The "Chancellor's foot" and the contrivance of deportability in the UK: matters arising

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Abstract

Purpose – It has been argued that the UK has the reputation of operating a complex set of immigration laws to the extent that the constantly changing laws and regulations lead much to confusion and lack of accountability. It has further been argued that the ever-increasing and shifting pattern of deportation laws (some of which are retroactive) violates the basic principles of human rights norms. This paper aims to raise the query as to whether legislation associated with deportation is constantly enacted and revised to achieve deportation without regard to the remit of the doctrine of legitimate expectation encapsulated under the principle of legal certainty.

Design/methodology/approach – This research applies the doctrinal research methodology in addition to somewhat reliance on anecdotal evidence. Doctrinal research is library-based and reliance will be placed on primary and secondary materials such as legislations, case laws, soft laws on the one hand and textbooks, journals, articles, legal encyclopaedia, databases and many valuable websites on the other hand.

Findings – While it is accepted that the State enjoys the discretion or prerogative to deport migrants that violate the State's immigration laws, the author posits that the issue of constant changes breed uncertainty, which in turn breeds unpredictability leading to unaccountability. Drawing on the UK's state practice, the author will submit that contrivance of deportability and/or removability is adumbrated by the legal production of migrant irregularity exemplified by inconsistent and uncertain laws that vary like the "Chancellor's foot". In addition, the research found that crimmigration heightened the velocity of deportation by expanding deportability grounds by way of triggering broader, harsher and more frequent criminal consequences leading to conviction, thereby creating a suitable avenue for deportation and reducing the scope for challenging deportation decisions.

Originality/value – The research is an original piece of work that contributes to scholarship and knowledge in the area of migration as it concerns international human rights law given that wider matters within the boundaries of immigration and nationality laws do have effect on individual possession of rights to be in the UK, by way of lawful presence or as a matter of discretion.

Keywords Removal, Crimmigration, Deportation, Legitimate expectation, Liberal democracy

Paper type Research paper

1. Introduction

Relying on the customary rights of State sovereignty, States have in principle the freedom to expel aliens [migrants] in their territorial jurisdiction[1]. It is unarguable however that with the advent, emergence and development of global and regional human rights institutions, States by virtue of their treaty obligations incumbent on these developments have ceded a measure of their sovereignty (Dauvergne, 2004; Schreuer, 1993). While it is conceded that States can maintain sovereignty over their internal affairs, they are nonetheless accountable to upholding acceptable principles and standards under International Human Rights Law (IHRL) in the exercise of sovereignty thus inviting a reconciliation of sovereignty with universality of human rights law (Cholewinski and Taran, 2010, p. 3).

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Even so, the rule of law requires that the law must be accessible and so far as possible intelligible, clear and predictable thus inviting its conformity and adherence to the principles of legal certainty. When a law is procedurally and legally transparent, predictable and legally certain, arbitrariness is avoided given that certain laws may be legal but arbitrary. Persons who are subject to the law must be able to explicitly predict the law, as the law should be adequately accessible to help them regulate their conduct. It has been argued that the UK has the reputation of operating a complex set of immigration laws to the extent that the constantly changing laws and regulations lead much to confusion and lack of accountability. It has further been argued that the ever increasing and shifting pattern of deportation laws (some of which are retroactive) violates the basic principles of human rights norms. The Lords Chancellor in the medieval England were thought to ignore precedents and decide what judgment to make in accordance with their own caprice.

In the seminal case of *Gee* v. *Pritchard* (1818), Lord Eldon remarked:

> [. . .] the doctrine of these courts ought to be as well settled and made as uniform almost as those of the common law laying down fixed principles but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot.

The idea is evaluating the contours of deportability *vis-à-vis* legal certainty-legitimate expectation and by so doing unravel the relationship between the construction of deportability and migrant irregularity lying in continuum with the interplay of "crimmigration" in the contrivance of deportability. This paper raises the query as to whether legislation associated with deportation are constantly enacted and revised to achieve deportation without regard to the remit of the doctrine of legitimate expectation encapsulated under the principle of legal certainty. While it is accepted that the State enjoys the discretion or prerogative to deport migrants that violate the State's immigration laws, I posit that the issue of constant changes breed uncertainty, uncertainty breed unpredictability leading to unaccountability. Drawing on the UK's state practice, I will submit that contrivance of deportability and/or removability is adumbrated by the legal production of migrant irregularity exemplified by inconsistent and uncertain laws that varies like the "Chancellor's foot".

1.1 Conceptualization and contextualization

Deportation and removal are inextricably intertwined but given their different statutory bases are distinctively defined. Deportation is defined by the Immigration Act 1971 section 5 (1) (2) and paragraphs 362 of the Immigration Rules, as a process where a non-citizen can be forcibly removed from the UK by virtue of an order and prohibited from returning unless the order is revoked[2]. It therefore authorises detention of the person until the subject leaves the UK, prohibits re-entry while the order is in force and invalidates any leave to remain, which the person has during the subsisting order[3]. The power to deport is exercised by the Secretary of State consistent with Immigration Act 1971 s 5 (1) but may equally be performed by certain other officials as delegated to them by the Secretary of State[4]. A distinguishing feature of deportation from other compulsory or forceful removal is that deportation brings a particular application or entry to an end but may create further difficulties for a migrant seeking future re-entry.

Removal on the other hand refers to all enforced departures thus describing the actual embarkation, which is preceded by a removal direction[5]. With the coming into force of the

1999 Immigration Act, s 10, removal became known as "administrative removal", which strictly speaking distinguishes removal from deportation. This is embedded in the fact that prior to the coming into force of the 1999 Act, deportation applied to persons who had leave to enter or remain whom the Secretary of State intended to remove or those recommended for deportation by a court following criminal conviction, whereas administrative removal applied to those who had no leave to enter or to irregular migrants (Jackson *et al.*, 2008, p. 974). Furthermore, while deportation is reserved for more serious cases of violation of immigration law where the non-citizen will be required to leave the UK and prohibited from entry while the order is still in force, administrative removal on its part is reserved for less breaches of immigration law that does not apply the prohibition clause but might create obstacle for re-entry for a particular period[6].

In addition, deportation and removal attract different congeries of rights with respect to in country and out-country rights of appeal[7]. Quite recently, section 63 of the Immigration Act 2016 with the "deport first and appeal later" provisions, which came into force on 01 December 2016, further distinguished appeal rights as it relates to deportation and removal[8].

Walters refers to deportation as the removal of aliens [migrants] by State power from the territory of that State, either voluntarily under the threat of force, or forcibly (Walters, 2010). For Clayton, deportation may take place where its grounds are either proved or deemed proved by statute while removal regardless of its devastating effect is an enforcement process; the grounds for it being regulatory and based on immigration control (Clayton, 2010, p. 580). But for Jackson, there is no clear or principled distinction between the processes of deportation and administrative forms of removal except on statutory bases (Jackson *et al.*, 2008, p. 973). Gibney on his part, refers to deportation as the departure of individual non-citizens under the threat of coercion by State authorities for breaches of immigration or criminal law elaborated as a broad account that go under a range of different nomenclatures in different States such as expulsion, removal or judicial deportation (Gibney, 2013, p. 119). He opined that while each of these may capture different congeries of rights, protections and entitlements, they nevertheless result in the expulsion from the State under the operation of the law (Gibney, 2013).

In short, the terms deportation and removal, for our purpose are used in this paper distinctively because each attracts different rights of appeal. Deportation and/or removal are encapsulated under the term "expulsion". Several authors prefer the use of expulsion to describe deportation and/or removal[9]. Consistent with this, is Goodwin Gill, who described expulsion as the exercise of State power that secures either the voluntary or enforced removal of an alien [migrant] from the territory of the State noting that terminologies vary from State to State (Goodwin-Gill, 1978, p. 201). However, Henckaerts observes that expulsion is more generally used in international law while deportation is preferred in municipal law[10]. For our purpose, expulsion will be used as an expression in international law to describe either deportation or removal but with the understanding that all successful deportation or removal results in the actual removal of a migrant from the territory of the State.

2. The contrivance of deportability and removability

The contrivance of deportability and removability for our purpose finds expression in the legislative and judicial architecture being that deportation in the UK is unarguably constructed by a combination of legislative and judicial actions. This part argues that legislation associated with deportation and/or removal are constantly and in an unrestrained manner enacted, revised and re-enacted to enhance and achieve actual removal

in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty. It further opens a vista of argument that deportability and/or removability is a state contrivance which commences from the very point the migrant enters the territory of the state whether regular or irregular and such can be articulated through the interplay of policy encumbered by legislative and judicial architecture. The first is the issue of legal certainty and its effect on legitimate expectation.

2.1 Legal certainty and legitimate expectation

The rule of law requires that the law must be accessible and so far as possible intelligible, clear and predictable (Lord Bingham, 2012). This invites its conformity and adherence to the principles of legal certainty (Annan, 2004). Legitimate expectation in the immigration context was first applied in *Schmidt* v. Home Secretary[11] in 1969 to differentiate aliens [migrants] facing removal as a result of expired leave and those whose leave were terminated or curtailed prematurely. For Lord Denning, the latter not the former had a legitimate expectation, considered unfair to deprive them of such rights without a right to fair hearing[12]. In *Abdi and Nadarajah* v. SSHD[13] the court described legitimate expectation as a requirement for good administration that fosters confidence in the administrative authorities.

In essence, when a law is procedurally and legally transparent, predictable and legally certain, arbitrariness is avoided given that certain laws may still be legal but arbitrary. Persons who are subject to the law must be able to explicitly predict the law, as the law should be adequately accessible to help them regulate their conduct[14]. This means that the law must, as much as possible, allow a person subject to it, the latitude to predict or foresee within reasonable circumstances the consequences of any action before taking it[15]. The accessibility rule, in the opinion of Wadham, aims to counter arbitrary display of power by the provision of a restriction that is unjustifiable even if authorised in domestic law unless there is publication of the rule made in a form accessible to those to be affected by it (Wadham *et al.*, 2007). In the phone tapping cases of *Malone* v. United Kingdom[16] and *Govell* v. *United Kingdom*[17] the ECtHR agreed that internal guidelines from State departments or agencies do not fulfil the accessibility requirement unless when published. In *Malone*, the court held that the tapping of the applicant's telephone by the police, which at the time was governed by internal regulations, not made public, was not in accordance with the law therefore an interference with his right to private and family life.

The certainty rule on its part is intended to enable individuals likely to be affected by the restriction of their rights to understand the circumstances giving rise to the imposition of such a restriction and to enable individuals foresee with a reasonable degree of accuracy the consequences of their actions (Wadham *et al.*, 2007, p. 31). Nonetheless, what is sufficiently certain is at times a product of circumstances given that absolute certainty may be unrealisable as it may come with excessive rigidity[18].

Drawing from an institutional background, Sales opined that the doctrine of legitimate expectation operates as a control over the exercise of the public authority's discretionary powers which ensures that they are judiciously exercised having due regard to the particular circumstances of individual cases before the decision maker (Sales and Steyn, 2004, p. 564). This is particularly so given the fact that Parliament could not have predicted all circumstances of the matter at the time of passing the legislation. Bradley and Ewing on their part describe legitimate expectation as an aspect of legal certainty where an individual is said to hold a public authority accountable to its words and actions and the extent where the public authority cannot be allowed to change its mind having led the individual to believe that a certain decision would be made (Bradley and Ewing, 2007, p. 753).

For our purpose, legitimate expectation has been captured in four main situations notably:

(1) Where the public authority [Home Office] has made a decision affecting a migrant which it later seeks to replace with a fresh decision[19].

(2) The Home Office gives an assurance that certain procedures or policies will be applied in a matter affecting the migrant but then acts differently[20].

(3) Without any assurance given, the Home Office had followed a consistent practice (course of dealing) which led the migrant to believe that the practice will continue in the absence of notice that it has been changed[21].

(4) Finally the Home Office makes public the policy it will follow in a matter but changes that policy before deciding the migrant's case thereby making a different decision from that which the migrant had expected (Bradley and Ewing, 2007, p. 754).

In *Re Findlay*[22], the Home Secretary changed the policy on the granting of parole to convicted criminals that caused some ineligibility of certain prisoners for parole earlier than expected under the former policy. The court held that their legitimate expectation would be that their cases would be decided individually in recognition of a policy that would have made them eligible for early release than for a latter release.

By way of typology, legitimate expectation may be substantive or procedural. Procedural legitimate expectation comes into being when as in (2) above, a public body led an individual to believe that he will have a particular procedural right over and above the general requirement of the principles of fairness and natural justice (Craig, 2018, p. 13). On the contrary, if an individual had been made to believe that he would receive a substantive benefit, then this will be protected by substantive legitimate expectation (Craig, 2018). As Forsyth stated, a substantive expectation arises where a favourable decision is expected (Forsyth, 1997, p. 376). In *A-G of Hong Kong* v. Ny Yuen Shiu[23] the basic concept is that of legitimacy where the applicant expects a favourable decision. Nevertheless, whether legitimate expectation is substantive or procedural, may be insignificant. What is important is the duty of good administration where public authorities are held to their promises that may undermine the law if was not insisted that any failure to comply is objectively justified as proportionate measure in the circumstance[24].

Cartwright finds a similarity between public law doctrine of legitimate expectation and the private law doctrine of estoppel (Cartwright, 2006, p. 6). To him, the paradigm of each case involves a clear unambiguous promise in the form of undertaking or representation by one party, which creates in the other party an expectation of belief for the happening of an event, which the other party relied on (Cartwright, 2006). In *R (Bibi)* v. *Newham LBC*[25], it was held that the reason for the enforcement of legitimate expectation is anchored on the broader principles of fairness and the prevention of abuse of power similar to detrimental reliance under estoppel[26]. In *R* v. *Secretary of State for Education and Employment*, *ex* p *Begbie*[27] detrimental reliance was identified as an important factor in substantive legitimate expectation claims.

The Court of Appeal in *R* v. North and East Devon HA ex *p* Coughlan[28] seized the opportunity to clarify the doctrine of legitimate expectation. The applicant and others having been displaced in a road accident was placed in the care of a local health authority on the assurance that they could live there (Mardon House) as long as they choose but the local authority thereafter closed Mardon House and transferred the applicant and others to a local authority home. Upon their judicial challenge, the Court held that the applicants had a clear

promise that Mardon House would be their home for life, finding that, if a public body induced a legitimate expectation of a substantive benefit, any frustration of that benefit might be unfair, unjustifiable and sufficient to amounting to an abuse of power.

Similarly in *R (Rashid)* v. *SSHD*[29] the claimant was an Iraqi Kurd who sought asylum in the UK on 4 December 2001 but his asylum application was refused. He argued that if the Home Office had applied their asylum policy between his arrival and March 2003, he would have been granted asylum, a subsequent change in asylum policy made his claim unsuccessful. In the protracted case, the key question for the Court of Appeal was whether the Secretary of State's decision was "invalid on grounds of unfairness". The court referring to *Bibi* above stated:

> In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do[30].

The court then concluded that it was clear that the Secretary of State committed himself to applying his policy during the period December 2001-March 2003 and that must follow from the existence of the policy itself. The argument therefore is that those who rely on published guidelines by public authorities are obviously entitled to expect them to be followed (Clayton, 2003). By extension, public authorities are duty bound to adhere to their own policies whether or not there is reliance or application of that policy (Dotan, 1997, p. 24). If anything, good administration requires that public authorities adhere to policies they promulgate and equality of treatment requires that like cases are treated equally (Clayton, 2003, p. 103). The rationale behind the expectation that public authorities adhere to their policies can be explained within the remit of the application of the principle of consistency (Steyn, 1997, p. 22). Steyn stated:

> The requirement of consistency is deeply rooted in English law. The rule of law requires that laws be applied equally, without unjustifiable differentiation. The courts of equity have long since embraced the principle that decisions must not vary "like the Chancellor's foot" and the law of precedent seeks to ensure, inter alia, that like cases are treated alike. Inconsistency is one of the most frequent manifestations of unfairness that a person is likely to meet[31].

As the court stated in *R* v. *SSHD ex* p *Urmaza* (The Times, 1996) the idea is that consistency follows the pattern and assumption that a public authority will follow his own policy and will in turn view inconsistency as inkling towards manifest absurdity and *Wednesbury unreasonableness*[32].

In the light of the foregoing, it is argued that the contrivance of deportability or removability runs contrary to the doctrine of legitimate expectation. Evidence shows that ninety statements of changes in Immigration Rules have been laid before Parliament since May 2003-2013 (Home Office UK Border Agency, 2013a). This excludes Immigration Acts, Statutory Instruments and policies. The said Immigration Rules is a product of the negative resolution procedure of Parliament consistent with the Immigration Act 1971 section 3 (2) that enables the policy content of the rules to be considered in either House, chosen in the interest of flexibility (HC Deb, 1971). This flexibility with little parliamentary scrutiny allows the Home Secretary to change policies, as she may consider necessary in the light of the government's agenda given that recent government policies set targets for the deportation and removal of migrants (Parliamentary Joint Committee on Human Rights, 2018).

The obvious implication of this constant inconsistency and unfairness is that even during the currency of the migrant's leave to remain, constant changes of the immigration

rules and policies create deportable status as the migrant may not be able to meet up the new requirement of the rules some of which were not in place at the time of the initial grant of leave. The consequence of the inability to renew leave due to inconsistency of the law, abrupt change of policies, and detrimental reliance on previous published rules is that the migrant becomes deportable or removable. It is therefore the legitimate expectation of a migrant that the law, which regulates his conduct, is not devoid of legal certainty, accessibility, and predictability consistent with international human rights standards. While it is accepted that the State enjoys the discretion or prerogative to deport migrants that violate the State's immigration laws, the issue of constant changes breed uncertainty, uncertainty breed unpredictability leading to unaccountability (Paoletti, 2010). This is due to the fact that the history of immigration laws on deportation and/or removal is possessive of intricate and calculated interventions, which are a function of a by-product of presumed action and agenda, therefore "the law serve as instruments to supply and refine parameters of discipline on the one hand and coercion on the other hand" (De Genova, 2002, p. 425).

As Foucault observes "the existence of legal prohibition creates around it a mass field of illegal practices" (Foucault, 1979). The argument is that to effect deportation, the deportee must have been put in a deportable state through the instrumentality of the law of the State. Therefore migrant irregularity is produced and sustained as an effect of the law within the realm of discursive formation and lived through a palpable sense of deportability and removability[33].

In my view, the contrivance of deportability and/or removability is adumbrated by the legal production of migrant irregularity exemplified by inconsistent and uncertain laws. In the words of Calavita "There may be no smoking gun, but there is nonetheless a lot of smoke in the air" (Calavita, 1998, p. 557). It could therefore be argued that irregularitygiving rise to deportability and/or removability is a creation of immigration laws because it constructs, differentiates and ranks various categories of migrants, which entails an active process of inclusion through irregularisation (De Genova, 2002, p. 439). The difficulty is that inconsistency and unfairness fuelled by constant changes of the immigration rules and policies during the currency of the migrant's leave to remain creates deportable status. In essence, unfairness, inconsistency and detrimental reliance function to feed the infraction of the doctrine of legitimate expectation, which in totality instigates and contrives deportability and/or removability. This practice disregards the establishment of private and family life by migrants in the host State running into several years with attachment to a web of strong social, personal ties and significant factors other than nationality which will be discussed below.

2.2 Legitimate expectation, article 8 ECHR and "belonging"

It might be expected that migrants having established a web of social, personal and family ties with the host State while estranged from their country of nationality, regardless of their conduct such as criminality, would be saved from deportation-as an interference with their right to private and family life. But as it stands, the European Court of Human Rights (ECtHR) applies no identifiable spectrum in deciding whether deportation will be disproportionate against them despite their length of stay in the host State[34]. Rather than treat long-term migrants as a special category of aliens whose expulsion would require thorough and weighty reasons, the ECtHR prefers the application of individual circumstances in each case with different outcomes (Steinorth, 2008, p. 186). Judge Martens in *Boughanemi* v. *France* described this approach as a "lottery" and "a source embarrassment" for the ECHR[35]. Judge Marten opined that the embarrassment arises as it

makes it impossible for the court to make comparisons between the merits of cases before it and those already decided[36].

In her reconstruction, Dembour opined that such a fluctuating approach does not allow for legal certainty, consistency and precision, which should be a parameter of measuring the rule of law but the court, has adopted different standards thus culminating in different findings since 1991 (Dembour, 2003, p. 64). Steinorth in her study reported that in the decade between 1991 and 2001, more than 10 cases came before the ECtHR concerning the expulsion of long-term migrants where in some cases violations were found, while in others no violations were found[37]. This inconsistency has led to the argument whether it will not be preferable for the ECtHR to take a clear stand on either the giving of primary consideration to the legitimate expectation of long-term residents or over the legitimate interests of States in securing their supposedly public order (Steinorth, 2008, p. 196). Narrating this inconsistency, Mole opined that there remains an imprecise boundary between positive and negative obligations but a fair balance must be struck between the interest of the individual and the interest of the community (Mole, 2007). After all, the conviction for a criminal offence itself should not necessarily warrant deportation, as this may not adequately address the issue of criminality given that the wrong doing of a foreigner is not greater than that of a citizen.

Nevertheless, the ECtHR in *Uner* v. *The Netherlands*[38] concluded that regardless of the non-national's strong residence (long term residence) and degree of integration, they cannot be equated with that of a national when it comes to the power of the host State to expel them. Mole observed that despite this position, several ECtHR judges have continued to hold dissenting opinions against the majority in insisting that long term resident migrants residing lawfully in the host State should be accorded the same fair treatment and a legal status as close as possible to that of nationals (Mole, 2007, p. 99).

The above illustrates that the dichotomy between the legitimate expectation of long term residents and nationals remains wide. According to Gibney, the boundary between legitimate expectation and deportation power can be narrowed down to "who belongs" in the liberal state (Gibney, 2013, p. 126). For Gibney, "the idea of who belongs chimes with recent writing by scholars from several perspectives who stressed the moral claims to citizenship and protection against deportation of long-term non-citizen residents[39]". They argue that these moral claims grow out of the liberal and democratic ideal of congruence between the contours of State's coercive power and the boundaries of its membership. They reasoned that an expansive conception of membership guaranteeing membership for long-term resident non-nationals, which protects them from deportation, is also consistent with more communitarian ideas of State[44]. This expanded concept of belonging is gaining weight with international human rights instruments. By applying Article 12 of the ICCPR, which states that an individual should not be arbitrarily deprived of "the right to enter his own country" the Human Rights Committee found in *Nystrom* v. Australia[40] that States are under obligation not to deport or expel certain categories of long term resident non-nationals. Gil-Bazo noted:

> [. . .] the UN Human Rights Committee had had cause to consider extensively the relationship that exists between individuals and States other than nationality, particularly the legal relevance of such significant attachments other than nationality[41].

which in my view, has not been given sufficient consideration and nuance by liberal democracies in deportation matters.

2.3 Legitimate expectation, deportation, removal, HSMP forum[42] and the Pankina[43] string of cases

The recurring decimal in the *HSMP Forum* and the *Pankina* string of cases is the issue of legitimate expectation and the exercise of power within the confines of unreasonableness. The underlying argument as highlighted above is whether the State can depart from its published policy [law] relied upon by migrants during the currency of their leave to remain-heightened by the fact that such departure would inadvertently create an unfavourable immigration situation culminating in deportation and/or removal.

In the *HSMP Forum Ltd* v. *SSHD*[44] the UK government introduced a policy allowing individuals to come to the UK under the Highly Skilled Migrant Programme ("HSMP"). The Home Office issued a guidance containing sufficient details for self-assessment enabling prospective applicants to determine their likelihood of success in the application for leave to enter the UK. Some 49,000 migrants entered the UK under this scheme (Parliamentary Joint Committee on Human Rights, 2018, p. 10). The Home Office reserved for itself the power to review the policy (through changes to the Immigration rules) stating that qualifying criteria might be adjusted from time to time. Three reviews were made in 2003-2006 but in 2007 the Home office tagged the review "new scheme". The new scheme changed the criteria for extensions and settlements made applicable to new entrants and migrants already in the UK [45].

The HSMP Forum challenged this new scheme by way of a judicial review as being unfair, unlawful and unreasonable and a breach of their right to legitimate expectation. The Parliamentary Joint Committee that conducted an inquiry found that the new rules were retrospective in effect and could not be justified as proportionate given that HSMP individuals have taken a number of steps to establish their home in the UK[46]. But the Secretary of State argued that the rule was not retrospective in effect stating that the only expectation which the applicants should have is that the rules and policies in force at the time of their applications, will be applied correctly to them. The court however held that the legitimate expectation of migrants at the time of their application was that the criteria of extensions of their leave to remain would not change from what was obtainable and that the revision of the scheme should not affect those already on the scheme. The court found that conspicuous unfairness was involved when migrants were encouraged to sever links with their home country and the court also found abuse of power in frustrating the path to final settlement in the UK for these migrants. In short, their only legitimate expectation was that their applications would be judged on the basis of the rules and criteria under HSMP in force at the relevant time, which if not applied will make it impossible for some of them to remain. The implication of the above is that had the court not given judgment in favour of the HSMP individuals, these 49,000 persons may have been subject to deportation and/or removal (for purported breach of conditions or overstaying their leave) when in actual fact it was the State that lured them into the country and during the currency of their leave decided to change the rules midway.

This approach leads to inconsistency and unfairness in view of these migrants' detrimental reliance on the State policies and laws, a breach of their right to legitimate expectation and consequently a latent contrivance of deportability and/or removability by the state in their initial inclusion and now what appears to be a calculated exclusion from the State. The retrospective effect of immigration laws as in this case, to say the least, is incompatible with international human rights law and cannot be said to meet the criteria of "in accordance with the law" requirement of Article 8 ECHR. The argument is that had the Home Office made the new HSMP policies for new entrants rather than the existing beneficiaries, the change would have been prospective rather than retrospective and may

not have affected the legitimate expectation of the affected migrants. Therefore it is this retrospective approach that has shattered the necessary foreseeability and predictability element considered an inherent requirement of the law (Parliamentary Joint Committee on Human Rights, 2018, p. 10). In essence, the inclusive measures exemplified by the adoption of the HSMP programme and the exclusive measures exemplified by the rule change, which has the consequence of deportability and/or removability shows inconsistency and uncertainty that negates international human rights law.

2.4 The ratio of the Pankina string of cases

The facts of the *Pankina* case were that in 2008, the Home Office introduced an immigration rule that allowed graduates of approved UK institutions to remain in the country under the Tier 1 (Post Study work) migrant category[47]. The rule require that the applicant must meet amongst other requirements, a certain sum of £800 in his/her bank account as explained in the Points Based System Policy Guidance. Migrants relying on the rules applied for leave to remain. The requirements of the rules were in mandatory terms of which failure will result in the refusal of the application and consequent removal. The Immigration Rules provided that the said £800 pounds was to be held by the applicant prior to the application while the Policy Guidance was amended to provide that the money was to be held for three months prior to the application.

The issue then was whether the applicant's application was to be judged under the Immigration rules or under the Policy Guidance interpreting the relevant rules[48]. The court held that the three month requirement in the Policy Guidance did not form part of the rules and as it was not laid before Parliament. It reasoned that policy is precisely not a rule and is therefore required by law to be applied without rigidity.

The court held that if the Home Secretary intends to make the rule black letter law, an established legislative route rather than the confusion it has generated must achieve this, the confusion generated being the unlawful incorporation of a document that had not been laid before Parliament.

However, I contend that aside of the issue of legitimate expectation raised by the above case, transparency, predictability and legal certainty are equally turned on. As been highlighted above, a law may be legal but arbitrary in its intent and application. The affected migrants having relied on the rules were put in a deportable status by virtue of the refusal of their applications, a situation that was saved by the decision in *Pankina*. Prior to this decision, migrants were compelled to leave the UK and some were removed (Home Office UK Border Agency, 2013b).

Furthermore, at the heart of the matter is a further underlying issue where information can be amended, removed, or added to policy. This thus reflects the pressure and absolute whirlwind which litigants and judges are made to go through[49]. The consequences are in themselves ominous as will be discussed further.

The *Pankina* decision was closely followed by *R (English UK)* v. SSHD[50] where the issue was that one of the requirements for the award of points being that the course must meet the requirements set out in the UKBA's published sponsor guidance. However, the course level specified in the Guidance was then altered that specified a different level of course required as minimum. In following *Pankina*, the court stated that the ratio is that a provision which allowed a substantive criterion for eligibility of admission or leave to remain must involve Parliamentary scrutiny, therefore the change of approach in the new guidance operated to materially change the substantive criteria for entry of foreign students who wished to study English in this country[51]. Similarly in *R (Joint Council for the Welfare of Immigrants)* v. *SSHD*[52] the court had to consider applications under Tier 1 of the Points

Based System vide a statement of proposed changes made to Immigration Rules HC 59 (Home Office, 2013). The changes *inter alia* enabled a limit to be set on the number of grant of entry clearance or leave to enter to a particular route during the relevant allocation period. The Secretary of State promised to publish the interim limit on the website of the UK Border Agency (now UK Visas and Immigration) but failed to do so at the relevant time only to be published at a later date. The court held that the manner in which the limits were imposed was unlawful following the decision in *Pankina* and stated that the limit should have been subject to Parliamentary scrutiny, however minor.

In 2012 in the case of *R (on the application of Alvi)* v. SSHD[53] similar issues came up. Mr Alvi, a citizen of Pakistan entered the UK as a student on 20 September 2003 with leave valid to 31 January 2005 subsequently renewing his leave as necessary. Prior to a later renewal of leave, the work permit regime has been replaced by the points based system, which came into effect on 27 November 2008. He applied for leave to remain on the points based system, his application was refused stating that he did not satisfy the requirements of the Immigration Rules because his job title as an assistant physiotherapist was not of the level of the skilled occupations required by the rules. He argued *inter alia* that the list of skilled occupations was not part of the Immigration Rules and the document containing the list had not been laid before Parliament under the negative resolution procedure consistent with the Immigration Act 1971, section 3 (2). In short, that the Occupation Codes of Practice contain material which was not just guidance. Mr Alvi sought a judicial review of the decision and permission was granted him to appeal to the Court of Appeal. The court allowed his appeal stating that the skilled occupation was not part of the Immigration Rules [. . .][54] The SSHD appealed.

In upholding the case of Mr Alvi, the court agreed that the information was not set out in the rules themselves and has therefore not passed the minute parliamentary scrutiny. The court pointed out the volume of rules being sent to Parliament under section 3 (2) of the Immigration 1971 Act appear to be voluminous to the extent that it is doubted whether Parliament would have subjected them to effective scrutiny before accepting them[55]. The court stated that the case illustrates the tension in public law decision-making, between flexibility in the decision-making process and flexibility of its outcome, remarking that even though both are desirable objectives but achieving balance is often difficult[56]. Lord Walker stated that the pressure under which the present day immigration control operates, makes it appropriate and desirable that outcomes of decision-making should be very predictable; therefore the requirement for detailed consideration of individual cases should be reduced[56].

In my view, the above cases have common ratios. The first is the ambulatory nature of the rules which appears to have been contrived to achieve a set standard inconsistent with the idea of Parliamentary scrutiny which is geared towards effective supervision even though no debates are usually held for passing Immigration Rules into law as they are made under the negative resolution procedure highlighted above. Secondly, as highlighted by Ian Dove J, the above cases raised a spectrum that operated to the extent that there lays a difference between the substantive requirements of the rules on the one hand and procedural requirement on the other hand[57]. The difficulty with this approach is that it does not allow for consistency, predictability and foreseeability, which have the consequence of creating deportability or removability by way of legislative architecture. The corollary is that legal certainty is compromised in that the migrant cannot foretell the consequence of hihe/sher application for leave to remain made in good faith.

In addition, the addition of extraneous materials as in the case of *Alvi* and *Pankina* illustrates abuse of power where a public authority can without the consent of Parliament

add or remove at will, anything it considered necessary to probably achieve a high rate of refusal of migrants' applications ultimately leading to removal. It is rather not surprising that the Merit Committee of the House Lords made an adverse comment as to why the actual limit of the Tier 1 during the relevant allocation period was not in the statement itself (Merits of Statutory Instrument Committee, 2018).

At the rear of the cases discussed above, is the issue of unconstrained power, which is the very essence of arbitrariness. The Parliamentary Joint Committee stated with regrets that if the legal basis for the change in the rules is simply to give unconstrained power to the government to change rules with immediate effect thereby rendering people whom the Government has required to make their main home in the UK ineligible to stay in the UK, such an unconstrained power is the very essence of arbitrariness (Parliamentary Joint Committee on Human Rights, 2018). Therefore legitimate expectation, as an aspect of legal certainty has been compromised with constant changes to the laws lacking intelligibility, clarity and predictability. The argument is that irregularity-giving rise to deportability or removability is a creation of immigration laws given that it constructs and differentiates migrants through the process of inclusion and in consequence creates exclusion leading to deportability and/or removability. Then follows the discussion on "crimmigration" as a vehicle to the contrivance of deportability.

3. "Crimmigration" – widening the gates

A primrose path to the contrivance of deportability, which has opened the vistas, widened the gates, and heightened the velocity of deportation, is "crimmigration". Crimmigration for our purpose is used to describe the:

> [. . .] intersection of criminal and immigration law where criminal justice norms are imported into deportation or removal proceedings, whereas relaxed procedural norms of immigration proceedings are themselves imported into the criminal justice system[58].

Crimmigration signposts the growing convergence of two critical regulatory regimes-criminal justice and immigration control where the two systems:

> [. . .] intersect at multiple points notably at points that violations of the immigration laws trigger broader, harsher, and more frequent criminal consequences even leading to refugees being prosecuted for illegal [irregular] entry (Demleitner, 2002, p. 1059; Kanstroom, 2004, p. 640).

Crimmigration exposes a common link, rooted in membership theory that has increasingly come to unite these two once discrete fields of law notably criminal law and immigration law (Stumpf, 2006, p. 368). It is therefore curious that State practice through legislation has steadily expanded the list of non-immigration-related crimes that trigger deportation and other adverse immigration consequences and in addition the plethora of deportations bordering on crime-related grounds have skyrocketed (Legomsky, 2007, p. 470).

The concomitant effect is that the underlying theories of deportation increasingly resemble those of criminal punishment to the extent that preventive detention and plea-bargaining, known as longstanding staples of the criminal justice system, have infiltrated the deportation process (Legomsky, 2007). Chacon on her part expresses that the State creates too many crimes about immigration that properly stated should not be crimes or if anything, stand as a ground for deportation (Chacon, 2012, p. 614). In the opinion of Beale:

> [. . .] in a system characterized by over-criminalization [crimmigration], law enforcement operates with an undesirable degree of unchecked discretion, in such a manner that procedural protections are undercut leading to the misallocation of scare resources in crime control efforts (Beale, 2005, p. 749).

As a result, concerns generated by crimmigration in the light of its implication vide the extension of the power to deport against the principle of legal certainty are legion. These concerns are amplified by what has been referred to as "the selective convergence of criminal and immigration law" argued to have contributed immeasurably to a subtle violation of broader international human rights through the contribution of American jurisprudence commentators as Chacon, Stumpf, Legomsky to mention but this few violations impinging on fairness, equal dignity, discrimination and proportionality to legitimate aim of immigration control (Frey and Zhao, 2011).

The palpable tension generated by crimmigration have led scholars to query the rationale behind the importation of criminal justice norms into the domain of immigration, which according to them was originally conceptualised as civil where inter alia; States applying the citizenship and non-citizenship dichotomy map the exclusionary effects of criminalization of immigration law (Legomsky, 2007, p. 471; Demleitner, 1999; Stumpf, 2006). From a symbiotic perspective, it appears that criminal law and immigration law serve the sole function of excluding individuals from the society and for determining when they could join or rejoin society (Demleitner, 1999, p. 640). Nevertheless, both play different roles: criminal law regulates conduct within a community whereas immigration law governs the entry and exclusion of individuals across borders (Stumpf, 2011, p. 1708). Criminal law:

> [...] functions to inflict punishment on those that committed offenses where temporal considerations play a part in the determinations of guilt because it focuses on a single moment in time: the moment of crime as against affiliation such as marriage, family, good moral conduct which may be irrelevant but forms a bulwark of considerations in the immigration context (Stumpf, 2011, p. 1724).

It is probable that the apparent rationale for using criminal law as a response to migration issues is the myth and stereotype of migrant criminality, which, according to Chacon are sometimes tinged with racism (Chacon, 2012, p. 629). In a bid to attempt to address the litany of problems associated with irregular migration, States use criminal law as a vehicle of exclusion thereby aligning itself with public discourse on migration resonating and dominated by a trope of criminality (Chacon, 2007, p. 1832). As Frey and Zhao argue:

> [...] the rise in the anti-immigrant rhetoric, trumpeted and hyped by interest groups with a passionately sympathetic media have all doubled to cement the ideological construction of migrant irregularity with the moral stigma and stereotype accompanying the name (Frey and Zhao, 2011, p. 280 citing Legomsky, 2007, p. 500).

The consequence is that a state of self-perpetuating phenomenon is created which subject migrants to an ever-increasing criminal law sanctions and by so doing ironically validates previous unjustified posture concerning migrant criminality (Chacon, 2012, p. 629).

In addition, Stumpf argues that crimmigration narrows the decision whether to exclude the migrant out of the State to a single moment in time-the moment of crime, compelling enough, to trigger the potential for deportation or detention for an immigration offense (Stumpf, 2011, p. 1710). Therefore by expanding deportability grounds by way of contrivance especially through the expansion of migration related conduct that constitutes a crime, crimmigration excludes non-citizens by first incarcerating them followed by removal from the State (Motomura, 2011, p. 1837). In addition, by the creation of an enforcement process that provide fewer substantive and procedural protections for non-citizens than its citizens, the State through crimmigration excludes non-citizens from equal access to the protection of the judicial system (Stumpf, 2011, 1710). That probably accounts for Kanstroom's argument that "the deportation of migrants especially lawful permanent

residents should be seen as punishment, and to that extent, substantive constitutional protections should apply to deportation proceedings" (Kanstroom, 2000, p. 1893).

In short, by the contrivance of deportability under the spectrum of crimmigration, the traditional boundaries between criminal and immigration sphere becomes blurred, if not, eroded making it easier for States to increase the deportation of migrants convicted of criminal offences. This is heightened and achieved by the increase of the number of immigration-related criminal offences and the severity of punishment attached. In addition, the State by way of contrivance expands the number of criminal offences for deportation purposes thereby creating targets for deportation, and through the arsenal of State resources, work to achieve it (Frey and Zhao, 2011, p. 281).

3.1 The factual matrix of crimmigration

The phenomenon of crimmigration in the UK came into prominence with the seminal Immigration Act 1971 ("1971 Act") followed by the Immigration and Asylum Act 1999 ("1999 Act") and the Asylum and Immigration (Treatment of Claimants Etc. Act) 2004 ("2004 Act"). The 1971 Act created a whole spectrum of immigration offences with custodial sentences[59]. The 1999 Act and the 2004 Act on their parts created similar immigration offences in parallel terms with the 1971 Act[60]. These expansions especially with respect to the 2004 Act drew the ire of the Refugee Council who opined that the UK government decided to insert the section 2 of the 2004 Act to prosecute people who destroyed immigration documents on arrival in the country with the aim of increasing the rate of removal of failed asylum seekers (Refugee Council, 2013). But in *R* v. Soe Thet[61] the court ruled that a conviction for the offence of failing to produce a passport at an immigration interview, or on arrival at a port of entry in the UK, under Section 2 of the 2004 Act does not apply if the defendant travelled to the UK with a false passport or without a passport.

The UK Borders Act 2007 ("2007 Act") amplified the issue of crimmigration with its mandatory deportation under section 32 with exceptions under section 33[62]. Consequentially, a direct link between deportation and the commission of a crime of the appropriate level of severity has been created which ultimately reduces the scope for challenging automatic deportation decisions through the appeals system (Explanatory Notes to the UK Borders Act 2007, 2013). The obvious implication is that Parliament lengthened the list of immigration related offences from the 1971 Act to a major "catch all" law by the instrumentality of the 2007 Act which rather than rely on immigration related offences alone but now relies on all offences carrying a sentence of more than 12 months. The reasoning is that any migrant convicted of any offence at all, is liable to deportation either under the "not conducive to public good grounds" or by way of automatic deportation under the 2007 Act. By so doing, crimmigration justifiably implores the conduct of the migrant and the length of imprisonment to expand deportation categories.

The section 33 exceptions of the 2007 Act as a counterpoise to deportation has not alleviated the potency of section 32 in automatic deportation cases thereby illustrating the effect of crimmigration as a contrivance of deportability[63]. It is typical of courts to find following a conviction that deportation was conducive to public good, even where families with children were involved, "the best interest of the child"[64] did not save their parent(s) from being deported[65]. As the court stated in *Rocky Gurung* v. *SSHD*:

> The Borders Act by s.32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognized by the Act itself applies Borja, 2013.

Therefore, without the application of a criminal conviction, deportation may not have been justified under this limb.

Similarly in the USA, the crimmigration debacle has assume exponential dimensions in the light of evidence that over the past two decades, the USA Congress has through the accumulation of legislative Acts, steadily expanded the scope of criminal conduct which underlies deportation (Legomsky, 2007, p. 482). As Stumpf identifies, deportation based on the commission of aggravated felony has expanded from the original three grounds notably murder, drug trafficking and firearms trafficking to what she refers to as "an alphabet of crimes of lesser gravity" (Stumpf, 2011, p. 1727). Therefore, through the instrumentality of legislation, immigration related conducted have been termed criminal with harsher sanctions for the violation of immigration law imposing incarceration as a ground for deportation[66]. The USA's Illegal Immigration Reform and Responsibility Act 1996 ("IIRIRA")[67], allows retroactive punishment, by way of convergence to the UK Borders 2007 Act which in its Explanatory Note permits deportation of those already convicted prior to the coming into force of the law[68].

Unlike IIRIRA and the Anti-Terrorism and Effective Death Penalty Act 1996 ("AEDPA") which allow cancellation of deportation under the defense of "exceptional and extremely unusual hardship" for the migrant's family, the UK's 2007 Act created exception to automatic deportation under its section 33 on grounds of breach of human rights or age of the offender[69]. But contrary to IIRIRA and AEDPA which specified all offences-aggravated felonies attracting deportation[70], the UK's 2007 Act by way of divergence excludes all offences less than 12 months but such offences remains deportable offences under the "not conducive to public good" limb enshrined in the 1971 Immigration Act[71]. The IIRIRA through its section 287 (g) generally referred to as "287 (g) agreements" made provision authorising state and local police to identify and turn over to the Immigration and Customs Enforcement ("ICE") any suspected criminal immigrant encountered during regular enforcement activities (Borja, 2013), with convergent enforcement patterns in the UK (Home Office UK Border Agency, 2013c). These deportation enforcement practices in the UK and the USA are similar in style and approach to the extent that it could be termed a legal transplant or policy transfer[72].

Crimmigration, it is argued, exposes a malaise, which in adjudicative proceedings pays little or no attention to discretion not to deport[73], with judges and officials lacking the authority to stay deportation in the face of separation of families that may lead to destruction of such families (Morawetz, 2000, p. 1943). In short, the relationship between criminal law and immigration law has become so inextricably intertwined to the extent they switch roles implying that the decision to deport are indirectly made through criminal justice institution at the point of conviction while the actors, functions and institutions in the criminal justice system have shifted allowing immigration objectives to dictate criminal prosecution[74]. The point being made by these divergent and convergent practices as exemplified by some sort of policy transfer is that they accomplish enforcement goals accompanied through lack of attention to the rights of migrants (Lee Koh, 2012/2013, p. 481), which I argue is the behaviour and character of liberal democracies. As Markowitz posited, "migrants have no right to protection against retroactive changes in law and they can be deported for minor criminal and other offences at the pleasing of the State" (Markowitz, 2010/2011, p. 1302).

In Australia, the main legislation for the deportation of migrants is the 1958 Migration Act with its later amendments[75]. Section 12 of the Act contains broad discretionary powers exercised by the Minister to deport an alien [migrant] convicted of a particular crime or sentenced to imprisonment of one year or more. This provision is in identical terms with

the UK Borders Act 2007- the identical decimal being criminal conviction, a product of "character test" as in Australia (Foster, 2009, p. 507). It is crucial therefore to note that while section 32 of the UK Borders Act 2007 makes provision for automatic deportation of "foreign criminals" as discussed above, the Australian section 501 of the Migration Act on the other hand is used to deport those under the "character test" regardless of their length of residence. It is therefore contended that this supposedly synergy of deportation practices in the form of convergence could not have been an accident. Using criminality as a springboard for deportation could better be explained as the exportation of the State's problem elsewhere with no reasonable consideration of their human rights.

In France, the deportation of migrants gained fervour with the 2003 legal reform *centres de retention*, which extended the maximum time of detention of migrants to 32 days thus providing an amphitheatre for large-scale deportation (Clemence and Fischer, 2008, p. 590). This was followed by the imposition of deportation quotas on *prefets*-law enforcement officers from several departments forcing them to increase the number of irregular migrants, charged with deportation and actually removed from the country (Clemence and Fischer, 2008). Nonetheless, the French Immigration law prohibits expulsion in these limited circumstances[76], and it appears that France has not made criminal conduct a major policy plank in the deportation of migrants by way of divergence but has made the use of quotas and targets as a convergent practice similar to the UK.

The above illustrates that the deportation realities of the USA, Australia and France within the broader context of liberal democracies offer significant similarities with the UK, with specificity to crimmigration in particular and immigration enforcement and control in general, as a vehicle for enhancing and sustaining deportation of migrants which queries the liberal democratic ideals of fairness in particular and compliance to international human rights standards in general.

4. Conclusion

Crimmigration, as has been asserted, is now a recurrent decimal in the lexicon of deportation. Criminality should lie within the province of criminal policy and not by its use in immigration control. This is because punishment, functionally speaking is intended to deter others and for the prevention of re-offending, these should be achievable within criminal law and should not be pushed to immigration control. This paper has proved that crimmigration heightened the velocity of deportation consequent upon the intersection of criminal justice and immigration control at multiple points- where violations of immigration laws trigger broader, harsher, and more frequent criminal consequences leading to conviction and thereafter deportation. Therefore, by expanding deportability grounds by way of contrivance especially through the expansion of migration related conduct that constitutes a crime, crimmigration excludes non-citizens by first incarcerating them and thereafter creating a suitable avenue for their deportation. The issue is that a direct link between deportation and the commission of a crime of the appropriate level of severity has been created which ultimately reduces the scope for challenging deportation decisions through the appeals system and even if challenged, success is a mirage.

Furthermore, deportation is constructed in the UK by a combination of legislative and judicial actions given that legislation associated with deportation are in an unrestrained manner constantly enacted and revised to achieve deportation in contrast to the doctrine of legitimate expectation. In essence, the more complex the laws, the easier it becomes to attract violation thereby creating a deportable or removable status. Put differently, to effect deportation, the deportee must have been put in a deportable state through the instrumentality of the laws of the State. The argument is that deportability and/or

removability is State contrivance, which is easily choreographed and articulated through the interplay of policy encumbered by legislative and judicial architecture regardless of whether or not they comply with international human rights obligations.

It is posited that State contrivance of deportability violates the legitimate expectation of migrants within the purview of legal certainty. As the *HSMP Forum*, *Pankina*, *English* and *Alvi* string of cases have shown, legitimate expectation as an aspect of legal certainty, have been compromised with constant changes to the laws lacking intelligibility, clarity and predictability. The implication is that irregularity-giving rise to deportability is a creation of immigration laws given that it constructs and differentiates migrants through the process of inclusion, and in consequence creates exclusion, leading to deportation through arbitrariness. Therefore, if the legal basis for the change of the law is simply to give unconstrained power to the government to change rules with immediate effect thereby rendering migrants deportable or removable, such unconstrained powers are arbitrary. It follows that the inclusive measures exemplified by the adoption of the HSMP programme and the exclusive measures exemplified by arbitrary changes in the laws which encourages and heightens deportability and/or removability, queries the rationality of this new legal framework of State power.

It has equally been shown that liberal states by way of convergent and divergent practices as exemplified by either legal transplant or policy transfer accomplish deportation enforcement goals. This paper makes the case that while section 32 of the UK Borders Act 2007 makes provision for automatic deportation of "foreign criminals" as discussed above, the USA uses the IIRIRA 1996-aggravated felonies- to expand the vistas of deportability of migrants regardless of their length of residence. The Australian section 501 of the Migration Act on the other hand applies the "character test" to deport migrants regardless of their length of residence. This leads to the contention that the supposedly synergy of deportation practices by these liberal states in the form of convergence could not have been by accident but suggests either a legal transplant or policy transfer. When immigration laws change uncontrollably, varying like the "chancellor's foot", with the underlying aim of enhanced and heightened deportation and/or removal, these unarguably, raise questions of disproportionality, illiberality and unbridled display of naked State power.

Notes

1. See discussions on the issue by the following authorities – King (2009); Pederson (2004).
2. Immigration Act 1971, Section 5 (1) and (2).
3. Immigration Act 1971 Section 5 (1) and Paragraph 362 of the Immigration Rules.
4. See *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 CA; *R (Munir) v SSHD* [2012] UKSC 32; *R (Alvi) v SSHD* [2012] UKSC 33.
5. Immigration Act 1971 Sch 2, para 9.
6. See paragraph 320-321 of the Immigration Rules.
7. See s 10 of the Immigration Act 1999, s 47 of the Immigration, Asylum and Nationality Act 2006, s 82 of the Nationality Immigration and Asylum Act 2002, s 32 of the UK Borders Act 2007 with exceptions at s 33 and s 15 of the Immigration Act 2014 which amends Part 5 of the 2002 Act; see also s 82, 84, 92 and 94B of the Nationality Immigration and Asylum Act 2002 dealing with certification of human rights claims made by a person liable to deportation..
8. 'In-country' depicts appeals that are allowed in the UK while 'out-country' are appeals having been removed; see also the Nationality, Immigration and Asylum Act 2002 s 82; Section 51(3) of

the Crime and Courts Act 2013 amended section 47 of the Immigration, Asylum and Nationality Act 2006; see also *Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures)* [2012] UKUT 00414 (IAC).

9. Ian Bryan and Peter Langford, 'Impediments to the Expulsion of Non-Nationals' (n985); Harvey (2007, p. 208).
10. Henckaerts (1995, p. 5), Fripp *et al.* (2015) x in their use of the terms expulsion or exclusion..
11. [1969] 2 Ch 149.
12. [1969] 2 Ch 149 [Lord Denning MR].
13. [2005] EWCA Civ 1363.
14. *Fothergill v Monarch Airlines* Ltd [1981] AC 251, for full details and discussions on the rule of law, see chapter 2, section 2.7.3 of this Thesis..
15. *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49.
16. (1984) 7 EHRR 14.
17. [1999] EHRLR 121.
18. See *Sunday Times v UK*, (n28) para 49.
19. *R v SSHD ex* p *Hargreaves* [1997] 1 WLR 906; see also *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1984] 1 KB 223*.
20. *R v SSHD ex* p *Khan* [1981] 1 WLR 1337.
21. *R v Inland Revenue Commissioners ex* p *Preston* [1985] AC 835.
22. [1985] AC 318 [338].
23. [1983] AC 629 Lord Fraser opined that legitimate expectation includes all expectations that go beyond enforceable rights on the proviso that they have some reasonable basis..
24. *Abdi and Nadarajah v SSHD* [2005] EWCA Civ 1363 [68] (Laws LJ).
25. [2002] 1 WLR 237.
26. [2002] 1 WLR 237 [29-31] see similarly *CCSU v Minister for the Civil Service* [1985] AC 374 In this case Lord Roskill captured legitimate expectation as a "manifestation of the duty to act fairly"; *R v Inland Revenue Commissioners ex* p *Unilever* [1996] S.T.C 681 [690] per Bingham MR where he stated: "the categories of unfairness are not closed and that precedent should act as a guide and not a cage"; *R v SSHD ex* p *Khan* [1984] 1 WLR 1337.
27. [2000] 1 WLR 1115 [1124].
28. [2001] QB 213 [4] [52-71].
29. [2005] EWCA Civ 744.
30. [2005] EWCA Civ 744 [46]; (Schiemann LJ) [29] in reference to *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237.
31. Steyn (1997), See also *Matadeen v Pointu* [1999] 1 AC 98.
32. See similarly *CCSU v Minister for the Civil Service* [1985] AC 374, 'the Wednesbury case established a high threshold for review of actions of public authorities, which was reinforced by Lord Diplock in formulating his "rationality" test', see also Lord Carnwath (2014).
33. De Genova (2002, p. 431, 439); see also Hagan (1994, p. 79) who opined that the U.S immigration laws beginning in 1965 have been instrumental in producing migrant illegality [irregularity] in its contemporary configuration.

34. For a full discussion on this, see (Anonymised) 'The Legality of Deportation and Removal of Migrants in the United Kingdom within the context of Liberal Democracy' (PhD thesis, University of Newcastle 2017) see particularly, 'Necessity in a democratic society' section 5.6.3..
35. (1996) 22 EHRR 228, para 4 (Judge Martens).
36. *Boughanemi v France* (1996) 22 EHRR 228, para 4 (Judge Martens).
37. Steinorth (2008) in this, Steinorth reported the following cases where the ECtHR found no violations of Article 8 regarding long term migrants- *Boughanemi v France* (1996) 22 EHRR 228, *C v Belgium* (2001) 32 EHRR 19, *Boulchekia v France* (1998) 25 EHRR 686, *El Boujaidi v France* (2000) 30 EHRR 223, *Boujlifa v France* (2000) 30 EHRR 419, *Dalia v France* (2001) 33 EHRR 26 and *Baghli v France* (2001) 33 EHRR 32. In contrast to the above, the ECtHR found in the following cases a violation of Article 8 by virtue of their long-term residency- *Moustaqium v Belgium* (1991) 13 EHRR 802, *Beldjoudi v France* (1992) 14 EHRR 801, *Nasri v France* (1996) 21 EHRR 458, *Mehemi v France* (2000) 30 EHRR 739 and *Ezzouhdi v France* App no 47160/99 (ECtHR, 13 February 2001).
38. App no 46410/99 (ECtHR, 18 October 2006).
39. Matthew Gibney citing Carens (2009); Walzer (1983); Baubock (2008) and Shachar (2009).
40. Communication No CCPR/C/102/D/1557/2007 Meeting of 18 July 2011.
41. Gil-Bazo (2015, pp. 34-35); see also (Anonymised)'The Legality of Deportation and Removal of Migrants in the United Kingdom within the context of Liberal Democracy' (PhD thesis, University of Newcastle 2017).
42. *HSMP Forum v SSHD* [2008] EWHC 664 (Admin).
43. *Pankina and Ors v SSHD* [2010] EWCA Civ 719.
44. *HSMP Forum* (n84).
45. *HSMP Forum* (n84) [5].
46. *HSMP Forum* (n84) [5] [21].
47. The affected rule is paragraph 245v of the Immigration Rules HC 607 laid before Parliament on 9 June 2008 under section 3 (2) of the 1971 Immigration Act..
48. See also *R v Secretary of State for Social Security ex parte Sutherland* [1996] EWHC 208 (Admin).
49. *DP (United States of America) v SSHD* [2012] EWCA Civ 365 [14].
50. [2010] EWHC 1726 (Admin).
51. *R (English) v SSHD* ibid (Foskett J).
52. [2010] EWHC 3524 (Admin); see also *R (Ahmed) v SSHD* [2011] EWHC 2855 (Admin); *R (Purzia) v SSHD* [2011] EWHC 3276 (Admin); *R (New London College Limited) v SSHD* [2012] EWCA Civ 51 on the interaction between what was in the policy guidance and the Immigration Rules..
53. [2012] UKSC 33; *Munir and Rahman v SSHD* [2012] UKSC 32 – these two cases were heard together with common issues at stake relating to parliamentary scrutiny section 3 (2) of the 1971 Immigration Act..
54. *R (on the application of Alvi) v SSHD* [2011] EWCA Civ 681.
55. *Alvi v SSHD R (on the application of Alvi) v SSHD* [2011] EWCA Civ 681 [65] (Hope SCJJ).
56. *Alvi v SSHD R (on the application of Alvi) v SSHD* [2011] EWCA Civ 681 [65] (Hope SCJJ) [111] (Walker SCJJ).

57. *R (Purzia) v SSHD* [2011] EWHC 3276 (Admin) [17] (Dove J).
58. Chacon (2009, p. 136); crimmigration or over-criminalisation came into the lexicon of migration law.
59. See Immigration Act 1971, s 24.
60. See the Immigration Act 1999, s105 and s 35 of the 2004 Act..
61. [2006] EWHC 2701 (Admin).
62. See UK Borders Act 2007, s 32 and 33.
63. See UK Borders Act 2007 s 33 (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's Convention rights, or (b) the United Kingdom's obligations under the Refugee Convention. (3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.
64. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides for the duty regarding the welfare of children which mirrors Article 3(1) of UN Convention of the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (CRC).
65. *Rocky Gurung v SSHD* [2012] EWCA Civ 62; *SS (Nigeria) v SSHD* [2013] EWCA Civ 550; *AJ (Bangladesh) v SSHD* [2013] EWCA Civ 493; *Richards v SSHD* [2013] EWCA Civ 244.
66. See the United Kingdom's 1971 Act, the 2009 Act, the 2004 Act and the 2007 Act; Cf. the U.S.'s sections, 101 and 237 of the Immigration and the Nationality Act 2006 and section 108 of the Illegal Immigration Reform and Responsibility Act 1996..
67. IIRIRA increased deportations by the expansion of categories of migrants subject to deportation; see Moore (2004, p. 537); see also Hagan *et al.* (2009/2010, p. 1800).
68. See the Explanatory Note to the UK Borders Act 2007, Part 5.
69. See UK Borders Act 2007, s 33.
70. See commentaries by Hagan *et al.* (2008, p. 65), Morawetz (2000, p. 1955).
71. See Immigration Act 1971, s 3 (5) (a) and the UK Borders Act 2007, s 32 (4).
72. Watson (1993, p. 29) (Legal transplant- a movement of a system of law from one country to the other usually a diffused law); Dolowitz *et al.* (1999, p. 720).
73. Cf. section 33 of the 2007 Act with decisions in *Rocky Gurung v SSHD, SS (Nigeria) v SSHD* and *AJ (Bangladesh) v SSHD* (n137).
74. Stumpf (2011, p. 1729); see also comments by Chacon (2010, p. 1571).
75. Section 12 of the Migration Act 1958 was amended by section 10 of the Migration Amendment Act 1983..
76. See Code de l'entrée et du sejour des etrangers et du droit d'asile [Code on the Entry and Stay of Foreigners and on the Right of Asylum] (France) art L521-3 [Nawaar Hassan trans] cited in Michelle Foster, 'An "Alien" By the Barest of the Threads" – The Legality of the Deportation of Long-Term Residents From Australia'; see also Cimade, 'Centres et locaux de retention administrative, Rapport 2007 (2008) cited in Clemence and Fischer (2008, p. 598).

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