Threats to Access to Justice in the Nationality and Borders Bill

Public Law Project and JUSTICE Briefing

House of Commons Committee Stage

About Public Law Project

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

About JUSTICE

2. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Executive Summary

3. This briefing focuses on four provisions of the Nationality and Borders Bill ('the Bill'): the priority removal notice (**Clauses 18-22**), accelerated detained appeals (**Clause 24**), further restricting appeal rights (**Clause 25**), and 'no notice' removals (**Clause 43**). For reasons outlined below, **we recommend that these clauses be removed or revised**.

4. Contrary to the Home Secretary's stated intention of 'ensuring access to justice and upholding the rule of law',[1] these clauses will erode the ability of those affected by decisions of Home Office officials to obtain access to justice and hold the Home Office to account. Public Law Project and JUSTICE are of the strong opinion that as currently drafted, the Bill does not strike the right balance between its competing aims of making the system fairer, to protect those in need of asylum, and facilitating removal. Instead, it risks creating a system where people with a legitimate basis to stay in the UK – and genuine grounds to fear removal - can be removed without effective access to justice.

5. The principles of access to justice and the Rule of Law are at the heart of our constitutional arrangements. It has been a principle of our law since at least 1772 that anyone who is subject to English law is entitled to its protection, and there is no distinction in the context of the right of access to justice between those who are British citizens and those who are not.[2] The Explanatory Notes to the Bill, like the flawed New Plan for Immigration consultation which preceded it, present the exercise of the right of access to justice as if it were no more than a delaying tactic used by migrants seeking to frustrate the Home Secretary's efforts to remove undesirable people from our shores.

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[1] Explanatory Notes, para 30.

[2] See *R v Home Secretary, ex p Khawaja* [1984] AC 74 (HL), *per* Lord Scarman at pp111-112.

6. By removing or restricting rights of appeal, and introducing new certification powers, the provisions we highlight below will divert opportunities for legitimate scrutiny of Home Office decision making away from the First-tier Tribunal and increase the need for recourse to judicial review. This is regrettable: judicial review should be a remedy of last resort and it is better for challenges to proceed in an expert Tribunal system which is designed to be an accessible means of efficiently and fairly resolving disputes.

7. There is no reference to the fact that around 50% of appeals to the First-tier Tribunal against the Home Office's decisions are successful.[3] Statistics on judicial review are presented in a way which ignores the fact that – according to the Home Office's own research[4] - around 19% of such cases brought by those facing removal are settled in favour of the claimant without a hearing. It told the Independent Review of Administrative Law that only about 2/3 of judicial reviews lodged against it in 2019/20 were successfully defended[5] – meaning around 1/3 of those cases were either settled or decided in the claimant's favour. There is no reference to the massive backlogs in Home Office decision making which have built up.[6] These are the real cause of delay in the system.

8. Finally, nothing in the Bill addresses the really urgent issue: how to improve the fairness, quality and efficiency of Home Office decision making processes so that more people receive the right decision first time and in a timely manner. The clauses addressed below will increase the risk of injustice for those subject to the immigration system and their families; at the same time they will not achieve the Home Office's aims of a more efficient immigration system, particularly if the need for access to proper legal advice, better first-instance decision making, and a properly funded courts and tribunals system[7] are not urgently addressed.

The Priority Removal Notice (clauses 18-22)

9. Key to the Bill's aims of creating a more effective and efficient system for removal is the new concept of the 'Priority Removal Notice' ('PRN').[8] Intended as a warning to the person that they are being prioritised for removal, the notice gives them a period of time (known as the 'cut-off period') within which to access legal advice and inform the Home Office of any grounds or evidence they want to provide in support of a claim to be allowed to remain in the UK (clause 18(3)). After the 'cut-off period', new claims will automatically be treated with scepticism (clauses 20 and 23), and appeal rights will be severely curtailed (clause 21).

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[3] Tribunal Statistics Quarterly: January to March 2021 (published 10 June 2021), table FIA.3, available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2021

[4] Issues raised by people facing return in immigration detention, Updated 19 July 2021, available at: https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention

[5] Summary of Government Submissions to the Independent Review of Administrative Law, §47. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf

[6] https://refugeecouncil.org.uk/latest/news/thousands-seeking-asylum-face-cruel-wait-of-years-for-asylum-decision-fresh-research-shows/

[7] The need for investment in the courts and tribunals system was recognised by the outgoing Lord Chancellor, Robert Buckland QC MP, in his letter of resignation to the Prime Minister: https://twitter.com/RobertBuckland/status/1438185693386354688/photo/1

[8] Ibid.

10. Clause 22 makes a limited amount of legal aid available for the PRN recipient to receive advice on any aspect of immigration law to inform their response to the notice. Critical to the fairness, efficiency and effectiveness of the immigration system is timely access to effective legal advice. This Bill presents an opportunity to improve access to immigration advice, consistently with its stated objectives, and we have produced a separate briefing making the case for increasing the availability of legal aid for immigration matters.

11. The new 'PRN' was not mentioned anywhere in the New Plan for Immigration Consultation which preceded the publication of this Bill. Vague reference was made to it in some consultation events but with limited – and sometimes conflicting – information was provided about its intended operation and purpose. Although the Explanatory Notes suggest a PRN will only be issued when there is a reasonable prospect of removal,[9] and that further guidance will be issued as to the factors that may prompt a PRN being issued[10], nothing in the Bill explains when a person will be served with a PRN. It is unclear how the PRN provisions relate to existing powers to issue 'One Stop Notices' under s120 Nationality Immigration and Asylum Act 2002 and to certify 'late' claims under s96 of that Act.

12. The Home Office needs to provide much more detail about the intended operation of the PRN, and its place in the removal process, before Parliament can assess its effectiveness in achieving the Bill's aims. MPs may wish to ask:

    a. At what stage will a person be served with a PRN?
    b. What factors will influence whether a person is served with a PRN?
    c. How long will the 'cut-off period' last?
    d. What steps will be taken to ensure that those served with a PRN can *in fact* access the new legal advice provision during the 'cut-off period'? Will the 'cut-off period' be extended if a person has not been able to access legal advice during the 'cut-off period'?
    e. What guidance will be given to Home Office caseworkers to ensure that those who raise claims after the 'cut-off period' with good reason are not unfairly penalised?
    f. How will the PRN relate to the existing 'one stop' notices under s120 of the Nationality Immigration and Asylum Act 2002?

13. PLP and JUSTICE are particularly concerned by **Clause 21** which allows the Home Office to severely circumscribe the right of appeal against any decision made on a 'late' claim (i.e. one made after the 'cut off period'). If certified under clause 21, any such appeal will be to the Upper Tribunal rather than the First-tier Tribunal, and decided on an expedited basis (cl21 (1)). If the Upper Tribunal dismisses the appeal, there will be no further right of appeal (cl 21(2)).

The problems with this clause

14. The mere fact that a claim is made 'late', (after the PRN cut-off period) even without 'good reason', does not mean it is unmeritorious, abusive, repetitious, or that it can fairly be decided

[9] Para 30
[10] Para 219

on an expedited basis. The presumptions underpinning these clauses are that (1) late claims should not be believed (2) late claims should be treated differently and should not be subject to the same level of judicial scrutiny provided in the normal appellate process. But there are numerous perfectly legitimate reasons why late claims are made, including difficulties in accessing legal advice; lack of understanding of the scheme; the emergency of new evidence; changes in the law; shame and fear of disclosure; and the impact of trauma on disclosure. The Home Office and the courts have always been able to consider the timing of a claim as a factor in determining credibility and that may determine an appeal. It is not only unnecessary to create the presumptions set out in the Bill, but it is likely to increase unfairness and unfair decision-making.

Case study: AT and family – R (AT, FF, BT) v SSHD [2017] EWHC 2714 (Admin)

AT is a Gambian national who had unsuccessfully sought asylum in the UK. He was married to a Gambian woman who had been granted indefinite leave to remain in July 2016 as she was unable to return to Gambia. His wife was heavily pregnant with his child, but their relationship had not been raised with or considered by the Home Office as part of his asylum claim.

On 19 September 2016, over three months after his asylum appeal was dismissed, AT received a 'notice of liability to removal'. This notice (issued under a Home Office policy since found to be unlawful[11]) gave him a period of just 7 days within which to raise any new claims (the 'notice period'), following which he could be removed without further notice at any time during the following three months.

AT had had solicitors who had acted for him in his asylum claim but he was not able to secure an appointment with them to obtain advice about the notice of removal until 28 September 2016, after the notice period.

On 26 September 2016, the day the notice period ended and before AT's appointment with his lawyers, AT was detained and told he would be removed to Gambia the following day. Immigration Officers took him to the flat he lived at with his wife to collect his belongings and saw that she was heavily pregnant. AT protested that he could not go back to Gambia because his wife was about to give birth to his child and he needed to see a lawyer.[12] However his removal was not deferred for this reason. Instead, the Home Office recorded that AT had 'disrupted' his removal by his actions and it was for that reason that removal was deferred.[13]

Just over a week later, AT's wife gave birth to their son, BT, a British citizen. Informing the Home Office of the birth of his son the same day, AT stated: "please I really need to go and meet my partner (wife) and my son", and provided photographs and a copy of BT's birth certificate which named him as a father.[14] AT was not released from detention and the Home Office continued to make arrangements for his removal.

[11] *R (FB (Afghanistan) and Medical Justice) v SSHD* [2020] EWCA Civ 1338
[12] Para 34
[13] Judgment, para 34
[14] Para 37

The Home Office refused AT's human rights claim based on his family life with his wife and British child, focusing on the late stage at which he had raised his family life with his wife, and removed him to Gambia before he could access legal advice and challenge that decision. His subsequent judicial review proceedings were successful and he was allowed to return to the UK in order to exercise his right of appeal to the First-tier Tribunal against that decision. The Home Office subsequently conceded his Article 8 family life claim and granted him leave to stay in the UK with his wife and son.

If the Priority Removal Notice provisions of the Bill had been in force then AT's right of appeal – even after he had succeeded in a judicial review - would have been severely circumscribed. He would only have been able to appeal directly to the Upper Tribunal; the appeal would have been decided on an expedited basis; the Tribunal would have been required to treat AT's claims to a family life as lacking credibility; and if the Upper Tribunal had found against him he would have had no right of appeal to the Court of Appeal.

15. The stated justification for the PRN provisions is 'to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action' (Explanatory Notes, para 220). However, the case of AT is just one example which shows that late claims are not necessarily abusive, repetitious or unmeritorious. The starting assumption that late claims lack merit is flawed.

16. Moreover, a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002 (to which the expedited appeals process applies) is only available in respect of decision to refuse human rights or protection claims which are either (a) first claims or (b) fresh claims which the Home Secretary accepts have a realistic prospect of success, and which she has not certified as clearly unfounded. Therefore, this provision will not tackle abusive, repetitious or unmeritorious claims but will severely circumscribe the right of appeal in cases which the Home Secretary accepts have – at least - a real prospect of success on appeal.

17. The effect of Clause 21, and the exclusion of a right of appeal to the Court of Appeal means that such appeals will be entirely insulated within the Tribunal system. Appeals from the Tribunal into the ordinary court system are vital for the proper and just application of the law. As we explained in our response to the government's earlier consultation on tribunal appeals,[15] closing off avenues for appeals risks closing off access to justice. An incorrect decision in this field can cost an individual their safety, security and livelihood.[16]

18. Appeals which are certified under Clause 21 will also be expedited. The scheme of these provisions gives one party to the appeal (the Home Office) power to decide (through certification) that the appeal should be dealt with more quickly than other appeals. However, there is no duty on the Home Office to consider whether that can be done fairly. Certification creates a starting presumption of expedition in such cases from which the UT can depart if in the interests of justice. The more appropriate mechanism would be for the Home Office to apply to the UT for directions if it wants a particular appeal to be heard more expeditiously. This will

[15] Public Law Project, *Submission to Ministry of Justice consultation Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal*, available at https://publiclawproject.org.uk/content/uploads/2021/01/Consultation-submission-PLP.pdf The Ministry of Justice has not yet published its response to this consultation.

[16] See *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 at [47] (Dyson LJ)

allow a judicial decision to be taken, after hearing from both parties, as to whether the appeal can fairly be decided on an expedited basis.

PLP and JUSTICE recommend the removal of clause 21 from the Bill. It will not achieve its stated objective and unless removed, there will be a reduction in the rights of individuals and their access to justice.

Accelerated Detained Appeals (clause 24)

19. **Clause 24** seeks to recreate, through primary legislation, a Detained Fast Track process. A Detained Fast Track for appeals previously existed in the First-tier Tribunal Procedure Rules. Those Rules were found to be unlawful in 2015 because they created an unfair system in which asylum and human rights appeals were disposed of too quickly to be fair.[17] The Court of Appeal described the timetable for such appeals as "so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases".[18] It held that the policy did not sufficiently appreciate "the problems faced by legal representatives of obtaining instructions from individuals who are in detention",[19] nor did it "adequately take into account of the complexity and difficulty of many asylum appeals [and] the gravity of the issues that are raised by them".[20]

20. Hundreds, if not thousands, of cases have had to be reconsidered by the Home Office and/or the Tribunal because they were unfairly rushed through that process. This includes survivors of trafficking and torture and other individuals who on the basis of a rushed and unfair procedure will have been removed to places where they fear persecution, or are separated from their families. There was no adequate system for ensuring that such people were removed from the fast track and given a fair opportunity to present their claims.

21. Since the Detained Fast Track procedure was overturned the Home Office has twice sought to persuade the Tribunal Procedures Committee to recreate it in Tribunal Procedure Rules. After consultation, The Tribunal Procedures Committee refused, stating: "a set of specific rules would not lead to the results sought by the Government. If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired."[21] The Committee was not satisfied that a Detained Fast Track procedure could be created in a way that was compatible with the fair hearing of asylum and human rights appeals. It was found to be also unnecessary, because the Tribunal already had ample case management powers to deal with appeals on an expedited basis if necessary.

The problem with this clause

22. **Clause 24** seeks to force the Tribunal Procedure Committee's hand by *requiring* it to make provision for a new Detained Fast Track. The sole criteria for inclusion in the proposed new

[17] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840
[18] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [38]
[19] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [38]
[20] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [45]
[21] Tribunal Procedure Committee, *Response to the consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

Detained Fast Track are (1) that the person is in detention and (2) that in the opinion of the Secretary of State the appeal 'would be likely to be disposed of expeditiously'.[22]

23. Nothing in these criteria requires any consideration of whether the appeal can be dealt with fairly if it is decided on an expedited basis. There is no requirement to ensure that the appellant has access to competent legal advice and representation. There is no requirement to ensure that they have adequate time to secure essential evidence, such as medico-legal reports, country expert evidence, or other documentary or witness evidence.

24. The requirement to include provision to transfer cases out of the Detained Fast Track if it is in the interests of justice to do so is not enough to make the system fair. Such a provision existed in the old Detained Fast Track but it operated in a way that was grossly unfair and resulted in very few appeals being removed from the Fast Track. The only avenue available for appellants to apply to be removed from the Fast Track was at the hearing at which their appeal would otherwise be determined. This put them in a paradoxical, Catch 22 position of having to argue that they needed more time to prepare in order for their appeal to be dealt with fairly, and if that argument failed to then argue that they had enough evidence for their appeal to be decided in their favour.

PLP and JUSTICE recommend that Clause 24 is removed from the Bill for the substantial reason that the Detained Fast Track is as unnecessary as it is unjust. The Tribunal has adequate case management powers to deal with appeals expeditiously in appropriate cases and already prioritises detained cases. The Home Secretary should not be trying to force the hand of the independent Tribunal Procedures Committee to stack the cards in her favour in appeals against her decisions.

Further restricting appeal rights (Clause 25)

25. **Clause 25** removes the right of appeal for cases which are certified as 'clearly unfounded'. At present, where the Home Secretary certifies a case as 'clearly unfounded', any appeal may only be brought after removal from the UK. In cases concerning protection claims or Article 3 human rights claims such appeals are incapable of providing an effective remedy because the feared harm will have eventuated before the appeal can be heard. As the Explanatory Notes (para 285) acknowledge, the right of appeal is rarely exercised and instead challenges are brought by way of judicial review. This section therefore contributes to a general trend in immigration and asylum law away from rights of appeal to the First-tier Tribunal and towards unappealable decisions which are amenable to judicial review. As noted above, this is regrettable and will not increase the fairness or efficiency of the system.

It is unclear how this further restriction of appeal rights will contribute to the Home Office's aims of creating a more fair and efficient procedure. It will not facilitate removal of those with no right to be in the UK because certified appeals can only be heard after removal. Clause 25 should be removed from the Bill.

[22] New s106A(1)(b)(i) provides for the procedure to apply to decisions of a 'prescribed description'. It is unclear what this is intended to achieve and the Explanatory Notes do not assist: see para 282 which refers only to 'further criteria which will be set out in regulations'.

'No Notice' Removals (Clause 43)

26. **Clause 43** makes clear in statute the duty on the Home Office to give people a minimum of 5 working days' notice of when they are going to be removed from the UK. As evidenced in the case study below, for more than 10 years, the courts have recognised that this duty to give notice of removal is essential to access to justice and the Rule of Law. The Explanatory Notes to the Bill make clear that the purpose of the notice period is to enable individuals to access justice prior to removal (para 493), and that by legislating for a statutory minimum period, the Bill aims to 'standardise the time to access legal advice' (para 497). The Home Office's removal powers can have profound consequences for people's lives. It is vitally important that when officials decide people should be removed, they can access the courts to challenge that decision if they have an arguable case that it's wrong.

27. **Clause 43(8)** creates two exceptions to the right to notice which will lead to 'no notice' removals, removing the courts' ability to supervise the Home Secretary's use of her power to enforce removal. The first exception (new s10A(3) IAA 1999) applies where removal directions fail for reasons outside the Home Office's control, including 'disruption by the person to be removed or others'. The second exception (new s10A(4) IAA 1999) applies where a planned removal does not proceed because of judicial review proceedings. If those proceedings are resolved in a way which means removal can proceed, the Home Office does not have to give any notice of removal if it's carried out within 21 days of the court's decision.

The problem with this clause

28. Providing a statutory minimum period for individuals to access just and creating a standard period of time 'access legal advice' (para 497) are important aims of the Bill but their efficacy in ensuring access to justice depends critically on the availability of legal advice. Unlike the provisions for Priority Removal Notices, there is no specific provision in the Bill for ensuring that those who are served with notice of intention to remove under these provisions can access legal advice within the notice period. The scheme therefore depends on existing legal aid provision. There are serious limitations in the availability of that provision both for those in detention[23] and in the community[24].

PLP and JUSTICE have produced a separate briefing on the need to extend the availability of legal aid for immigration cases if the Home Office's aims of creating a fairer and more efficient system are to be met. If the new statutory notice period is to be effective in ensuring access to justice, clause 22 of the Bill should be amended so that the new legal aid offer made available to those served with a PRN is extended to those served with Notice of Removal Directions.

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[23] Joint Committee on Human Rights, '*Immigration Detention*', Sixteenth Report of Session 2017, HC 1484 HL Paper 278 at §41: The proportion of detainees who were unrepresented was noted with concern in the JCHR report[23]. BID Legal Advice Surveys (currently suspended due to COVID-19 pandemic), Autumn 2018, Spring 2019, Autumn 2019: proportion of detainees interviewed who had to wait for over one week for an appointment with a DDAS lawyer (1) Autumn 2018 – 43% (2) Spring 2019 – 54% (3) Autumn 2019 – 54%; proportion of detainees interviewed without representation (1) Autumn 2018 - 49% (2) Spring 2019 – 37% (3) Autumn 2019 – 41%. Court of Appeal in R(FB) v SSHD, 21 October 2020 at §59(i): Home Office evidence of average waiting times for the DDAS exceeding the standard length of the notice period prior to removal.

[24] Joint Committee on Human Rights, *'Enforcing Human Rights'*: July 2018, Tenth Report of Session 2017 – 2019, HC 669 HL Paper 171 at §§79 – 83; Refugee Action, "Tipping the Scales: Access to Justice in the Asylum System" March 2018. Home Office Policy Equality Statement "Updated Policy: notice of removal" 14/09/15 acknowledging that a longer notice period was needed for those who are not detained as it may take them longer to find an immigration adviser. See also R(FB) v SSHD at §59(iv).

29. Of the two exceptions to the right to notice which will lead to 'no notice removals' under Clause 43(8) the first, (new s10A(3) IAA 1999) is problematic because there is no definition of 'disruption' and, in PLP's experience, Home Office caseworkers interpret the notion of 'disruption' on an extraordinarily broad basis. For example, a person refusing to leave their room in detention because they want to speak to their lawyer first has been defined as 'disruption' as highlighted in the case study of AT, who protested that he could not go back to Gambia because his wife was about to give birth to his child and he needed to see a lawyer. This protestation was recorded by the Home Office as an attempt to 'disrupt' his removal. In such a case, this new exception would allow the Home Office to then proceed with removal at any time over the following 3 weeks without any notice at all. In AT's case, his removal on less than 24 hours' notice (under the Home Office's unlawful removal windows policy) was itself held to be unlawful because it was based on a seriously flawed decision which had been reached in an unfair way. The lack of notice – compounded by difficulties in accessing legal advice from detention- meant that he could not access the court to challenge that decision before removal. It resulted in his being separated from his wife and child for a year, missing out on crucial time to bond with his son.

30. The second exception (new s10A(4) IAA 1999) is even more problematic because it is effectively unlimited in time. It applies where a planned removal does not proceed because of judicial review proceedings. If those proceedings are resolved in a way which means removal can proceed, the Home Office does not have to give any notice of removal if it is carried out within 21 days of the court's decision. But that decision could come weeks, months, or even years after the first notice of removal. Over time, the person's circumstances could have changed fundamentally, important new evidence could have come to light, or the situation in their own country might have changed dramatically – and such changes can happen virtually overnight as has recently been witnessed in Afghanistan. Yet once their previous judicial review proceedings – potentially based on completely different facts and circumstances – are decided they can be removed without any notice or opportunity to raise these new circumstances with the Home Office or access the court. There is not even provision in the Bill as to what would happen if the person wished to appeal the court's decision that they could be removed.

Case study: R(MLF) v SSHD – CO/4418/2017

MLF is a Sri Lankan national whose asylum claim had been dismissed. During judicial review proceedings, in which he was unrepresented, he submitted further representations to the Home Office based on new evidence of the killing of 3 male relatives, which post-dated the hearing of his asylum appeal. This new evidence could not be considered in the judicial review proceedings because it post-dated the decision being challenged. The Home Office's barrister informed him that the material would be forwarded to the relevant part of the Home Office for consideration.

MLF was subsequently served with a decision which refused to consider his fresh representations (on the incorrect basis that he had not followed the correct procedure for providing further evidence) and removed to Sri Lanka on the same day without any notice or opportunity to access the court (under the Home Office's unlawful removal windows policy).

PLP assisted MLF, who was in hiding in Sri Lanka, to apply for judicial review of his removal without notice. The Home Office conceded that he had been unlawfully removed and

arranged for MLF to return to the UK. He has since been granted refugee status on the basis of evidence which post-dated his original appeal, including that which he had submitted during his judicial review proceedings.

31. Clause 43(8) would if enacted have authorised the removal of MLF without notice, providing this was done within 21 days of the final decision on his previous judicial review claim.

Case Study: RAO - CO/2789/2017

RAO is an Iraqi national who had issued judicial review proceedings challenging the Defendant's refusal of further representations he had made in support of his asylum claim. He obtained an injunction preventing his removal pending consideration of his judicial review. However, he was refused permission to apply for judicial review on the papers and the judge ordered that any request for renewal to an oral hearing would not be a bar to removal.

Despite an undertaking given to his solicitors that RAO would be given 72 hours' notice of any removal directions, he was removed without notice to Iraq before the renewed application for judicial review could be heard. The lack of notice meant that RAO was unable to apply to court for a fresh injunction. After his removal, the High Court granted permission to apply for judicial review on the renewed application and ordered RAO's return to the UK. The Home Office subsequently conceded RAO's judicial review and granted him a right of appeal to the First-tier Tribunal. His appeal was allowed and he has now been granted refugee status.

32. If Clause 43(8) is enacted, it appears it would permit a person like RAO to be removed without notice within 21 days of the paper permission decision, despite having good grounds for judicial review.

33. Removing clause 43(8) would not prevent the Home Office from seeking to remove a person who has been refused permission on the papers, it would simply require the person to be given notice of removal directions, and an opportunity to ask the court to issue an injunction preventing their removal while their application for permission is reconsidered (as in RAO's case) or in order to present fresh evidence or challenge a new decision on that evidence (as in MLF's case).

Clause 43(8) should be amended so as to delete sub-sections (3)-(5) of new s10A of the Immigration and Asylum Act 1999.[25] There is no justification for the exceptions to the right to notice of removal and if enacted, they could give rise to serious injustices.

[25] By removing lines 8-42 on page 40 of the Bill as published.