

**Welcome to Landmark Chambers’
‘Bill of Rights Bill’ webinar series – Session 3**

The recording can be accessed [here](#).

Your speakers today are...



Richard Drabble QC (Chair)



Luke Wilcox

Topic:
Overseas military operations



Miranda Butler

Topic:
Deportation



Katharine Elliot

Topic:
Freedom of expression and journalistic sources

Deportation

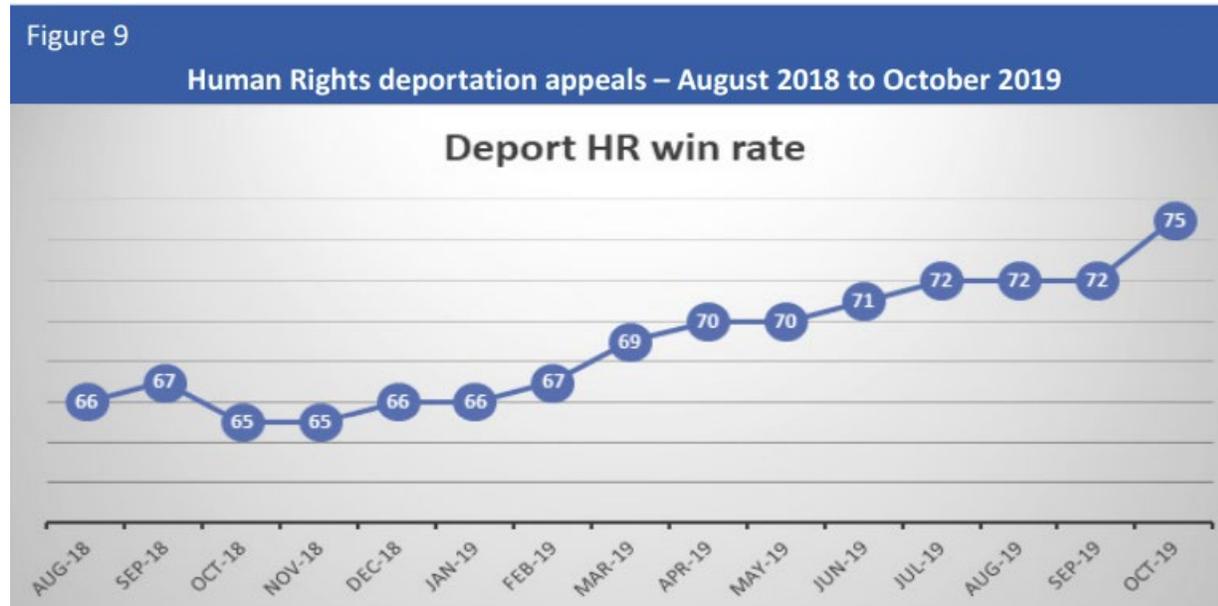


Miranda Butler

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

Freedom of expression and journalistic sources



Katharine Elliot

Clause 4: Freedom of Speech

*“When determining a question which has arisen in connection with the right to freedom of speech, a court **must give great weight** to the importance of protecting the right.” (4(1))*

- Right to freedom of speech = Article 10 ECHR (4(2)) *“so far as it consists of **a right to impart** ideas, opinions or information by means of speech, writing or images (including in electronic form).”*
- A deliberately distinguished sub-category (excl. freedom to hold/receive)
- To secure increased weight given to importance of free speech by decision-makers

Clause 4: Freedom of Speech

- Exemptions (4(3)):
 - Criminal proceedings / legislation creating criminal offences
 - Breach of confidence claims based on agreement/professional relationship
 - Immigration / citizenship cases
 - National security

- Picks up key ‘themes’ of Article 10(2) as limitations will continue to apply

- Breach of confidence exemption narrowed to exclude cases where no relationship giving rise to duty of confidence (e.g. *Mosley v NGN Ltd* [2008] EWHC 1777 QB)

Clause 4: Freedom of Speech

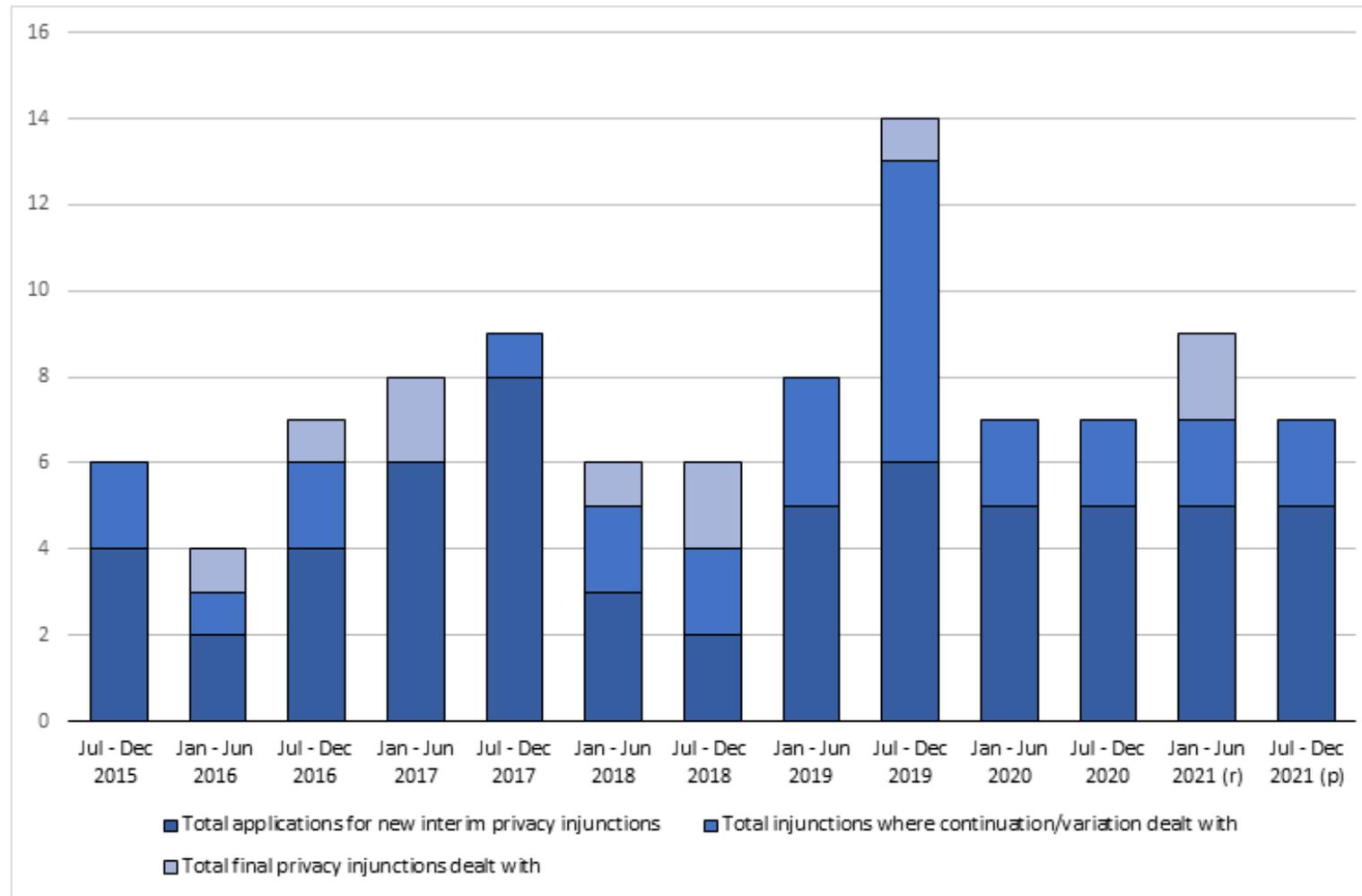
- Courts determining question arising in connection with Convention right must comply with clause 4 (3(2)(c))
- Compliance with clause 4 to allow more expansive interpretation of Convention rights by UK courts (3(4))

“Subsection (3)(a) does not prevent a court from adopting an interpretation of a Convention right where it does so as a result of complying with section 4 (freedom of speech)”.

Clause 4: Freedom of Speech

- Intention to lead to “*more restrictive application of rights than [ECtHR] would adopt where the great weight to be given to the importance of protecting freedom of speech permits greater interference with another qualified right than would otherwise be the case*”.
- Intention to limit ability to rely on competing rights but reassures that “*the great weight to be given to the importance of protecting freedom of speech will never operate to extinguish*” other Convention rights.
- Classic scenario = Article 8 v Article 10 publication injunction cases

Number of privacy injunction proceedings (15-21)



Clause 4: Freedom of Speech

- Particular focus in IA on increase in Strategic Lawsuits Against Public Participation (SLAPPs)

“an abuse of legal process, where the primary objective is to harass, intimidate and financially and psychologically exhaust one’s opponent via improper means”.

- Impacting areas of defamation law, DPA and privacy law (e.g. Catherine Belton/Putin’s People case; Tom Burgis/Kleptopia case - *ENRC v Burgis & Harper Collins* [2022] EWHC 487 (QB)).
- Aim to reduce availability of injunction as a ‘*weapon*’

Clause 22: Limiting court's power to grant relief

- Imposes limit on granting of any relief (“*any remedy or order*”) which might affect exercise of Article 10 (i.e. all of it) (22(1))
- No relief to be granted in respondent’s absence unless the court is satisfied that (22(2)):
 - The applicant has taken all practicable steps to notify the respondent; or
 - That there are exceptional and compelling reasons why the respondent should not be notified.
- No relief restraining pre-trial publication unless court satisfied applicant likely to establish publication should not be allowed (22(3))

Clause 22: Limiting court's power to grant relief

- Restatement of s.12 Human Rights Act 1998 except:
 - “**exceptional and compelling reasons**” to proceed *in absentia* where all practicable steps to notify not taken;
 - S.12(4) (particular regard in cases of journalistic, literary or artistic material) not included.
- Combined effect of clause 4 and 22 (with 21) is that protection of freedom of speech is “*enhanced*”.

Clause 21: Disclosure of journalistic sources

- Court may not require disclosure unless satisfied that (21(1)):
 - Disclosure necessary in the interests of justice or national security or for the prevention of crime or disorder; and,
 - There are exceptional and compelling reasons why it is in the public interest for the disclosure to be made.
- Same test for contempt of court for refusal to disclose

Clause 21: Disclosure of journalistic sources

- In determining whether exceptional and compelling reasons (21(2)):
 - “...*the court must give great weight to the public interest that exists in protecting journalistic sources, including the fact that their protection supports the Convention right set out in Article 10 of the Convention...*”
- Applies to any body exercising the judicial power of the state (21(3))
- Journalistic source = person who supplies information to another person intending it to be used for purposes of journalism / knowing that it is likely to be so used

Clause 21: Disclosure of journalistic sources

- Intended as “*strengthened equivalent*” to s.10 Contempt of Court Act 1981
- Changes:
 - Expressly journalistic sources (plus new definition);
 - Not confined to publication for which person responsible;
 - Adds “*exceptional and compelling reasons in the public interest*” requirement;
 - Express requirement to give great weight to PI in protecting journalistic sources in line with Article 10;
 - Applies to any body exercising judicial power of the State.

Overseas military operations



Luke Wilcox

Topics to be covered

- The background to human rights and extraterritorial armed forces activities
- The mischief: *Al-Skeini v UK*; *Smith v MoD*
- The Government's intentions
- The provisions of the Bill
- The challenges and risks

Background

- The general position: ECHR does not apply beyond the territorial boundaries of the High Contracting Parties
- E.g. *Soering v UK* (1989) 11 EHRR 439: States have no general obligation to seek to impose ECHR standards on non-party states.
- Extraterritorial acts are within a State's "jurisdiction" for ECHR purposes only in exceptional circumstances: *Bankovic v Belgium* (2001) 11 BHRC 435

Military operations overseas – the evolution of the jurisprudence

- *Al-Skeini v UK* (2011) 53 EHRR 18
- Claim brought against UK by relatives of Iraqi citizens shot by British soldiers
- ECtHR held that extraterritorial actions could be within jurisdiction where:
 - A State's agents exert authority and control over others
 - The State, by acquiescence, consent or invitation of a non-contracting state, exercises public functions in the non-contracting state
 - The State exercises effective control over a territory via military action

Al-Skeini v UK

- Result – actions of UK soldiers established a jurisdictional link to the UK for ECHR Art 1 purposes

The current position

- *Smith v MoD* [2004] AC 52
- Concerned deaths of UK soldiers in Iraq – Art 2 claim on basis of unsuitable armoured vehicles
- Held (UKSC):
 - *Al-Skeini* establishes that the bar for “exceptional circumstances” is not especially high (para 30)
 - The ECtHR’s jurisprudence had moved on since *Bankovic* (para 48)
 - Art 2 ECHR extends to members of the armed forces serving abroad (para 55)

Background: the Government's concerns

- “Human Rights Act Reform: A Modern Bill of Rights” consultation (CP588, Dec 21), p. 43:
 - Extension of HR law to armed conflict has created legal and operational uncertainty
 - *Travaux* make clear the ECHR was not designed to regulate conflict situations, and is ill-adapted for that purpose
 - ECHR application is applied on top of existing armed forces obligations (e.g. the Geneva Convention) which are designed specifically for the circumstances of warfare
 - Cost and morale implications of HR litigation against members of the armed forces

The BoRB's provisions: clause 14

- Disapplies the s. 13 right to bring proceedings in respect of an act or proposed act done or proposed to be done outside the UK by a public authority in the course of overseas military operations (cl 14(1))
 - E.g. tactical or operational decisions taken in-theatre
- Disapplies s. 13 in relation to acts done in the UK but wholly for the purposes of overseas military operations, and where the affected person is outside the UK (cl 14(2))
 - E.g. decision taken in London to launch a drone strike overseas

The BoRB's provisions: clause 14 (continued)

- Prevents related persons from bringing claims disappplied under cl 14(1) and (2) (cl 14(3))
 - e.g. family members of deceased soldiers
- Disapplies s. 13 for investigations and inquiries into cl 14(1) or (2) matters (cl 14(4))
 - Intended to limit ECHR art 2 and 3 investigative obligations in this context (ENs para 126)

The BoRB's provisions

- Cl. 14 does not prevent a person from relying on Convention rights in criminal proceedings (14(5))
- “overseas military operations” includes:
 - Peacekeeping operations
 - Counterterrorism
 - Operations dealing with civil unrest or serious public disorder where armed forces personnel come under, or face threat of, attack or violent resistance (cl. 14(6))
- Term “military” not strictly appropriate ...

Cl 14's effect

- Cl 14 obviously and deliberately removes Convention rights established by the ECtHR
- How is it consistent with the ECHR, as per the Lord Chancellor's declaration?
- Answer: cl 39(3):

CI 39(2) and (3)

(2) The other provisions of this Act come into force on such day as the Secretary of State may by regulations appoint.

(3) The Secretary of State may exercise the power in subsection (2) in relation to ... section 14 (overseas military operations) only if the Secretary of State is satisfied (whether on the basis of provision contained in an Act passed after this Act or otherwise) that doing so is consistent with the United Kingdom's obligations under the Convention.

The intended trigger for cl 39(3)

- Per the MoJ's ECHR Memorandum for the Bill (para 22):
 - Government intends to *“introduce alternative remedies to cover such circumstances”*

- ENs to the Bill, para 262:

“For the Secretary of State to be satisfied, it may require either the introduction of alternative domestic remedies within subsequent legislation, or the revision of extraterritorial jurisdiction under the Convention.”

Issues to watch ...

- Success or failure of this legislation, and the underlying policy, will turn on the nature and extent of the “alternative remedies”
- Tricky balancing act – how to satisfy Strasbourg that ECHR is complied with, while avoiding creating a regime that re-introduces the mischiefs the Govt has identified under the *Al-Skeini* jurisprudence?
- Risks of Ombudsman-type solution (clinical decisions, local government planning decisions etc) ...

Thank you for listening

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