Amnesty International UK

BRIEFING

Parliamentary Briefing: Bill of Rights Bill (Clause 8: deportation: respect for private and family life)

Introduction

This briefing solely concerns deportation, particularly relating to clause 8 of the Bill of Rights Bill (the bill). We provide a brief analysis of clause 8. Thereafter, we provide further analysis and context relating to the inclusion of this clause in the bill. We address the bill more broadly in a separate briefing.

It is remarkable that such prominence is given to deportation, a narrow area of policy, in a bill of such constitutional significance concerning wide and fundamental matters of human rights. Regrettably, deportation has long been a focus for criticism of the Human Rights Act 1998 (HRA). That criticism has been unnecessary, misleading, and damaging. Clause 8 is one of the bill's two provisions on deportation. It is unnecessary and will do further harm.

Clause 8: analysis

The clause is to exclude UK courts from declaring any primary or secondary legislation that requires or permits the deportation of someone – designated by the UK Borders Act 2007 as a "*foreign criminal*"[1] – to be incompatible with the right to respect for private and family life.[2] It would set an extraordinary threshold before a court could ever declare such legislation to be incompatible with human rights law by reason of the legislation's unnecessary, illegitimate or disproportionate interference with private or family life.[3] The threshold would be that the legislation *required* action that would cause manifest harm to specified family members of the person facing deportation that was so extreme as to be exceptional, overwhelming and either incapable of any significant mitigation or wholly irreversible.[4]

Permitting or requiring harm at this level or more extreme – if that is possible – could not be declared incompatible if the harm was to the person to be deported.[5]

Example:

A 30-year-old man, who was born in the UK and has lived here his entire life, facing exile from his home and family to a country to which he has never been and has no ties (save for possession of nationality via a parent). This would be deemed irrelevant, even if likely to lead to overwhelming and irreversible psychological collapse or deprive him of vital physical care.

[1] Section 32(1) of the UK Borders Act 2007

[2] Article 8 of the 1950 European Convention on Human Rights, as incorporated by the HRA, requires respect for private and family life.

[3] Article 8 provides that interference with private and family life is permitted if it is in accordance with law, pursues a legitimate purpose and is a necessary and proportionate means of pursuing that purpose.

[4] This threshold is established by paragraph 4 of clause 8.

[5] Article 3 would continue to prohibit deportation if that were to put the person at risk of torture, inhuman or degrading treatment.

It could equally not be declared incompatible if that harm was to someone other than that person's minor child or adult relative who is dependent on them.[6]

Example:

A British citizen child (of the British citizen partner of a person facing deportation but not of that person), who is living with severe physical and/or mental impairments and whose physical, psychological and emotional needs are being substantially and vitally addressed by the person facing deportation caring for the child. This would be deemed irrelevant even if the separation from that person would be likely to lead to catastrophic psychological or emotional harm to the child, deprive the child of vital care and place the child's relationship with their British citizen parent under impossible strain.

In the case of an adult relative some additional factor of "*most compelling circumstances*" would be required[7] – as if avoiding exceptional, overwhelming harm that was incapable of mitigation or wholly irreversible was somehow not already the most compelling of circumstances. Moreover, permitting or requiring this harm to the person's child or dependent relative could not be declared incompatible if the child or relative did not fulfil various further conditions relating to their status in the UK or length of residence.[8]

Example:

A six-year-old child, of mixed national parentage, who is settled in the UK with one parent, is living with severe physical and/or mental impairments and whose physical, psychological and emotional needs are being substantially and vitally addressed by the other parent facing deportation. This would be deemed irrelevant even if the separation from that parent would be likely to lead to catastrophic psychological or emotional harm to the child, deprive the child of vital care and place the child's relationship with their settled parent under impossible strain.

Clause 8 is an extraordinary and wholly objectionable measure. There are several fundamental reasons for describing it in such terms:

(1) There is the extreme level of harm that it would allow to be inflicted upon people without even formal judicial remark on the legislation that either permitted or required that to be done. The level of such harm would include exceptional and overwhelming harm to some people that merely fell short of being either beyond any mitigation or wholly irreversible. It would also include exceptional and overwhelming harm to other people that was beyond any mitigation and wholly irreversible.

[6] This is the effect of designating qualifying members of the person's family by paragraph 5 of clause 8.
[7] This is the effect of paragraph 4 of clause 8.
[8] See definition of 'qualifying child' and 'qualifying member of P's family' in paragraph 5 of clause 8.

(2) There is the exclusion of such judicial remark upon even provisions of subordinate legislation – i.e., provisions in secondary legislation, made by ministers under enabling powers, that is not subject to any parliamentary process allowing for amendment of its provisions and may be subject to nothing more than a negative resolution procedure.

(3) There is the damaging impact upon the integrity of the judicial system that requiring the court's silence upon a provision's manifest incompatibility with human rights law would cause. If implemented, clause 8 will require that silence from the court in circumstances in which the UK remains not merely a party to the European Convention on Human Rights but purports to have formally incorporated its international obligations under that Convention within its domestic laws. Clause 8 would allow that incorporation to be made a fiction in the context of deportation and the application of Article 8 of the Convention. It would require the courts to partake of that fiction by treating a manifest incompatibility as if it were compliant with the Convention.

Context relating to clause 8

Clause 8 gives every indication of being both a wilful attempt to flout the UK's obligations under the European Convention on Human Rights and designed to spark yet further intemperate and often ill-informed debate about human rights and deportation laws.[9]

The power of deportation derives from the Immigration Act 1971.[10] For more than two decades it has been reserved for the removal and exclusion from the UK of people, who do not possess British citizenship and whose presence is considered by the Home Secretary to be not conducive to the public good.[11] For many years after the HRA's introduction, the exercise of the power was subject to immigration rules that required a broad and balanced consideration of the circumstances of any person liable for deportation, including the relative strength or absence of their ties to the UK or to the place to which they would be deported if the power were to be exercised.[12] These rules made no express reference to human rights law.

However, this longstanding domestic approach to deportation was abandoned in 2006[13] and firmly displaced in 2008[14] with a narrow approach that made the HRA the primary or sole consideration in many, if not most cases. The catalyst for that development was a purely administrative failure at the Home Office

[9] This is a matter we raised with the Joint Committee on Human Rights, and on which it commented, in relation to its inquiry in *Enforcing Human Rights*: Tenth report of Session 2017-19, HC 669, HL Paper 171, July 2018.
[10] Sections 3(5)-(6A) and 5 of the Immigration Act 1971
[11] On 2 October 2000, section 3(5) of the Immigration Act 1971 was amended by Schedule 14 to the Immigration Act 1999. The 1999 Act introduced distinct provisions for removing from the UK people who required leave to be in the UK and did not have this.
[12] Paragraph 364 of the Immigration Rules prior to its being substituted on 20 July 2006 required consideration of the following in relation to any potential deportation: (i) the person's age, (ii) length of residence in the UK, (iii) strength of connection with the UK, (iv) personal history including character, conduct and employment record, (v) domestic circumstances, (vi) previous criminal record and the nature of any offending for which the person was convicted, (vii) any compassionate circumstances, and (viii) any representations made on the person's behalf.
[13] On 20 July 2006, Statement of Changes in Immigration Rules (HC 1117) substituted paragraph 364 to presume that a person's deportation would be required in the public interest which could only be outweighed "*in exceptional circumstances*" unless otherwise prohibited by the HRA.
[14] Sections 32-39 of the UK Borders Act 2007 took effect on 1 August 2008 to require deportation of person's designated as 'foreign criminals' unless specified exceptions applied. Exception 1 is where the deportation would be contrary to either the Refugee Convention or HRA: section 33(2).

to consider whether its power of deportation ought to be exercised in hundreds of cases.[15] Ministers publicly and wrongly blamed that failure on human rights law.[16] These events had a threefold effect:

(1) Deportation was put under far more intense public and political scrutiny.

(2) Political and public discourse surrounding that scrutiny was led by a false narrative that strongly associated human rights law with preventing the exercise of powers that had, in fact, simply been overlooked by the Home Office.

(3) That scrutiny and false narrative were exacerbated by making human rights laws the focus for consideration of deportation in circumstances where they had not been such a focus, including circumstances in which those laws are now the only barrier to a person's deportation that the previous rules would have proved sufficient to prevent.[17]

The harmful and misleading intensity of this discourse and scrutiny has been exacerbated by the statutory language adopted in the UK Borders Act 2007, the Immigration Act 2014 and now in this bill. These each designate certain people as 'foreign criminals', though the designation in the 2014 Act is in significant part different to that in the 2007 Act and this bill.[18]

Nonetheless, each of these designations includes people who are British in all senses, including having rights to British citizenship (the citizenship of the UK), save for formally possessing that citizenship.[19] This includes people who are born in the UK and have never left the country. It also includes people, whose ties to the UK are less strong than this but nonetheless very substantial, including where they have lived here for much or most of their lives and have British partners and children. The 'foreign' label therefore conceals the huge variance in the strength of connection among the people to whom the label is applied.

These designations also include people who have powerfully demonstrated their rehabilitation, present a low risk of reoffending, and have not reoffended for long periods. The designations also include people whose offending was during childhood or early adult years;[20] and people convicted of offences of greatly varying degrees of seriousness including people sentenced to terms of imprisonment of 12 months and

[15] This was made clear by HM Chief Inspector of Prisons in two reports: *Foreign national prisoners: a thematic review*, July 2006 and *Foreign national prisoners: A follow-up report*, January 2007.

[16] This was the subject of inquiry by the Joint Committee on Human Rights into statements of the Prime Minister and Home Secretary, which Committee received oral evidence from the Lord Chancellor and Home Affairs Ministers (later appointed Attorney General) confirming that human rights law had no part in the Home Office failure: *The Human Rights Act: the DCA and Home Office Reviews*, Thirty-second report of Session 2005-06, HC 1716, HL Paper 278, November 2006.

[17] That has also been achieved by section 15 of the Immigration Act 2014, which narrowed rights of appeal in all immigration cases to only where human rights or asylum claims have been made.

[18] Section 32(1) of the UK Borders Act 2007 and section 117D(2) of the Nationality, Immigration and Asylum Act 2002 (as amended by section 19 of the Immigration Act 2014) provide overlapping but distinct definitions. Clause 36(1) of the bill stipulates that it is the 2007 Act definition to which the bill refers, including in clause 8.

[19] More information is provided by the October 2019 joint briefing of the Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK: https://prcbc.files.wordpress.com/2021/12/briefing_good-character.pdf

[20] A period widely recognised as being emotionally, psychologically and neurologically formative.

people sentenced to life.[21] The 'criminal' label therefore conceals the huge variance in the degree to which the people to whom the label is applied constitute any risk to others or have seriously offended.

Clause 8 would allow the existing failure of current deportation law, policy and practice to distinguish between vastly differing circumstances to be magnified far further. It would not, however, alleviate any of the profound misrepresentation of human rights laws in the discourse and scrutiny that has been promoted since 2006. Instead, it would enable even greater harm to be done to people, and their families and communities, by their expulsion or exile; and perpetuate the undermining of rehabilitative work – including efforts of the State, the offender and others – even in circumstances where the person's future remains and will continue in the UK. That was plainly the immediate result in 2006 when hundreds of people were recalled to prison in a knee-jerk response to the public exposure of administrative failure at the Home Office, some of whom were British citizens and many of whom were never going to be and were not deported.[22] It is still the result of a political culture that arbitrarily targets deportation numbers (rather than any rational deportation policy). This results in deportation orders being made against many people who should not and/or cannot be exiled from the country of their home. People are thereby left deprived of any means to maintain themselves independently, still less to complete their rehabilitation following a term of imprisonment.[23]

Black and brown people are disproportionately affected by the harm and injustice of deportation policy. This in part results from racial discrimination arising in the criminal justice and care systems, as for example highlighted by the Government-commissioned Lammy Review,[24] because deportation is intimately connected to offending and the criminal justice system. The Review, like other inquiries into racial discrimination, did not consider the link between these systems and deportation.[25] That remains a profound failure. Another reason for the disproportionate impact arises from the application and injustice of a statutory requirement, first introduced in 2006, that children as young as 10 must satisfy the Home Secretary that they are of good character.[26] This applies to children born in the UK and entitled to British citizenship by reason of their continued residence and connection to this country.[27] Depriving these children of their citizenship rights on grounds of character subjects them to the 'foreign' designation for the purposes of deportation provisions, including clause 8.

By any calculation, the impact upon families, children and communities of existing deportation policy is extremely harmful. Clause 8 would license the executive to make that even worse.

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[21] The UK Borders Act 2007 designates all people who are not British citizens and have been sentenced for any period of 12 months or more for an offence as 'foreign criminals'. If an offence is specified as 'serious' by order made by the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002, any custodial sentence (including of one day) would be sufficient for the person to be caught by the designation.

[22] As was, for example, made clear by HM Chief Inspector of Prisons in her *Foreign national prisoners: A follow-up report*, January 2007.

[23] The impact of this has been exacerbated by the Immigration Act 2016, which restricts the Secretary of State's powers to support and accommodate people on 'immigration bail' (generally excluded from permission to work or access public funds) to people who have made a claim for asylum.

[24] *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, September 2017

[25] See e.g. *Race Disparity Audit: Summary Findings from the Ethnicity Facts and Figures website*, October 2017 (updated March 2018), reviewing several areas of policy excluding immigration.

[26] This was first introduced by section 58 of the Immigration, Asylum and Nationality Act 2006 and later inserted as section 41A of the British Nationality Act 1981 (by section 47 of the Borders, Citizenship and Immigration Act 2009).

[27] Section 1(4) of the British Nationality Act 1981