great (if not insuperable) difficulty for a person subject to the 2010 exceptions to obtain legal representation if the period of notice of the directions is almost entirely outside office hours especially with the great difficulties that any legal representative would have in the limited time available not only first in obtaining access to the relevant papers, second in obtaining instructions, and third in being able to reach a decision on the proper advice; fourth in obtaining financial assistance; and fifth in making an application for a stay of the removal directions.
96. Safeguard (iv) (which I have also set out in paragraph 27 above) requires that the person subject to removal directions receives “*as much notice as possible*” but it lacks the necessary element that the overriding principle should be that the person concerned must not be denied effective access to both to their legal representative and to the courts. There is, for example, no obligation to ensure that if the individual concerned wishes to do so that he or she would have spoken to his or her legal representative or would have been able to do so.
97. Turning to sub-paragraph (v), which I have set out in paragraph 27 above, and which provides that the application of an exception “*should where possible only delay service of the removal directions*” the position is that there are still some cases in which removal directions are given when the decision is served. Nevertheless, the stark fact is that even if there is a time gap between the service of the decision and the removal directions, there are no provisions to ensure that access to justice is given to those to whom the 2010 exceptions are applied.
98. Mr Swift sought to rely on the fact that the removal notice contains on the back the telephone numbers of RMJ and of the IAS. The former is now defunct while the undisputed evidence of Ms York of the IAS is that:-

*“the position of the IAS is that the current policy of less than 72 hours notice in the category of cases where the ‘exception’ is applied has the effect of depriving the persons facing removal of the opportunity to obtain access to legal advice and, if so advised, access to the court”.*

99. I am driven to the conclusion that the safeguards do not ensure those about to be removed under the 2010 exceptions have adequate safeguards built in to ensure that they have access to justice. It is clear that the standard 72 hour minimum time frame was as Ms Homer explained a result of the obligation “*to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities*”. There is no such balance in 2010 exceptions of providing a minimum period of notice built into the safeguards, nor are there any provisions precluding removal if the person subject to removal could not obtain access to any lawyer or to legal advice in the period between service of the removal instructions and actual removal.

100. It is also necessary to refer to section 5 of the 2010 instructions because this deals with the issue of whether if a threat is made of judicial review; the removal directions should be deferred. These provisions state that:-

*“You should not normally defer removal on the threat of a JR where there is just a threat of judicial review. Removal directions should remain in place until a Crown Office... reference or injunction is obtained. All threats of judicial review should be referred to the Operational Support and Certification Unit who will consider whether it is appropriate to maintain removal directions;*

*In all cases if a person is unable to file a claim because the Administrative Court Office is closed you should still consider whether the deferral is appropriate where a copy of detailed grounds is provided to UK BA and lodged with the court at the earliest opportunity. A decision whether to defer in those circumstances would be taken by [Operational Support and Certificate Unit];*

*In [third country unit] and [non in-country appeal] cases a threat of judicial review made in circumstances where an exception to standard notification of removal has been applied (as set out in section 3 of this guidance) should normally be enough to defer removal if there has been no reasonable opportunity to obtain a Crown Office reference number”.*

101. These provisions have to be considered in the light of section 4 of the 2010 document which is entitled “*Handling Judicial Reviews*”. This explains that it is not necessary to defer removal because of a threat of a judicial review, although it is important to consider whether the person concerned has had the opportunity to lodge a claim with the court “*particularly in non-suspensive or third country cases where there has been no in-country right to appeal*”. It is also stated that there is only a need to consider deferral of removal if a judicial review application is properly lodged with the court and the court has issued a claim form.
102. There are then detailed provisions, which state that removal will be deferred if, first an application for judicial review is made prior to removal, second a copy of the claim form is issued by the court and third a copy of the detailed statement of grounds is received by UKBA. There will also be deferral of removal directions if a court decides there is good reason for failure to comply or if the individual concerned is given permission to proceed or a court has not considered the matter by the time or date of removal. It is also said that where it is not possible to file a claim due to the Administrative Court being closed, the removal may be deferred if a copy of detailed grounds is provided.
103. I do not consider that these provisions guarantee or even show that those about to be removed have effective access to the courts. Each of the circumstances in which deferral takes place can only in practice occur after first a lawyer has been consulted, second the lawyer can properly be funded, third he or she then has had an opportunity to consider the relevant papers, fourth he or she is then able to take instructions and

fifth the lawyer has been able to reach a conclusion which enables him or her to make a threat of proceedings. There are great difficulties about reaching that stage in the limited time available, which can be wholly or mainly outside office hours when the 2010 exceptions are applied as I have explained in paragraphs 60 to 80 above.

104. The stark fact is that there is no provision which states that removal will be deferred where a person subject to the 2010 exceptions could not conceivably have been able to obtain legal advice and legal advice or even where that person has made all reasonable efforts to obtain legal advice and access to the courts but nevertheless has been unable to do so in the very limited time available.

*(vi) The practical operation of the policy of giving reduced notice*

105. The Secretary of State contends that the safeguards do as a matter of fact and in practice “ensure” access to justice. The way in which the Secretary of State sought to monitor whether the limited exceptions policy as set out in the 2007 Directions had been properly applied was by producing monthly reports which were required by paragraph 60.6 of the Operational Enforcement Manual and which were to be sent to the Chief Executive of UKBA by the Litigation Management Unit (see paragraph 60.6). Mr Peckover in paragraph 19 of his second witness statement explains that the monthly reports from the period March 2007 until August 2009 have been located but surprisingly that the further reports after August 2009 could not be found. It appears that by then, the requirement to produce reports had been overlooked and continued to be overlooked very surprisingly and so it would not appear that there have been any monitoring arrangements whatsoever in place since then although the results of monitoring would have been a matter of great importance and relevance.
106. Regrettably the position is even more disturbing because the monthly reports sent before they ceased to be provided were defective as they regrettably did not give details of (a) how much notice was given to those subject to removal directions; (b) whether the removal took place on a working day; (c) whether the individual had a legal representative on the record; (d) whether the individual was able to contact a legal representative and, if not, why not; and (e) whether any attempt was made by the person served with removal directions, to obtain access to the court and, if so, how and whether any such attempt was successful. All this information would be crucially necessary to see if those subject to abridged periods of notice under either the 2007 document or the 2010 policy actually had access to justice. No proper explanation has been given for this omission, which indicates a disturbing lack of concern for the right of access to justice of those receiving abridged periods of notice.
107. The significance of the defendant’s failure to monitor the policy is, as Baroness Hale explained in **R (European Roma Rights) v Prague Immigration Officer** [2005] 2 AC 1, 62 [91], that the absence of monitoring information means that the Secretary of State cannot show that the 2010 exceptions were being operated in a lawful manner by giving access to justice to those served pursuant to the 2010 exceptions or its predecessors.
108. The claimant also relies on the case of **R (M & T) v Secretary of State for the Home Department** [2010] EWHC 435 (Admin) in which Collins J granted permission to proceed in a case in which two unaccompanied minors from Eritrea had been taken from their homes at 4am for removal that morning in the case of **T** for

removal at 7.30am and in the case of **M** at 9.30am or thereabouts. All these events obviously occurred outside working hours. **M** managed to prevent her removal taking place but she suffered some physical injury when attempts were made to remove her but her legal representative persuaded the UKBA to cancel removal directions. **T** was not so fortunate and having been removed from the United Kingdom, she then arrived in Italy where she contacted her solicitors who had represented her explaining to them that whilst on the street in Bergemo, she had met a male stranger with whom she was living. She appeared to be in some distress although it was not suggested that she had been molested. It is disturbing that she was removed in circumstances in which it was impossible for her to contact her lawyers. This case shows that the right of access to justice was infringed when limited notice was given under the 2007 policy and there is no reason to believe that similar short notice will not be given to those falling within the 2010 exceptions although the Secretary of State is not at present relying on it for the unaccompanied children exception. This case also is an example of where removal directions can be set aside.

109. Another case referred to is that of **Nyam**, who was arrested at approximately 11pm on 27 April 2010 and he was then told that he would be removed at 6.30 am but he asked his room mate to contact his solicitor who was duly contacted. Having received a copy of the removal directions and the immigration factual summary at 00.37 on the following morning, the claimant's solicitor was surprisingly, but impressively, able to obtain an injunction from the duty judge at 1.30am prohibiting removal. Although Mr Swift contended that this showed the lawful operation of the policy, I am unable to agree because Mr Nyam was exceptionally lucky as within the very limited time available in the middle of the night first he had a solicitor acting for him, second he had his personal telephone number and third the solicitor was able to obtain information necessary to obtain an injunction from the duty judge within the very limited time available in the middle of the night. This case is ongoing but it does show that there are often grounds for successfully challenging removal directions as well as problems of doing so if the 2010 exceptions are relied on.
110. Even assuming that there were good grounds in each of these cases for imposing removal directions, the problems of effecting access to the courts for those served was of monumental proportions. It is not known if in other cases in which periods of notice shorter than those set out in the standard directions have been given, those removed had access to the courts because of the failure to have proper monitoring arrangements. It is exceedingly unlikely that any of those who did not have access to the courts and were removed would bring or indeed would be able to bring proceedings thereafter from abroad. Their difficulties of obtaining access to English lawyers when abroad would be much greater and those removed would also be more concerned about rebuilding their lives in the country to which they were sent rather than in seeking to get redress for what had occurred in this country prior to their removal.
111. The Secretary of State can obtain little assistance from statistics as of the 145 cases in which the exceptions policy has been applied since March 2007, removal was only stopped in ten cases because of an actual or threatened court challenge. There is no evidence as to whether in the other 93% of the cases, the person removed was able to obtain access to a lawyer and to obtain legal advice. It is disturbing that no evidence is available as monitoring this fact would have enabled UKBA to ascertain how the

right to obtain legal advice etc from those served with removal directions was being safeguarded.

*(vii) Conclusion*

112. Even before the collapse of RMJ, the 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 in the access provision or indeed anywhere else requiring 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 period available or if the person concerned has made every conceivable effort but had nevertheless still failed to obtain legal advice in the time available between the imposition of reduced period of notice of removal and the actual removal. In addition, this is of crucial importance when considered together with the fact that access to a legal adviser is unlikely to be available in the limited period between the time for serving the removal directions and the time when they take effect. Thus the 2010 exceptions fail to ensure that when they are invoked, the persons subjected to them will have access to justice notwithstanding that experience has shown that standard removal directions are frequently stayed. It is unfortunate that the Secretary of State did not ensure that there had been any meaningful consultation process involving those who provide immigration law advice before introducing the 2010 exceptions. For that reason, this claim succeeds and the policy under challenge will have to be quashed.

## **V. The Rationality Challenge**

*(i) Introduction*

113. It is not in dispute between the parties that the categories in the 2010 exceptions in which reduced notice can be given thereby curtailing or removing the right of access to court needs to be “*clearly delineated*” and “*strictly justified*”. Miss Rose submits that the categories in the 2010 exceptions fail to reach that threshold and that they are irrational. The case for the Secretary of State is that the categories in the 2010 exceptions reach that threshold as the categories selected were adopted for good reason and indeed were properly formulated. Mr Swift stressed that in the case of each of the categories, there is no obligation to invoke the 2010 exceptions but rather that a discretion was given to invoke them if certain criteria were satisfied so as to justify the need for them in particular cases and therefore that they are remedies of the last resort. I now turn to consider each of the categories on the assumption that the right of access to justice has contrary to my conclusion been safeguarded.

*(ii) Medically documented cases*

114. Paragraph 3.1.1 of the 2010 document repeats the policy which was originally adopted in 2007 and it provides that:-

*“You may not need to provide standard notice of removal directions prior to removal where service of removal directions*

*will create a risk of suicide or self harm and that risk is medically documented.”*

115. In response to a letter before action, it was explained in a letter sent on behalf of the Secretary of State dated 19 March 2010, that the case of each individual was to be dealt with on a case-by-case basis and this exception would only be invoked if it was in the best interests of protecting the person concerned to do so. This would be determined in the light of information from medically qualified individuals, which would lead to first an assessment of the level and nature of risk and second of whether the risk could be managed by another method such as by providing a member of staff to monitor the individual between service of the removal notice and removal itself. It was stressed that this exception would only be invoked first if it would be necessary for the safety of the individual concerned and second if it was in the best interests of protecting the person concerned.
116. It was also explained in that letter that the decision to use this exception would require consideration of relevant factors relating to the person concerned such as their case history, their previous medical evidence and their previous attempts at self harm, which might have been triggered by service of decisions in their case. The assessment would be made at the time the individual was in detention and UKBA would not rely exclusively on historic information. The purpose of invoking this exception was to deal with cases where the risk could not be managed in any other way and it would only be done to protect the individual and not to deny them access to legal redress. In other words, this exception would only be used if there was no other remedy available.
117. This exception has been criticised in a witness statement made by Professor Cornelius Katona, who is a Consultant Psychiatrist in the Kent and Medway Mental Health Partnership Trust as well as being a member of the Management Committee of the claimant. His evidence has to be considered not on the basis of whether it is right under any circumstances to remove those subject to a risk of suicide or self harm but whether it is rational to *reduce* the period of notice for serving removal directions on the people concerned by this exception.
118. Professor Katona states that the most significant aspect of the policy in terms of minimising the risk of self-harm or suicide is the requirement to have adequate reception arrangements in place in the receiving country. In response to the letter before action, it was pointed out by the Secretary of State first that once an individual has left the United Kingdom, it is not possible to maintain safeguards against possible self harm but such people would on removal normally be escorted, and second if the escorts had particular concern about an individual’s behaviour “*the escort may alert the authorities on arrival, if appropriate*”. It was also explained that:-

*“..decisions are always taken on a case-by-case basis taking into account the needs of the individual and their personal circumstances. This situation would be carefully considered before the exception is applied”.*

119. Professor Katona also points out that the removal of the claimant and the service of removal directions are likely to have a very significant impact on the mental health of the individual and the risk of self-inflicted injury. As I have explained, in the letter in

response to the letter before action, it was pointed out that this exception was only invoked where it was “*necessary to protect the individual*” and where the risk could not be managed in any other way.

120. Dr David Bell, another consultant psychiatrist, agrees with Professor Katona and stresses that giving no notice of removal directions would from a psychiatric point of view be expected to be considerably more harmful than providing a period of time for the news to be digested as it would be likely to increase the traumatic impact of the decision. Dr Joanne Stubbley, who is a Consultant Psychiatrist and who leads the Tavistock Trauma and Refugee Service, agrees with both Dr Bell and Professor Katona and she stresses the importance of the person concerned having time to prepare for removal.
121. It is noteworthy that although these three distinguished psychiatrists have experience of the effect of removal on those subject to risk of suicide or self-harm, they have not stated that there is *no* case in which the exception might properly be applicable in the light of the circumstances in which it is as explained in the response to the letter before action that the exception would be applied. Significantly the experts have not commented, on those requirements where the use of the exception has been shown to be in the best interests of the person concerned and where the risk could not be managed in any other way. Indeed, I do not consider this category to be irrational provided that the right of access to justice is preserved. Thus I must reject this complaint.

*(iii) Children*

122. Paragraph 3.1.2 of the 2010 policy explains that:-

*“You may not need to provide the standard notice of removal directions prior to removal where you believe that it is not in the best interests of unaccompanied children because of an abscond risk. This must be considered in liaison with Children’s Services and the receiving country”.*

123. Mr Peckover has explained that the Secretary of State is not currently operating this exception because the Secretary of State is conducting a review of this policy as a result of the comments made by Collins J in the case of **AM/BT** to which I referred in paragraph 108 above. I will therefore deal with this aspect of the 2010 exceptions much more briefly than I would have done if the Secretary of State was still applying the policy. The justification for this exception and the way it operates was described by Mr Peckover in his first witness statement.
124. The background to this exception is that the policy of the Secretary of State is not to detain unaccompanied children pursuant to immigration powers but instead that they are accommodated by local authority Children’s Services Departments. This means that there is a risk that the child would abscond when served with removal directions and also if the child were to abscond, their particular vulnerability might result in them being exposed to harm.
125. The decision whether to give standard notice is taken by the UKBA, which works closely with the relevant local authority Children’s Service department throughout

and especially in obtaining any information about the child which relates to the risk assessment and the vulnerability of the child concerned. This means that before any decision is taken to remove the child, a case conference between the UKBA and the Children's Services' staff would take place at which there would be a discussion relating first as to any reason the Children's Services Department has as to why the child should not be removed, second as to the likelihood of the child absconding, third as to any additional factors which might indicate the child is particularly vulnerable and finally as to the appropriateness of removing the child with less than 72 hours' notice.

126. The decision whether it would be appropriate to reduce the standard 72-hour period of notification in any particular case has to take account of the information and the views of the Children's Services. There are at least three different areas of the UKBA, who in turn then have to consider the risk of the child absconding and so reducing the period of notification. They are first the Local Immigration Team ("LIT"), which considers first the information set out in the last paragraph and then makes an initial assessment. If that assessment of the LIT would justify reducing the period of notice, the matter is then referred to the second area of UKBA, which is the Office of the Children Champion ("OCC"), who consider the reasons why it is thought that the 72-hour period should be reduced. In consequence, the OCC offers advice on whether the case of the particular child requires additional safeguarding measures. The third stage is that if the LIT still considers reducing the length specified in the removal directions, a written submission is made to the Deputy Director, who would have responsibility for the LIT and he or she is the third area of UKBA involved in deciding whether to invoke this 2010 exception. The Deputy Director will then consider whether to apply the exception taking account of the views of the LIT and of the OCC.
127. In carrying out this exercise, the UKBA is assisted by advisors who are qualified social work professionals seconded to the UKBA from local authority children's services department. The facts which are considered include (but are not limited to) first, whether the child has stated that he or she has no intention of leaving the United Kingdom; second, whether the child has stated that he or she would not comply with removal directions; third, whether there is any evidence of disruptive or criminal behaviour while the child has been in the United Kingdom, including for example non-compliance with social services or getting into trouble with the police; fourth, whether the child's behaviour or other attributes indicates a particular vulnerability, such as that if the child did abscond, he or she would be more likely to be at risk of coming to harm or the consequences of the harm would be likely to be greater; fifth, whether the child has close friends, who have previously absconded and who would have influence on the child's behaviour; sixth, whether there is evidence of deception on the child's part such as false documentation or lying to immigration officers; seventh whether there has been previous disappearance by the child from social services care in the United Kingdom, and finally, whether there is evidence of disruptive behaviour, non-compliance or absconding or of deception by the child concerned within another EU Member State.
128. It was stressed by Mr Peckover that the decision whether to invoke the exception was discretionary and that it would take account of the views of how to manage the risk to

the child after taking account of views of qualified social work professionals with the best interests of the child as a primary consideration.

129. To show that this category is irrational, Miss Rose relies on the evidence of Dr Kimberley Ehntholt and Dr Matthew Hodes, who are medical health professionals with specialist knowledge of clinical psychology as well as child and adolescent psychiatry. They consider that *“removal from the United Kingdom without warning would have an extremely detrimental impact on the psychological well being of an unaccompanied child as it would constitute yet another sudden, traumatic loss of all that was familiar to them”*. They believe the present policy would not operate in the best interests of the child and that it would be likely to precipitate or worsen mental health conditions in particularly vulnerable children.
130. In response to the letter before action, it was explained by the Secretary of State that any decision taken concerning invoking the exceptions policy:-

*“is taken having regard to the need to safeguard and promote, and with the best interests of the child as a primary consideration”*.

131. I appreciate that there are justifiable concerns as to how this policy is applied in the light of the **AM/BT** case, but I consider that there is nothing irrational with the policy first if the right of access to justice is safeguarded and second if the policy is applied, in the way the defendant contends that it would be applied, particularly bearing in mind that it is a discretionary policy which acknowledges *“the best interests of the child as a primary consideration”*. As with all the categories if the Secretary of State were to fail in a particular case to apply his policy in the way she has said that she would, the particular child could seek to quash the removal directions.

(iv) *Best interests of another*

132. Paragraph 3.1.3 states that:-

*“You may not need to provide standard notification of removal directions prior to removal where it is in the best interests of another because there is a threat or a credible risk that the removee would seek to harm other detainees if notified of removal (e.g. a parent threatening to harm his or her child) which could not be managed in another way.*

*Evidence of a threat or risk that the removee would seek to harm others must be fully documented. Normally, the threat should be managed by separating the threatening individual from others. This exception may only be applied in exceptional case where there is no other practical way of managing the removal safely.”*

133. In my view, there is nothing irrational about this exception, bearing in mind first that it is discretionary; second, the requirement that the evidence of threat or risk should be fully documented; and third, that this exception could only be applied where there are no other means of managing the removal safely. In other words, this exception is

only intended to be a discretion exercised only in the most extreme circumstances and even then as a remedy of the last resort.

134. Indeed this is borne out by paragraph 11 of Mr Peckover's second witness statement where he states that this exception was only invoked on one occasion and the social services had been consulted. In addition, a copy of a care plan of help and support which the family received in the United Kingdom was sent to the country of origin together with a letter addressed to the local social service providers informing them of the need to assess and possibly support his family. This exception cannot be regarded as irrational provided it is used in the way indicated by the Secretary of State as the last resort but, of course, provided that there is access to justice.

(v) *To maintain order*

135. A discretion is given to not give standard notice where:-

*“Where it is necessary to maintain the order and discipline of the Immigration Removal Centre (IRC) or short term holding facility, standard notice of removal may not be needed in cases which meet the following criteria:-*

*1. Where there is a history of non-compliance in an attempt to frustrate removal, either during or immediately before a removal is due to take place. There must be reason to believe that an attempt to remove him or her with advance notification seriously threatens the good order and discipline of the IRC which cannot be managed effectively in another way and;*

*2. Where there is evidence to show or strongly suggest that an individual is planning on actions, which seriously threaten good order and discipline in an Immigration Removal Centre or short-term holding facility.*

*An attempt to frustrate removal could be, but is not limited to:-*

- violence or refusal to comply with instructions e.g. to leave the centre;*
- attempts by the detainee to frustrate his removal, the removal of a member of his/her family who is also detained or the removal of another detainee being held in the same facility”*

- 136 The threshold for invoking this exception is, according to the claimant, extremely low because an individual need only have refused to leave the centre on a previous occasion. The case for the claimant is that in the light of the powers which the Secretary of State has to restrain, isolate and move individuals, it is difficult to see how the actions of one individual could threaten the good order and discipline of a detention centre. So it is said that this exception if applied properly should only be used where other individuals are involved in this disruption but that then it would be

unfair and arbitrary to penalise one individual by removing his right of access to justice.

137 Miss Rose also submits that use of the threshold that good order and discipline is “*seriously threatened*” and that “*it cannot be managed in other ways*” are subjective tests and so they are amenable to a wide range of interpretations.

138 A further criticism is that if the removal of the individual could preclude widespread unrest it is difficult to see why providing little or no notice would quell it whereas it might well aggravate an already tense situation.

139 The submissions of the claimant fail to appreciate that it is stipulated in paragraph 3.1.4 of the 2010 document that:-

*“This exception should not be applied where*

- *The disruption could be managed in another way without reducing the notice of removal. For example all effort should be made to find alternative secure accommodation where the individual could be prevented from creating disorder.*
- *The evidence to the history of disruption relies upon behavioural actions that the individual may have taken prior to be taken into detention when they have been frightened or distressed.*
- *The evidence of a history of disruption relies upon hearsay and has not been properly recorded and documented.*
- *Removal was previously delayed by the disruptive behaviour of others where the subject of the removal (and their families) have not been involved in the disruption in question”.*

140. It must be stressed that this exception will only be invoked as a last resort and so for example a simple refusal to leave the immigration removal centre would not qualify under the provision as the individual could be restrained in order to effect removal. It is also noteworthy that this exception has not been invoked to date which shows its very limited nature. I cannot see why it is unreasonable to have this exception provided, of course, there was adequate access to justice available to the person subject to it.

*(vi) Consent to Removal*

141. Under paragraph 3.1.5 of the 2010 policy it is provided that:-

*“Standard notification of removal may not be needed if the individual concerned wishes to be removed and has provided their consent, in writing to reduce notification. If there is an outstanding immigration claim you must ensure that the claim*

*has been withdrawn. If an injunction preventing removal exists you must inform the appropriate court of the individual's intention before removal takes place and if necessary ensure the injunction is discharged (in such instances you should first check the position with the Operational Support and Certification Unit).*

*Once written consent is given a copy must be immediately faxed to legal representatives where the UK Border Agency has details of any representation actively involved in the case”.*

142. The claimant contends that this is irrational because first the policy does not make clear what happens if, after having given consent, the individual withdraws it and second because the detained person may have limited language skills and might not have received independent legal advice. Thus, it is said that it is difficult to see how consent obtained from a detainee, which is only sent to legal representatives after it has been obtained could meet the criteria that a person waiving fundamental rights is aware first of all material facts, second of the consequences to the choices open to him or her and third given a fair opportunity to reach a decision free from pressure (see **Millar v Dickson** [2002] 1 WLR 1615, 1619 [31] per Lord Bingham).
143. It is noteworthy that all individuals are informed of their right to have access to legal advice because the form that they are asked to sign indicating their consent clearly states that “*I have been given the opportunity to access to legal advice*” and “*I have given up the minimum 72 hour notice period between receiving notification of Removal Directions and removal*”. Mr Peckover says that UKBA staff ensure that the individual concerned understands what is being signed and that they use an interpreter if necessary.
144. As to the claimant’s concern where an individual withdraws consent, Mr Peckover has explained that in that event, the proposed removal is deferred and then the case progresses as if the individual had not consented to the reduced notice period for removal. There is no evidence before the court to show that this is not correct.
145. If the practice described by Mr Peckover is followed, there would be nothing irrational about the policy subject to the right of access to justice.

*(vii) Failure to consult*

146. The claimants contend that the Secretary of State should have consulted various organisations and the Scheme is therefore irrational because she failed to do so properly.
147. This submission is not borne out by the statements of Sedley LJ in **R (BAPIO) v Secretary of State for the Home Department** [2007] EWCA Civ 1139 in which it had been contended that the alteration without consultation by the Home Secretary of the policy to abolish free training for doctors who lacked a right of abode in the United Kingdom was a breach of public law rights. The Court of Appeal rejected the idea that there was any need to consult:-

*“47...as a condition of the exercise of a statutory function; but in the present context it seems to me a duty to consult would require specificity which the courts concerned, as they are with developing principles, cannot furnish without assuming the role of a legislator”.*

148. To my mind, the same principle applies in this case because as I have explained in dealing with removal directions, the Secretary of State is dealing with a statutory duty imposed on her. Nevertheless there is much to be said for having a formal consultation before the present policy was introduced in order to ascertain what safeguards were required but the absence of it either by itself or together with other factors does not show the categories to be irrational.

*(viii) Conclusions*

149. I am bound to consider the rationality of each of these provisions on the basis that what the Secretary of State had stated about the circumstances in which the 2010 exceptions would be invoked is correct (see **R v London Borough of Camden**). Miss Rose says the question for the court is as Lord Diplock explained in **Secretary of State for Education v Tameside MBC** [1977] AC 1074, 1005:-

*“Did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”*

150. In my view, the answer to that is in the affirmative so far as the categories are concerned. As I have explained there is nothing irrational about these exceptions but they are not enforceable because the right of access to justice has not been safeguarded for the reasons, which I have sought to explain. For the reasons I have explained the right of access to the courts has not been safeguarded by the 2010 exceptions.

## **VI. The Discrimination Challenge**

*(i) Introduction*

151. The case for the claimant is that the defendant had duties under both section 71(1) of the RRA and section 49A of the DDA to have regard to the need to eliminate unlawful discrimination but that the Secretary of State failed to comply with those duties first when introducing the exceptions policy in 2007 dealing with the self-harm and the unaccompanied children categories and second when re-enacting those exceptions and introducing new exceptions in the 2010 exceptions.
152. Section 21B of the DDA makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions while section 21E (2) imposes upon a public authority a duty to take such steps as is reasonable in all the circumstances of the case to have to take in order to change a discriminatory practice, policy or procedure so that it no longer has that effect. Section 49A of the DDA provides that:-

*“(1) Every public authority shall in carrying out its functions have due regard to –*

- (a) the need to eliminate discrimination that is unlawful under this Act;*
- (c) the need to promote equality of opportunity between disabled persons and other persons;*
- (d) the need to take steps to take account of disabled persons’ disabilities even where that involved treating disabled persons more favourably than other persons”.*

153. Section 1(1) of the RRA provides that a person such as the Secretary of State:-

*“(1) ..shall in carrying out its functions have due regard to the need –”*

*(a) to eliminate unlawful racial discrimination; and*

*(b) to promote good relations between persons of different racial group”*

154. The duties under the DDA and the RRA are similar and in **R (Brown) v Secretary of State for Work and Pensions** [2009] PTSR 1506, Aikens LJ giving the judgment of the Divisional Court set out the position under the DDA when he explained that:-

*(a) “we do not accept either section 49A (1) in general or section 49A (1) (d) in particular imposes a statutory duty on public authorities requiring them to carry out a formal disability equality impact statement when carrying out their functions. At most it imposes a duty on a public authority to consider undertaking an assessment, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability” [89];*

*(b) “...those in the public authority who have to take decisions that do or might affect disabled persons must be made aware of their duty to have “due regard” to the identified goals. Thus an incomplete or erroneous appreciation of the duties will mean that “due regard” has not been given to them” [90];*

*(c) “the “due regard” duty must be fulfilled before and at the time the particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind.. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision are not enough to discharge the duty..” [91]; and that*

(d) “*the duty must be exercised in substance, with rigour and an open mind. The duty has to be integrated within the discharge of the public function of the authority. It is not a question of “ticking boxes”*” [92].

155. It is also established that:-

“*the question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need. To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning*” (per Dyson LJ in **Baker v Secretary of State for Communities and Local Government** [2008] EWCA Civ 141 [37]).

156. The case for the Secretary of State was that she was unable to advance any specific evidence showing compliance with her duties under section 71 of RRA and section 49A of DDA but it can be inferred from the “*substantive result of the exercise of functions*” that she has discharged her duty under those statutory functions.

(ii) *The position in 2007*

157. The original policy related to the medically-documented cases of potential suicide or risk of self-harm and Third Country cases involving unaccompanied children, which were later re-enacted in an amended form in the 2010 exceptions. Mr. Swift is unable to show that there was any assessment in 2007.

158. Indeed, in the Equality Impact Assessment of 4 January 2010 (which is erroneously dated 4 January 2009), it is stated that “*the original policy dates from a time when we were not committed to carrying out Equality Impact Assessments for changes in policy*”. Mr. Peckover said in his first witness statement that when these exceptions were introduced, IND did not carry out an Equality Impact Assessment as they were not routinely carried out at that time. I am unable to accept the contention of Mr. Swift that the 2007 policy amounted to a “*reasonable adjustment*” bearing in mind that the position of disabled people was not considered and the statutory duties was not complied with.

159. Thus the claimant has established a breach of the duties in respect of the 2007 exceptions but the issue is whether it could be, or indeed more importantly was, cured by the 2010 Equality Impact Assessment.

(iii) *The position in 2010*

160. The 2010 Equality Impact Assessment only purports to deal with the new exceptions added in 2010 and it does not deal with the potential impact on those falling within the self-harm and unaccompanied children categories, which were originally introduced in 2007. This is evident from four matters contained in the 2010 Equality Impact Assessment and they are that:-

- a. under the heading “*Policy Aims, Objectives and Projected Outcomes*” it is only the aims and objectives of the new exceptions and not the self-harm and unaccompanied children exceptions which are set out ;

- b. under the heading “*Key Benefits*” it is only the benefits of removing more easily those who are “*seriously disruptive*”, “*prepared to harm others*” and “*reduced detention following failed removals*” which are identified and there is no consideration of any benefits or the impact or possible adverse effects in relation to self-harm or unaccompanied minors categories;
  - c. under the heading “*Assessment and Analysis*” it is only the effects of the new exceptions, which are analysed ; and that
  - d. it is stated in the Assessment that “*no specific impact on those with a disability has been identified. No additional research has been carried out*” and this has to be considered in the light of the fact that the categories in relation to self-harm or unaccompanied minors are likely to have a specific impact on disabled people. Indeed nothing to the contrary was suggested by Mr Swift at the hearing. In my view this shows that the existing categories were not considered.
161. It is noteworthy that the Secretary of State did not seek to introduce any further evidence from Mr Peckover or any other official to show that the equality duties had been considered other than in the 2010 impact assessment.
162. In reaching these conclusions, I have not overlooked the submissions of Mr Swift that it could be inferred that the duty under the DDA had been taken into account in substance but none of the facts whether considered individually or cumulatively go anywhere near establishing that especially as the Secretary of State has failed to adduce any evidence positively showing that there was ever any consideration of the equality impact aspects under the DDA of the self-harm and unaccompanied children categories.
163. Turning to the remaining 2010 categories, I have concluded that the DDA aspects were adequately taken into account by the statement to which I have referred to in paragraph 160(d) above that in the 2010 impact statement that “*no specific impact on those with a disability has been identified. No additional research has been carried out*”. In my view in the absence of any cogent contrary evidence, this shows that the impact has been taken into account especially bearing in mind that the duty was to have “*due regard*” to the relevant statutory need.
164. Although a claim was made in the Claim Form under the RRA, it was not pursued at the oral hearing. The outcome of that claim under that Act must be the same as that made under the DDA as the self-harm and unaccompanied children categories were not considered in 2007 or in 2010 for the reasons which I have explained. The exceptions introduced in 2010 were dealt with in the 2010 impact statement when it was stated that “*all those being removed from the U.K. will be given notice of the removal and have any judicial review application handled in the same way regardless of race or nationality*”. I consider that the Secretary of State complied with her duties under the RRA in respect of the categories first introduced in the 2010 exceptions.

*(iv) Consequences of non compliance*

165. The claimant’s case is that the policy containing the 2010 exceptions should be quashed but Mr Swift points out that any breaches of the DDA and the RRA which

occurred took place more than 3 years ago. He submits that in the light of the time lag, the appropriate remedy should be limited to the grant of a declaration as was ordered in **R (BAPIO) v Secretary of State for the Home Department** [2007] EWHC 199. It is material that in that case there had been a subsequent Race Equality Impact Assessment the sufficiency of which had not been challenged.

166. I consider that the position in that case is very different from the present case where there still has not been an Equality Impact Assessment under the DDA, or the RRA in respect of the self-harm and unaccompanied children categories. Ms Rose contends that the proper remedy on the present application would be to quash the 2010 exceptions and she relies on the approach of the Court of Appeal in **R (C a minor) v Secretary of State for Justice** [2009] QB 657 in which it allowed an appeal from a decision of the Divisional Court, which was not to quash rules which failed to comply with the requirement to make a Race Equality Impact Assessment in circumstances where the whole issue was receiving active consideration in good faith within a reasonable time period thereafter.
167. Buxton LJ (with Tuckey and Keene LJJ agreed) explained in the case of **C** that in respect of the failure to carry out the appropriate assessment:-

*“49... Inattention to it is both unlawful and bad government. In the present case, absence of [an “assessment”] was the result not of inattention but of a mistake made by the Secretary of State... In my view it sent out quite the wrong message to public bodies with responsibilities under “Section 71” to allow that deficit to be cured by a review only undertaken 8 months after the [rules] had been laid, and in the face of an adverse court decision”.*

168. In my view similar reasoning applies here and it is necessary to quash those parts dealing with self-harm or unaccompanied children categories but not in respect of the other categories for which the case that the defendant had not complied with her duties under the DDA and the RRA has not been made out.

## **VII. The ECHR Challenge**

169. The case for the claimant is that by relying on the 2010 exceptions, the Secretary of State is infringing the rights of those subject to the removal direction which arise under Article 5(4) and (6) of the ECHR. In addition the use of these powers discriminates unlawfully against those to whom it is applied contrary to article 14 of the ECHR when considered together with articles 5, 6 and 8 of the ECHR.
170. Miss Rose did not make any oral submissions in support of these claims probably because she could not succeed on these claims if her other claim on the right of access to justice failed. In those circumstances I need not say any more about them.

## **VIII. Conclusion**

171. The main challenge of the claimant to the 2010 exceptions was that it abrogated the constitutional right of access to justice. This right means that every individual must be in a position to challenge a decision in the court. This right was acknowledged by the

Secretary of State in the 2007 policy document which stated that “*we need to ensure that persons, subject to removal enforced removals have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]*”. Further the Chief Executive of UKBA stated in a letter dated 1 March 2007 in relation to the minimum 72-hour time frame that “*in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities*”.

172. Unfortunately, the 2010 exceptions do not take account of “*the need to ensure proper access to the courts*” as they permit the Secretary of State to depart from the standard policy of giving a minimum of 72 hours’ notice of removal including at least two working days with the last 24 hours being on a working day. The effect of the 2010 exceptions is that in practice in the limited time available between serving the removal directions and the actual removal, it is frequently almost impossible that somebody served with removal directions will be able to find a lawyer who would be ready, willing and able to provide legal advice within the time available prior to removal let alone in an appropriate case to challenge those removal directions. There is a very high risk if not an inevitability that the right of access to justice is being and will be infringed. Miss Rose suggested that the Secretary of State could have provided at her expense an independent lawyer to advise those served with abridged notice
  
173. Unfortunately, there are no adequate safeguards built in to the present policy which would ensure that removal could not take place. If somebody had been given very short notice of removal and then in the time available before removal it was impossible for him to contact a lawyer and to obtain advice. There are instances which are set out in paragraphs 108 and 109 above and which show how the policy functions and how it could preclude those served with short notice from enjoying the basic right of access to justice. This means the policy in the 2010 exceptions and which is contained in Section 3 of the 2010 policy document, which was suspended as a result of an interim judgment by Cranston J, has to be quashed. I should record that I considered the possibility that I should not quash the policy but that instead should merely await challenges in individual cases but that is not appropriate because in many cases where access to justice is not available to those served with abridged notice pursuant to the 2010 exceptions, they will be deported and will be unable to pursue their claim from abroad. There are also, as I have explained other grounds for quashing parts of the policy in Section 3 of the 2010 document. Finally I should stress that nothing in this judgment casts any doubt on the legality of the minimum 72 hour time frame and the effect of this quashing order is that those covered by the 2010 exceptions now fall within that time frame.