

## Deportation

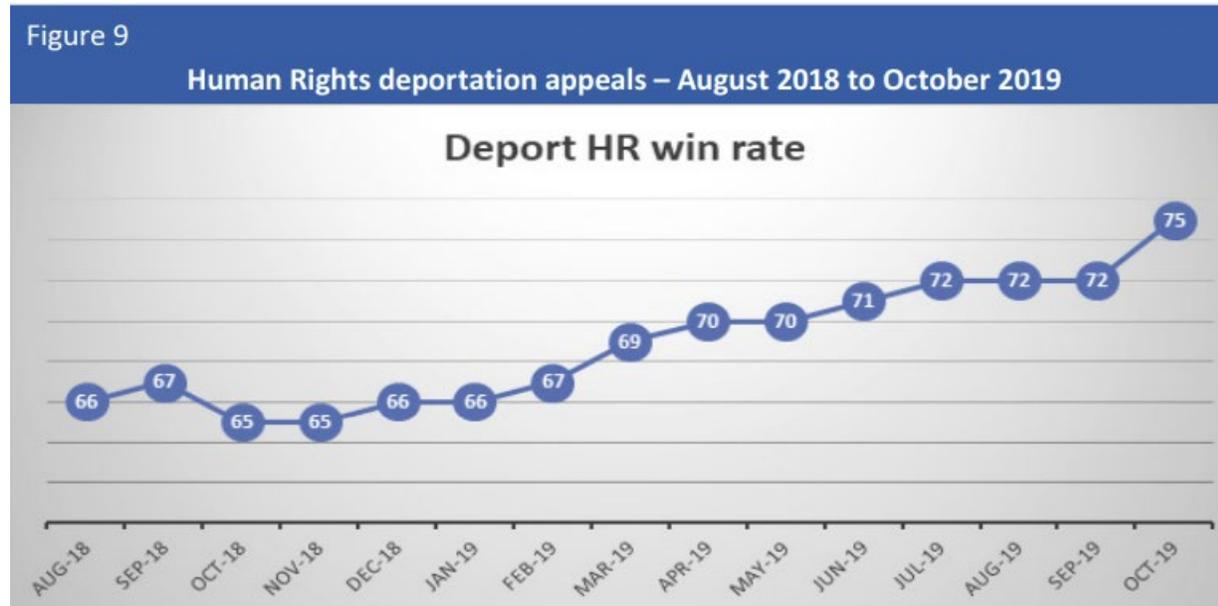


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## Introduction

- Key provisions:
  - Clause 8: ‘extreme harm’ the new standard for Article 8
  - Clause 20: ‘nullification’ the new standard for Article 6 (in deport cases)
- Longstanding government antipathy to deportation cases & attempts to make it harder to succeed (Immigration Rule 2012; Immigration Act 2014)
- Hard to see these provisions being compatible with ECtHR jurisprudence
- Text of the Bill is [available here](#)

# Purpose of new deportation provisions



Source; ICIBI *Inspection of the Home Office Presenting Officer Function*, January 2021

## Purpose of new deportation provisions

- October 2018: *KO (Nigeria) v SSHD* [2018] UKSC 53 promulgated
- Considered changes brought in by 2014 Act
  - When is it “*reasonable to expect*” a child to leave the UK, when would separation be “*unduly harsh*”?
  - UKSC: No need to balance child’s interests against parent’s offending, does not require “*very compelling reasons*”

## Clause 8: statutory framework

(1)

- Applies to Art. 8 challenges to legislation concerning deportation ('deportation provisions')

(2)

- No Art. 8 breach unless **manifest harm so extreme** that wd override the otherwise paramount interest in removal

(3-4)

- Extreme: "*exceptional and overwhelming*", no mitigation
- Applicant will only win in "*the most compelling circs*"

## Clause 8: who does this cover?

- Applies where a court is considering a challenge to deportation legislation, not individual challenges
- Covers all '*foreign criminals*'
- Purports to cover private and family life, but '*manifest extreme harm*' test only applies to **qualifying family members**
  - Child under 18 w/ whom P has **always** had & continues to have a genuine & subsisting parental relationship & who is British / lived in UK for 7+ years
  - Dependant who is British / settled

## Clause 8: what does it mean?

- Does not repeal pre-existing deportation legislation
  - Suggests more restrictive legislation will be introduced?
- Allows legislation to impose an additional, **insuperable hurdle**
- Could be used to **prevent any Art. 8 claims succeeding** in deportation cases
- Prevents consideration of private life issues?

## Clause 8: what about Strasbourg?

- Strasbourg recognises wide margin of appreciation; deference to domestic decision-makers, unless “*strong reasons*” to do so:
  - *Ndidi v UK*
- **But** domestic legislation cannot absolve judges of their obligation to conduct a full proportionality assessment:
  - *Unuane v UK*

## Clause 20: statutory framework

(2, 4)

- Applies to Art. 6 challenges to deport orders

(2)

- No Art. 6 breach unless **so fundamental** that it would amount to a **nullification** of the right

(3)

- Court **must** treat SSHD's assessment of assurances as correct & determinative of the appeal, subject to rationality

## Clause 20: what does it mean?

- Art. 6 not regularly relied upon in deportation claims
  - *Kiarie & Byndloss* [2017] UKSC 42: procedural element of Art. 8
- ‘Nullification’: does any process which is unfair nullify the right?
  - Art. 6 is not an absolute right: restrictions must not restrict or reduce access to a court so that the very essence of the right is impaired: see e.g. *Stanev v Bulgaria*

## Clause 20: will it make a difference?

- Challenges to unfair processes invoke **common law right of access to justice**
  - *Medical Justice v SSHD* [2010] EWHC 1925 (no-notice removals):  
decided under common law although Art. 6 cited
  - *R (FB (Afghanistan)) v SSHD* [2022] QB 185

**No express statutory language ousting the principle of legality**

# Thank you for listening

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