IMMIGRATION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE HOME OFFICE

Summary of the Bill

1. The Bill provides for a number of provisions in the area of Immigration.

2. The Bill has three main themes: first, the Bill will crack down on exploitation of low-skilled workers, increase the penalties for employing illegal migrants and strengthen the sanctions for working illegally. A new Director of Labour Market Enforcement will coordinate our strategy for tackling non-compliance in the labour market. Those who work illegally will face criminal penalties, as will those persistently using illegal workers as cheap labour. Measures in the Bill will also ensure that those working illegally or employing illegal workers cannot gain licences to sell alcohol or late night refreshment. Immigration officers will also have new powers to close businesses where illegal working is being conducted.

3. Secondly, the Bill will build on the Immigration Act 2014 to ensure that only those migrants who are lawfully present in the UK can access services such as renting accommodation, holding a driving licence and using UK bank accounts. New powers will make it easier for landlords to evict those with no right to be here, and enable immigration staff to seize driving licences from illegal migrants and close their bank accounts, retaining any money made through illegal activity.

4. Thirdly, to make it easier to remove people who should not be in the UK the Bill will implement manifesto commitments to tag foreign criminals released on bail and to extend “deport now, appeal later” certification powers to more immigration cases. The Bill will also equip immigration officers with additional search and seizure powers to better enforce our immigration laws.

5. In addition to these three key areas, the Bill will: reform asylum support arrangements so failed asylum seekers are no longer given preferential treatment over other illegal migrants; strengthen our sea and air borders; require public authorities to ensure that only those with a sufficient command of spoken English (or in Wales, Welsh or English) can work for a public authority in customer-facing roles; impose a new skills charge on businesses bringing migrant labour into the country; reform fees charged by the Home Office in relation to passports and civil registration; simplify the process by which international travel bans are implemented in domestic legislation.

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Statement under section 19 of the Human Rights Act 1998

6. The Secretary of State has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights, on introduction of the Bill in the House of Commons.

Introductory comments

7. In many respects, this Bill builds on measures contained in the Immigration Act 2014, and the Department therefore considers it would be helpful to recapitulate in summary form some of the reasoning it set out in the ECHR Memorandum for the bill that led to that Act.

8. The Department in particular notes that it is relevant to a number of provisions in this Bill that case law on ECHR Article 8 establishes a number of propositions about the ability of a State to enforce immigration controls where they might affect a person's right to respect for private and family life. The first key principle is that the ECHR does not guarantee the right of an alien to enter or reside in a particular country (see para 39 *Boultif* [2001] - 54273/00 [2001] ECHR 497) and that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (para 54 *Uner v Netherlands* (46410/99 [2006] ECHR 873). The ECHR cases then recognise that States enjoy a certain margin of appreciation when balancing the competing interests of the individual and of the community as a whole (para 68 *Nunez v Norway* - 55597/09 [2011] ECHR 1047). *Boultif* and *Uner* form part of a line of case law concerning the deportation of foreign criminals where the ECtHR has consistently recognised that the deportation of foreign criminals serves the legitimate aim of the prevention of disorder or crime under Article 8(2). A separate line of ECtHR case law including *Chandra v Netherlands* - 53102/99 (13 May 2003), *Rodrigues da Silva v The Netherlands* - 50435/99 [2006] ECHR 86, *Osman v Denmark* - 38058/09 [2011] ECHR 926 (para 58), *Nunez* (para 70) and *Antwi v Norway* - 26940/10 [2012] ECHR 259 (paras 87-93) confirm that immigration control is itself a legitimate aim under Article 8(2). This latter case law is recognised domestically as being based on immigration control being mainly a means of protecting the economic well-being of a country (see para 18 of *ZH (Tanzania)* [2011] UKSC 4 and Elias LJ para 76 *Treebhowan* [2012] EWCA Civ 1054).

9. Although these broad principles were developed almost exclusively in the context of expulsion cases, the Department considers that they have a read-across to justify wider measures of immigration control as being compatible with Article 8. It is suggested they provide a clear basis to argue that, just as the United Kingdom can lawfully remove illegal migrants for both crime prevention and wider immigration control reasons, so it can also, compatibly with the Convention, take other measures that seek to encourage such persons to leave by limiting their access to services and benefits in the United Kingdom. This is subject to the proviso that such actions are in themselves proportionate and do not violate other ECHR rights such as Article 3.

10. As noted in the ECHR Memorandum from the bill that led to the 2014 Act, there is an associated point to be made concerning ECHR Article 14. The ECtHR has established in its case law that only differences in treatment based on identifiable characteristics or "status" are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*), and differential treatment on grounds of both nationality and immigration status constitute an "other status". States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom*, no. 13378/05, § 58, ECHR 2008). The scope of the margin will vary according to the circumstances, subject matter and the background (*Carson and Others v. the United Kingdom*, no. 42184/05, § 61, 16 March 2010). A wide margin is usually allowed to States when it comes to general measures of social policy because of their direct knowledge, unless it is "manifestly without reasonable justification" (*Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006). In *Bah v. the United Kingdom* 56328/07 [2011] ECHR 1448 the ECtHR noted that the margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status, which involves an element of choice, and the issue is a socio-economic one.

11. But in order for an issue to engage Article 14 in the first place, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v The Czech Republic* [GC], no. 57325/00, paragraph 175, ECHR 200). The Bill's measures are designed to reinforce the maintenance of immigration control, and it is integral to the concept of immigration control that some people are subject to it and some people are not. Those subject to immigration control are to be treated differently from those who are not. This is a fundamental assumption reflected in the Immigration Acts by the fact that a person subject to immigration control requires leave to enter or remain in the United Kingdom. Thus the Department considers that for measures concerning actual immigration control there is no direct comparator between those subject to immigration control and those not.

12. The Department further notes the response of the Joint Committee on Human Rights in its Eighth Report of 203-14 (HL Paper 102 HC 935) to the effect that while it agreed that the Government "rightly" explains that measures concerning actual immigration control do not require justification under Article 14, it considered it a well-established requirement of the Convention case law that in cases regarding the enjoyment of Convention rights (for example, in relation to access to services), any differential treatment must be objectively and reasonably justifiable.

13. The Department can see the force of this argument. Accordingly, it accepts that Article 14 is engaged by provisions of the Bill which provide for differential treatment in the enjoyment of Convention rights between those subject to immigration control and those not, including the provisions on illegal working, eligibility for licences under the Licensing Act 2003 and residential tenancies. In each of those cases, though, the Department is satisfied that any interference in the Bill with Article 14 is objectively and reasonably justifiable. The different treatment serves the legitimate aim of immigration control, primarily to protect the well-being of the country, and there is a reasonable relationship of proportionality between the means employed and the aim which it is sought to achieve.

14. Because of the varied nature of topics in the Bill in this section the ECHR issues are grouped in topics. Where there is no ECHR issue, no mention is made of the provision.

Analysis

Part 1. Labour Market and Illegal Working

Clause 6: Director of Labour Market Enforcement

Articles engaged:

Article 8

Interference:

15. Clause 6 provides that a person appointed as the Director of Labour Market Enforcement will have a duty to gather, store, process, analyse and disseminate information relating to non-compliance in the labour market. This could include information which engages Article 8.

Justification:

16. The interference will be in accordance with the law as the function will be set out clearly in primary legislation. The interference will also only be permitted in so far as it is necessary in a democratic society, since the function must be discharged in relation to dealing with non-compliance in the labour market (that is, specific pieces of labour market legislation); it addresses the public safety of the country, the prevention of disorder and crime, the protection of health and the protection of the rights and freedoms of others (such as the rights of others not to be forced into labour under Article 4). The interference is also proportionate in that it only gives this function to a specific person, the Director, who must exercise it in connection with a specific purpose. It should be noted that this is not a power to share information.

Clause 8: Offence of illegal working

Articles engaged:

Article 8 and Article 14

Interference

17. Clause 8 creates a new illegal working offence which criminalises those who perform work and who are subject to immigration control and have no right to work in the United Kingdom. The Department considers that Article 8 is potentially engaged as the offence places a greater restriction on individuals' ability to perform work, which is within the ambit of Article 8. If Article 8 is engaged, then the restriction could also be within the ambit of Article 14 because a person who is subject to immigration

control will not have the same right to work that a person who is not so subject would have.

Justification:

18. The offence is a proportionate measure to tackle the significant problem of illegal working and to stem the illicit economy. It is already a criminal offence knowingly to employ illegal workers and it is already an offence for migrants with leave to work in breach of their leave conditions. This offence attaches criminal liability to the workers, rather than the employers and specifically captures those workers who are illegal entrants and therefore have no leave conditions to break. Although the offence is one of strict liability, it is summary only and the maximum penalty is proportionate to the serious effect illegal working has on the economy.

19. In terms of Article 14, the Department is satisfied that the differential treatment serves the legitimate aim of immigration control, and is proportionate to the aims being pursued, given the wide margin of appreciation available in cases where differential treatment is based on immigration status.

Clause 10 and Schedule 1: Illegal working in licensed premises

Articles engaged:

Articles 6, 8 and 14 and Article 1 Protocol 1

Interference

20. Clause 10 and Schedule 1 amend the Licensing Act 2003 ("the 2003 Act") to provide that a person without an entitlement to work in the UK will not be able to apply for a premises or personal licence and that such a licence will lapse if the holder ceases, after the grant of a licence, to be entitled to work in the UK.

21. The Secretary of State will be specified as a responsible authority under the 2003 Act with the ability to make representations against the grant of a premises licence. If a premises licence holder is convicted of an immigration offence or is issued with a civil penalty notice under section 15 of the Immigration, Asylum and Nationality Act 2006 (employment of illegal worker) or section 23 of the Immigration Act 2014 (penalty notices issued to landlords), the Secretary of State may seek a review of the licence and the licensing authority may revoke the licence.

22. In the case of a personal licence, if the applicant has committed an immigration offence or been required to pay an immigration penalty, an objection may be made against the grant of the licence, and conviction of an immigration offence may lead to the forfeiture of a personal licence by the court.

23. In *R (Chief Constable of Lancashire) v Preston Crown Court [2002] 1 WLR 1332* it was conceded by the Chief Constable, and accepted by Laws LJ, that the right to apply for an on-licence under the Licensing Act 1964 fell within the scope of "civil rights and obligations" in Article 6(1) because it related to the applicant's right to

make a living and pursue commercial activity. Applicants for such licences therefore had the right to have their application determined fairly in accordance with the guarantees contained within Article 6(1). This decision is likely to apply to applications for forms of licence under the 2003 Act.

24. It is considered that a licence of a type granted under the 2003 Act is a possession for the purposes of Article 1 Protocol 1 (*Crompton (t/a David Crompton Haulage) v Department of Transport North Western Area* [2003] EWCA Civ 64, [2003] RTR 517, [2003] LLR 426, [2003] All ER (D) 311 (Jan), CA *)*. Article 1 Protocol 1 does not guarantee a right to acquire a new licence, but where an existing licence is held, revocation or removal of that licence is likely to be an interference with the licence holder's rights under that Article (*Tre Traktorer v Sweden (*1989) 13 EHRR 309; *Fredin v Sweden (*1991) 13 EHRR 784; *Catscratch Ltd v City of Glasgow Licensing Board* [2001] LLR 610).

25. Section 179 of the 2003 Act is also amended to provide power for an immigration officer to enter premises which he has reason to believe are being used for a licensable activity, with a view to seeing whether immigration offences are being committed in connection with that activity. This may engage Article 8 or Article 1 Protocol 1.

26. Article 14 may be engaged to the extent that the provisions provide for differential treatment between those subject to immigration control and those not.

<u>Justification</u>

27. To the extent that Article 6 is engaged, the existing framework under the 2003 Act, into which these measures are to be inserted, will provide adequate protection for the rights of existing personal licence holders.

28. Where it is proposed to make provision for premises and personal licences to lapse (which already exists, for example, in section 27 of the 2003 Act in relation to the death, incapacity or insolvency of a premises licence holder) it is intended that this will apply only in respect of licences granted after commencement.

29. In the case of a premises licence granted before commencement, loss of the entitlement to work in the UK will not automatically cause the licence to lapse. Instead, it will be a ground upon which a responsible body can make representations to the licensing authority under the existing framework in the 2003 Act and the authority will consider those representations and those of the licence holder, before reaching a decision.

30. Where a premises licence holder commits an immigration offence, revocation will only be possible if a licensing authority, having considered representations from the licence holder, determines that the licence should be revoked. Where a personal licence holder is ordered by a court to forfeit their licence upon conviction, the necessary procedural protections are provided by the criminal proceedings in which the defendant will have been given an opportunity to defend him or herself.

31. With regard to Article 1 Protocol 1, this is a qualified right. The Department considers that any interference with this right is in accordance with the law (because it will be set out in precise terms in primary legislation) and is in pursuance of legitimate aims, namely ensuring that only those lawfully in this country and with an entitlement to work in the UK should be able to apply for and hold premises or personal licences, thereby ensuring effective immigration control and protecting the economic well-being of the country. The Department is also satisfied that the measures are proportionate to the aims being pursued.

32. The new powers given to immigration officers to enter licensed premises are an extension of powers already available to authorised persons under the 2003 Act. These, too, pursue the legitimate aims mentioned above. Any interference with Article 8 or Article 1 Protocol 1 is justified as a necessary and proportionate measure for the effective enforcement of the 2003 Act and related immigration controls.

33. The Department is satisfied that any interference with Article 14 is objectively and reasonably justifiable. Any differential treatment serves the legitimate aim of immigration control and preventing those with no entitlement to work in the UK from obtaining premises and personal licences, primarily to protect the well-being of the country, and there is a reasonable relationship of proportionality between the means employed and the aim which it is sought to achieve.

Clause 11 and Schedule 2: Illegal working closure notices and compliance orders

Articles engaged

Articles 6, 8 and Article 1 Protocol 1

Interference

34. Clause 11 and Schedule 2 make provision for immigration officers to close business premises where there is evidence of repeated breaches of illegal working legislation, and to obtain a court order with terms designed to force the business into compliance. The closure notice and illegal working compliance orders principally interfere with Article 8 and Article 1 Protocol 1 as they concern the shutting down of business through closing their premises. Business activities and premises may fall within the ambit of Article 8 – see *Niemetz v Germany* (Application No. 13710/88) and *Halford v United Kingdom* (Application No. 20605/92). The power of the court to require that a business conduct, or produce evidence of, checks of documents which evidence a right to work engages Article 8 through the processing of personal data as well as affecting the operation of the business. The power of the court to permit immigration officers to access the premises to check if illegal working is being carried out interferes with the Article 8 rights of both the business owners and the employees – the latter being subjected to an examination to ascertain their right to work.

35. Article 6 is engaged by the determination of the rights to use the premises by the courts.

Justification:

36. A premises closure notice may only be issued where there is evidence of repeat offending. There must have been at least one previous instance of illegal working on the premises – i.e. the issue of a civil penalty or conviction for an illegal working offence in connection with the premises. This helps to ensure that the significant intrusion into the rights of the business owner through closing the premises is a proportionate response to persistent non-compliance with illegal working legislation. Immigration officers must also act compatibly with the ECHR when deciding to issue the notice by virtue of section 6 of the Human Rights Act 1998. The immigration officer must be satisfied that the closing of the premises is necessary to prevent the recurrence or continuation of illegal working, and only a senior immigration officer may issue the notice. The decision to issue the notice is challengeable by way of judicial review, ensuring that the individual has an effective remedy to abuse of the power and for it to be considered by a fair and impartial tribunal.

37. Following the issue of the notice, the immigration officer must make an application to a court of summary jurisdiction to obtain an illegal working compliance order. This must be done within 24 hours from the time the notice is issued, unless this is extended to a maximum of 48 hours by an immigration officer of a higher rank than the officer which issued the notice. Although there is a power to cancel the notice before the order is sought, this is only where the premises owner can show that right to work checks have been conducted and therefore would not be liable for a civil penalty because of the availability of a statutory excuse. The ability to cancel the closure notice ensures that where such evidence of compliance is provided, the business can be opened and there is no disproportionate interference with ECHR rights. Again, judicial review would provide an effective remedy to any abuse.

38. The notice and closure order contains several safeguards such as the restriction on who may be prohibited from entering the premises. Persons who habitually reside on the premises cannot be made homeless as a result of the power and must be permitted access.

39. It is recognised that simply closing premises would be a blunt and potentially disproportionate instrument to achieve compliance with illegal working legislation. A closure requirement is therefore only one possible element of the illegal working compliance order. The order may contain a range of requirements to permit the court to assess what would be proportionate to achieve the legitimate aim of supporting immigration control and prevention of crime. The court may therefore simply require the employer to produce evidence that right to work checks have been conducted, or permit immigration officers a right to investigate those working in connection with the premises to ensure no illegal working is taking place. Although the duration of the order is for a maximum of 12 months, it is likely that any closure of premises would be for a much shorter period, recognising that it is more proportionate to use other requirements to achieve compliance. The terms and duration of the order should reflect the seriousness of the repeat offending in question and how likely the court assesses illegal working to continue or recur.

40. The order is subject to an appeal mechanism to a higher court and both the immigration officer and interested parties may apply to discharge or vary the order. There is also a mechanism for certain categories of individuals unconnected with the premises to claim compensation. Although it could be that some legitimate workers may lose income or even their jobs through the exercise of this power, it is open to them to mitigate their loss by finding other work and this is a consideration that must be taken into account by the court to meet its ECHR obligations when issuing the illegal working compliance order. The provisions also require the court to ensure that interested parties are given the right to make representations before the order is issued.

Part 2. Access to Services

Residential tenancies

Clause 13: Eviction

Articles engaged

Articles 3, 6, 8, 14 and Article 1 Protocol 1

Interference

41. Clause 13 permits a private sector landlord of a private residential tenancy to seek possession of the property without a court process, if they are issued with a Home Office notice notifying them that a tenant is a person disqualified from renting as a result of their immigration status. This route is available only where the landlord is satisfied that all members of the household are so disqualified. Following receipt of the Home Office notice, the landlord can then issue a further notice stipulating the notice period to leave the property. It is only if the tenant declined to leave that recourse to the court to obtain a warrant for possession would be required. The tenant would still be protected from forcible eviction by section 6 of the Criminal Law Act 1977.

42. The power may be challenged on Article 3 ECHR grounds in extreme cases where destitution results from homelessness following eviction – see *R (on the application of Limbuela) v SSHD* CA affirmed by HOL 2005 UKHL 66. The threshold is deemed to be high in cases where deliberate infliction of pain or suffering is not involved – in *Limbuela* the threshold was deemed to be crossed if an individual "with no means and no alternative sources of support … is by the deliberate action of the state, denied shelter, food, or the most basic necessities of life." This was particularly so where "his predicament was the result of state action rather than his own volition" and he was "ineligible for public support". This route to eviction may also be challenged on Article 6, Article 8, Article 14 or Article 1 Protocol 1 grounds.

Justification

43. In terms of Article 8, the power to evict without a court process is in accordance with the law because it is set out in precise terms in primary legislation

(new section 33D of the Immigration Act 2014, inserted by clause 13(2)). The Department is satisfied that the measure is necessary in a democratic society to protect a legitimate end, i.e. in this case immigration control and the economic well-being of the country. The state has a margin of appreciation in determining where the balance should be struck between the interests of society and those of the individual (see *Stec and Others v UK* ECHR (2005) 41 EHRR SE 295 and *Jeunesse v Netherlands* ECHR (2014) App. No. 12738/10). This new route to eviction applies to those individuals who are present in the United Kingdom in breach of immigration laws and acts to support the effective operation of immigration controls by restricting the ability of persons subject to immigration control and disqualified from renting by virtue of their immigration status to obtain settled accommodation in the private residential sector. Such individuals will have had the option to regularise their stay in the United Kingdom. In terms of potential impact on the right to respect for family life enjoyed by those impacted, the reason can be said to be justified and proportionate for these same reasons.

44. In respect of Article 3, this route to eviction will not meet the threshold set out in the case of Limbuela (see above). Those persons who are disqualified from taking up residence as their only or main home in the private rented sector are those present in the United Kingdom in breach of the immigration laws and in respect of whom it is considered that there is no legitimate barrier which prevents them from leaving the United Kingdom. Therefore, it is open to them to make arrangements to leave in order to access accommodation. Further, the exceptions provided for in Schedule 3 to the Immigration Act 2014 mean that the prohibition will not apply to all kinds of accommodation, and the vulnerable and those in need of additional support will be able to access appropriate services.

45. In relation to Article 1 Protocol 1, any interference with the landlord's peaceful enjoyment of possession is in the public interest to ensure compliance with immigration legislation and is proportionate. The expectation is that the landlord will take steps to evict someone once they are aware that they are disqualified from renting but a number of routes to eviction are at their disposal. The interference with the rights of the tenants is justified for the reasons set out above in respect of supporting the effective operation of immigration controls.

46. In terms of Article 6, the fact that the exercise of the power by the Secretary of State is inherently susceptible to judicial review means that a person in respect of whom the power is exercised does have an avenue available to him for challenging the exercise of the power in his case, as well as more generally challenging Article 3, Article 8 and Article 1 Protocol 1 compliance. Interim injunctive relief would also be available as appropriate. An affected tenant could seek an interim injunction against the landlord in the county court on the basis that the landlord could not lawfully pursue this route (e.g. because a member of the household was not disqualified by virtue of their immigration status). In addition, the Secretary of State is able to exercise discretion to grant permission to rent to those disqualified by virtue of their immigration status in appropriate cases.

47. In terms of Article 14, the Department considers that a similar analysis applies: for the reasons summarised above it is also satisfied that the differential treatment serves the legitimate aim of immigration control, and is proportionate to the

aims being pursued, given the wide margin of appreciation available in cases where differential treatment is based on immigration status.

Clause 14: Order for possession of dwelling-house

Articles engaged

Articles 3, 8, 14 and Article 1 Protocol 1

Interference

48. Clause 14 provides for a new mandatory ground of possession for a landlord following receipt of a notice from the Secretary of State. The new mandatory ground of possession is inserted into the existing possession procedures in Part 1 of Schedule 2 to the Housing Act 1988 and will be available where someone in the property (tenant or occupant) is disqualified from renting as a result of their immigration status. Because at least one of the occupiers has the right to rent, the "no court route" to eviction is not available. Instead, the landlord can rely on a new mandatory ground for possession, inserted by clause 14 into Schedule 2 to the Housing Act 1988 as Ground 7B, namely that persons named in the notice are disqualified as a result of their immigration status from occupying the dwelling-house under the tenancy. In cases where tenancies enjoy protection under the Rent Act 1977, clause 14(6) also inserts a new ground for possession into Schedule 15 to the Rent Act 1977, on the basis that the occupier is disqualified from occupying the property because of their immigration status.

49. This ground for possession is distinguishable from the power in clause 13 in its human rights impact because whilst the Secretary of State triggers the eviction process, there will be a court process in addition to the possibility of recourse to judicial review and injunctive relief. Private proceedings are accepted as being Article 8/Article 1 Protocol 1 compliant (see *McDonald -v- McDonald* [2014] EWCA Civ 1049 24).

Justification

50. The landlord recovers possession through an established court procedure. Those procedures are in accordance with law, being based in primary legislation. Challenges to the Home Office notice may also be brought on other human rights grounds such as Article 1 Protocol 1. The fact that the exercise of the power is inherently susceptible to judicial review means that a person subject to the exercise of the power has an avenue for challenge, judicial review, and interim relief as appropriate.

51. Insofar as Article 8 is engaged by the new ground for possession (because an individual's right to respect for his or her family life and his or her home will clearly be affected by an eviction), any interference will be in accordance with the law because there will be clear provision in primary legislation about the additional circumstances in which landlords will be able to seek possession. The Department is satisfied that the interference can be justified as proportionate to the legitimate aim of encouraging

individuals who are present in breach of the immigration laws to leave the United Kingdom, and so supporting the effective operation of immigration control.

52. In terms of Article 14, the Department once again considers that a similar analysis applies: for the reasons summarised above it is also satisfied that the differential treatment serves the legitimate aim of immigration control, and is proportionate to the aims being pursued, given the wide margin of appreciation available in cases where differential treatment is based on immigration status.

Clause 16: Powers to carry out searches relating to driving licences

Articles engaged:

Articles 6, 8, 14 and Article 1 of Protocol 1.

Interference:

53. Clause 16 confers powers for authorised officers to search persons and premises for, and to seize and retain, the United Kingdom driving licences of persons they have reasonable grounds for believing are not lawfully resident in the United Kingdom. These powers build on sections 46 and 47 of the Immigration Act 2014 which ensure that people who are not lawfully resident in the United Kingdom (meaning that they require leave to enter or remain in the United Kingdom but do not have it), are not entitled to United Kingdom driving licences. In particular, section 47 provides a power to revoke such licences. These new search and seizure powers will, therefore, be facilitating the seizure of licences which have been revoked under an existing power, or which fall to be revoked under that power.

54. While the ECtHR has commented that once a driving licence has been granted, its revocation might have the *de facto* effect of engaging Article 6, insofar as this revocation could be seen as the bringing of a criminal charge or the determination of a civil right[1], the Department does not consider that these same issues are engaged by the seizure power. The seizure power is an administrative provision to enable the existing revocation power to operate more effectively. It is acknowledged that, in fact specific circumstances, an argument could be made that the seizure interferes with a person's property rights guaranteed by Article 1 of Protocol 1, but it is not accepted that seizure of a licence will automatically do so. In *Toma v Romania* the ECtHR stated that driving licence revocation and seizure in that case did "not disclose any appearance of a violation of the rights enshrined in Article 1 of the Protocol"[2].

55. The Department accepts that Article 8 may be engaged but limits on the power, e.g. the extent of the search and the need for a reasonable belief that the person is not lawfully resident, lessen any interference. Moreover, if the search takes place in the course of a criminal arrest or investigation, the normal procedural

[1] *Becker v Austria* (App. No. 19844/08) - [2015] ECHR 19844/08.
[2] *Toma v Romania* (App. No. 1051/06) - [2012] ECHR 1051/06, paragraphs 35-36 of the judgement.

safeguards in the Police and Criminal Evidence Act 1984 (PACE) and the PACE codes of practice will apply[3].

Justification:

56. The Department believes these powers do not engage Article 6. If it is felt that they do, however, there is an avenue for redress through judicial review and a statutory right of appeal.

57. The driving licence search and seizure measures are in accordance with the law, as required by Article 8, because they are set out in precise terms in primary legislation. The Department considers that any interference with Article 8 is in pursuance of legitimate aims, namely ensuring effective immigration control, which is necessary to ensure the economic well-being of the country, and preventing crime and disorder. The powers are circumscribed by important safeguards, detailed above.

58. The measures are also considered to be proportionate. Many of the licences seized will have already been revoked and it is a criminal offence under section 99(5) of the Road Traffic Act 1988 not to return a revoked licence. If a person's driving licence has not been revoked, but falls to be seized under the new power, the person could not drive without committing the new criminal offence of driving while not lawfully resident in the United Kingdom and so could not use their driving licence for its proper purpose in any event.

59. The fact that the exercise of these powers is inherently susceptible to judicial review means that a person in respect of whom they are exercised has an avenue available to challenge any perceived non-compliance with Article 8.

60. The Department considers the revocation power arguably does not engage Article 14 of the Convention, since persons who require leave to enter or remain in the United Kingdom are not in a comparable position to those who do not in these circumstances. To the extent these powers do engage Article 14, the margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status, which involves an element of choice, and the issue is a socio-economic one[4]. The restriction can be said to be justified on an objective and rational basis: it is intended to encourage individuals who are present in breach of the immigration laws to leave the United Kingdom and so support the effective operation of immigration control.

[3] For immigration officers this is as applied by the Police and Criminal Evidence Act 1984 (Application to Immigration Officers and Designated Customs Officials in England and Wales) Order 2013, S.I. 2013/1542.
[4] *Bah v United Kingdom* [2012] 54 EHRR 21*, paragraph 47.*

Clause 17: Offence of driving when unlawfully in the United Kingdom

Articles engaged:

Articles 6, 8, 14 and Article 1 Protocol 1.

Interference:

61. Clause 17 creates a new offence of driving a vehicle in a public place when the driver of the vehicle is not lawfully in the United Kingdom. The Department accepts that Article 8 can be engaged by creating this offence, which is punishable by a fine and imprisonment, and by the detention and forfeiture of vehicles ancillary to the offence, especially in cases where that person has been in the United Kingdom for a significant period of time[5]. This offence needs to be seen in the context, however, that the policy since 2010 has been not to issue driving licences to people not lawfully resident in the United Kingdom and this was enshrined in statute by the Immigration Act 2014, along with the accompanying revocation power.

62. The detention and forfeiture of vehicle clauses also engage the right to protection of property, guaranteed by Article 1 Protocol 1, and Article 6. Vehicle detention can occur prior to the court's determination regarding the offence/forfeiture.

Justification:

63. The measures are "in accordance with the law", as required by Article 8, because they are set out in precise terms in primary legislation. The Department considers that any interference with Article 8 is in pursuance of legitimate aims, namely ensuring effective immigration control, which is necessary to ensure "the economic well-being of the country", and preventing crime and disorder. The powers are circumscribed by important safeguards and the criminal offence is necessarily subject to the scrutiny of the court.

64. These measures are also considered to be proportionate. The detention provision contains a power, not a duty, to detain a vehicle believed to be used in the commission of the offence and a person with an interest in the vehicle may apply to the court for its release pre-trial and make representations regarding forfeiture. The fact that a court makes the forfeiture decision provides a safeguard that this occurs proportionately.

65. Case law on Article 1 Protocol 1 states that states enjoy a wide margin of appreciation when deciding whether a general public interest aim is legitimately served by deprivation of property. The Department considers that any interference is justifiable in the public interest of preserving evidence, preventing the commission of further crimes and, in the case of forfeiture, punishment on conviction of an offence committed using the vehicle forfeited. The control and deprivation of property provided for by these clauses is proportionate to these aims given that it is to the minimum extent necessary to achieve them.

[5] *Dawit Teckle v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin), paragraph 36.

66. Regarding Article 6, a person with an interest in the vehicle may make representations to a court regarding detention and/or forfeiture and the ultimate decision on forfeiture or detention is with the court (which must act compatibly with Convention rights).

67. As before, the Department considers that the operation of this offence will not engage Article 14 of the Convention, since persons who require leave to enter or remain in the United Kingdom are not in a comparable position to those who do not in these circumstances. To the extent that these powers do engage Article 14, the margin of appreciation afforded to states is relatively wide. The restriction can be said to be justified on an objective and rational basis: it is intended to encourage individuals who are present in breach of the immigration laws to leave the United Kingdom and so support the effective operation of immigration control.

Clause 18 and Schedule 3: Bank accounts

Articles engaged:

Article 6, Article 1 Protocol 1

Interference

68. Clause 18 provides for banks to check the immigration status of current account holders and to help facilitate the closure of accounts held by illegal migrants. Article 6 will be engaged when the Secretary of State applies to the court for a freezing order pursuant to new section 40C(2) of the Immigration Act 2014, as amended by Schedule 3 to the Bill, as the outcome of the application will be determinative of the disqualified person's civil rights.

69. Article 1 Protocol 1 will be engaged in instances where a court makes an order pursuant to the new section 40D prohibiting any person from making withdrawals or effecting payment transactions from an account held by a bank or building society that is operated by or for a disqualified person. The making of any such order will necessarily amount to the control of the use of the disqualified person's property (i.e. any credit balance in the frozen account or available credit facility).

Justification

70. As regards compliance with the requirements of Article 6, although it will be possible for the Secretary of State to apply to the court for a freezing order *ex parte*, any such order must provide for notice to be given to the disqualified person and any other person in respect of whom the account is operated by or for. Once put on notice, any such person may apply to the court that made the order for variation or discharge of the order. As such, following the making of an *ex parte* order, the disqualified person etc. will be afforded the opportunity for a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Clearly, where the Secretary of State gives notice to the disqualified person etc. of

her application to the court for the order, the disqualified person etc. will be able to make representations to the court as to whether the order should in fact be made.

71. It is also the case that a disqualified person etc. will be able to appeal any decision of the court to grant an application for a freezing order, or any decision made in respect of an application to that court for the variation or discharge of the order, to the relevant appeal court.

72. Insofar as compliance with Article 1 Protocol 1 is concerned, a freezing order amounts to a control of use of the disqualified person's property (i.e. any available funds in the account or agreed borrowing facility) and is not a deprivation of the ownership of the property. The test for justification of a control of use of property has three limbs. The first is that the control must be in accordance with the law. The second is that the control must be for the general interest (or for the securing of the payment of taxes or other contributions or penalties). The third limb is that the measure must be proportionate to the aim pursued.

73. The freezing order procedure will be in accordance with the law: the Secretary of State's application will be made in accordance with the rules of the court and the ability to apply for the order is prescribed in statute (see section 40C(2)(a)). Moreover, the factors that the Secretary of State will take into account when determining whether to make an application for a freezing order will be set out in a statutory code of practice (see section 40C(4)).

74. The Government is clear that encouragement of persons who are illegally within the UK to leave the jurisdiction is a wholly legitimate aim (the measure is intended to promote compliance with the rule of law) and to be in the general interest.

75. As regards the proportionality of the measure, there are procedural safeguards protecting the disqualified person's right to his or her property: in the event that the disqualified person is able to persuade the court that he or she has made arrangements to leave the United Kingdom, the likelihood is that the court would revoke the order. It will also be possible for the Secretary of State to apply to the court for the discharge of the order at any time, and the likelihood is that the Secretary of State will do so in instances where she is satisfied that the disqualified person has left the jurisdiction or is about to leave the jurisdiction.

76. In determining whether a measure is proportionate, the extent to which the property owner can be said to be at fault is also a material consideration (see *Air Canada v. UK* [1995] 20 EHRR 150). Given that applications for freezing orders will only be made in the case of individuals who have already, by definition, broken the law, and given that the application is made for the purposes of encouraging such individuals to comply with the law, freezing orders can properly be said to be a proportionate means of securing a legitimate aim.

Part 3. Enforcement

Powers of immigration officers

Articles engaged:

Articles 5, 8 and Article 1 Protocol 1

Interference

77. Part 3 of the Bill confers additional search and seizure powers on immigration officers. The amendments and expansion to these enforcement powers principally concern the search for and transfer of evidence. The searches of private premises clearly engage Article 8 and Article 1 Protocol 1 as any search will entail a disruption to private and family life and relevant evidence, which may constitute personal possessions, may be seized and retained by immigration officers.

78. There are also new powers in clause 24 for detainee custody officers, prison officers and prison custody officers to search individuals who are already in detention for nationality documents and seek authority from the Secretary of State to seize those documents.

79. The enforcement powers also expand an immigration officer's powers of examination to include examination in support of a decision to curtail leave. A person subject to examination by an immigration officer is under a positive obligation to provide the immigration officer with all information and documentation they require for the purposes of the examination (see paragraph 4 of Schedule 2 to the Immigration Act 1971). This obligation interferes with Article 8 and Article 1 Protocol 1. The person being examined is also automatically liable to detention for the duration of the examination (see paragraph 16(1) of Schedule 2 to the Immigration Act 1971). Therefore the amendment to the examination power also engages Article 5 ECHR.

Justification:

80. The enforcement powers concerning the search for documentation in support of a curtailment decision and issue of a civil penalty will be administrative in nature – i.e. they are for non-criminal purposes. Any interference with Article 8 or Article 1 Protocol 1 is justified as a necessary and proportionate measure for the effective enforcement of immigration controls. The limits on the power, e.g. the extent of the search, the need for a reasonable belief that relevant documents will be found and limits on retention of the documents lessen any interference.

81. The amendment to the examination power is justified as a proportionate interference with ECHR rights to provide the effective enforcement of immigration control and places examination for the purposes of curtailment of leave on the same basis as refusal of leave. Detention is necessary in order to carry out the examination effectively and is justified under Article 5(1)(b) and (f) ECHR.

82. The general power of seizure assists immigration officers to tackle criminality (a legitimate aim under Article 8 ECHR) and is very similar to the general power of seizure available to the police in section 19 Police and Criminal Evidence Act 1984. Immigration officers must have reasonable grounds to believe that the items seized constitute evidence of an offence. Evidence of general criminality may only be retained by immigration officers on the authorisation of a public authority with functions in relation to the suspected offence.

83. The power of the Secretary of State to direct the search of individuals in detention for documents which might facilitate removal allows those with charge of the detainee to exercise powers already available to immigration officers. The Secretary of State can only direct that the powers be exercised where she has reasonable grounds to believe that the subject of the search is in possession of the documents and that they would facilitate the removal of an immigration offender or foreign national prisoner. Where the detainee custody officer discovers a nationality document on a routine search, they must obtain Secretary of State authorisation to seize and retain the document.

84. The amendments to the warrant provisions enable a court to grant multi-premises and all-premises search warrants – something which the police may already do in England and Wales. The power is subject to judicial oversight and the search warrants are for evidence of immigration criminal offences or documentation to enforce the effective operation of the immigration controls.

Clause 29 and Schedule 5: Immigration bail

Articles Engaged

Articles 3, 5, 8 and Article 1 Protocol 1

Interference and Justification

85. Section 30 and Schedule 5, primarily consolidating the current provisions in the 1971 Act on temporary admission, temporary release (known as “bail”) and release on restrictions, provide for the grant of immigration bail by the Secretary of State or the First Tier Tribunal to a person detained or liable to be detained in immigration detention.

86. Although there is no right of appeal in relation to the Schedule 5 provisions, the exercise of the powers will be susceptible to judicial review challenges – which will be an effective forum to consider any human rights issues.

87. Immigration bail must be granted subject to conditions – what those conditions are will depend on the individual’s circumstances, including the person’s risk of absconding and reoffending. These conditions may restrict a person’s liberty; for example, a person may be bailed subject to a condition that they reside at a particular address, a condition that they adhere to a curfew or (in exceptional cases) a condition that they do not leave a defined geographical area. Such conditions may be enforced by way of electronic monitoring.

88. Notwithstanding their restriction on a person's liberty, the Home Office does not consider that such conditions are ordinarily capable of amounting to a "deprivation of liberty" for the purposes of Article 5(1). Case law has shown Article 5 will generally only be engaged where a person is subject to a curfew of eighteen hours or more (or, potentially, a shorter curfew where the effect upon the individual is substantial when taken with other bail conditions). However, where Article 5 is engaged, Article 5(1)(f) will apply – permitting the lawful deprivation of liberty of a person: (1) to prevent his effecting an unauthorised entry into the country; or (2) against whom action is being taken with a view to deportation or extradition.

89. The Home Office recognises that, in many cases, the imposition of conditions on an individual may interfere with a person's private or family life and so engage Article 8. That said, the Home Office considers that any such interference which does occur may be justified. The imposition of conditions will be "in accordance with the law" because such a power is detailed at paragraph 2 (as informed by paragraph 3) of Schedule 5 to the Bill. Further, the Home Office considers that the imposition of conditions is necessary in a democratic society to protect a legitimate end (i.e. immigration control – and, dependent upon the facts, national security, public safety and prevention of disorder) and the UK has a margin of appreciation in weighing the interests of society and the individual.

90. Article 3 could potentially be engaged by conditions of bail amounting to inhuman or degrading treatment. Given the high threshold of severity of treatment which must be met for an Article 3 breach, it is envisaged that such breaches, if any, would arise from conditions of bail which exacerbate an individual's mental or physical illness (this occurred (but not in relation to bail) in the case of *DD v Secretary of State for the Home Department* [2015] EWHC 1681 (Admin) where it was held that the maintenance of a Terrorism Prevention and Investigation Measure – in particular that the individual remain subject to electronic monitoring – would be contrary to Article 3 ECHR). Evidently, as Article 3 is an absolute right, there is no question of proportionate interference. The Secretary of State and the First Tier Tribunal are both under the duty found in section 6 of the Human Rights Act 1998 not to act incompatibly with the ECHR – and so would be mindful of a person's circumstances when applying and maintaining bail conditions to ensure those do not breach Article 3.

91. The provisions will clarify that a person who is "liable to detention" under the Immigration Acts may be on immigration bail – and this amendment will have retrospective effect and have early commencement. Although noting that this would preclude claims from being brought in reliance on the recent judgment in *B v SSHD* [2015] EWCA Civ 445 (which held that the test for maintenance of bail is not whether a person is "liable to detention"), the Home Office does not consider that Article 1 Protocol 1 is engaged. In any event, even if Article 1 Protocol 1 were engaged, the Home Office does not consider there to be a breach. Article 1 Protocol 1 is a qualified right. The interference would be in accordance with the law because it will be provided for in primary legislation and, as it will be clarified for all purposes that bail can be lawfully maintained, there can be no uncertainty about the extent of the restriction on claims that could otherwise be brought. This clarification is in the general interest because, were it not done, there would be a significant operational

and financial impact from the judgment – a judgment that creates considerable legal uncertainty and disruption to a fundamental part of the immigration system that has hitherto operated (and been understood to operate) in the manner embodied in the clarification (i.e. that the question is whether the person is liable to detention). In addition to the above, such a provision would not be disproportionate as maintenance of bail conditions of those affected could give rise only to limited detriment – bail conditions are, by their nature, much less intrusive than detention.

92. The Department does not consider Article 6 to be engaged; the ECtHR has confirmed (in *Maaouia v France* (2000) 33 EHRR 42) that litigation on immigration control does not concern the determination of a civil right within the meaning of article 6(1) ("immigration control" will include questions on immigration bail – see *R (oao BB) v SIAC* [2012] EWCA Civ 1499).

Clause 30: Power to cancel leave extended under section 3C of the Immigration Act 1971

Articles engaged

Articles 2, 3, 6 & 8

Interference and Justification

93. Clause 30 provides for the cancellation of leave which is statutorily extended by virtue of section 3C of the Immigration Act 1971. Where leave is cancelled, the person will have no leave, rendering them liable to removal. This is because, under section 10(1) of the Immigration and Asylum Act 1999, as amended by the Immigration Act 2014, the Secretary of State may remove a person from the United Kingdom who requires leave to enter or remain, but does not have it.

94. Theoretically, such removal would be capable of breaching the ECHR, if the person was removed notwithstanding a pending human rights claim – either a protection claim (giving rise to a risk of breach of Articles 2 and 3) or a claim under Article 8 ECHR. However, prior to removing a person from the United Kingdom, the Secretary of State will consider any protection claim, or human rights claim in compliance with her obligations (including under section 6 of the Human Rights Act 1998). Moreover, and as to Article 6, any refusal of a protection or human rights claim will give rise to a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002. Pursuant to section 92 of that Act, that appeal right must be exercised from within the UK where the person in respect of whom the decision was made was in the UK at the time of the decision, unless that claim is certified under sections 94 to 94B of that Act. Accordingly, it is envisaged that any removal action that follows cancellation of 3C leave will be in accordance with the Secretary of State's obligations under the ECHR. The new provision simply restores the position that existed under the pre-Immigration Act 2014 regime.

95. The Department notes that persons without leave are subject to various restrictions. In particular, they may not be entitled to work, rent a property or access benefits in the United Kingdom. This will be relevant in cases where the person

whose leave is cancelled has a protection or human rights claim that has yet to be determined, or in respect of which an appeal could be brought or an appeal is pending. The aforementioned consequences of having no leave could also result in an interference with Article 8. However, we do not anticipate a breach of Article 8 given (i) the interference will be justified in most cases by the seriousness of the immigration offence giving rise to curtailment and (ii) curtailment action is at the Secretary of State's discretion, such that all relevant considerations, including ECHR considerations, must be taken into account before pursuing such action.

Part 4. Appeals

Clause 31: Appeals from within the UK: certification of human rights claims

Articles engaged:

Articles 2, 3, 6 & 8

Interference and justification

96. The Immigration Act 2014 introduced new certification powers to render human rights appeals made by persons liable to deportation non-suspensive of removal (section 94B of the Nationality, Immigration and Asylum Act 2002, inserted by section 17 of the 2014 Act). Clause 31 extends these powers to all human rights claims (that is, not only those made by persons liable to deportation).

97. Section 94B provides that the Secretary of State may only certify a claim where removal will not be unlawful under section 6 of the Human Rights Act 1998, and where it will not give rise to serious irreversible harm. Case law confirms that claims made on the basis of Articles 2 and 3 require a suspensive (that is, in-country) right of appeal. For these reasons, there is no intention to apply this power to cases relying on Article 2 and 3 rights. The case law also makes plain that where there is an arguable Article 8 claim, there needs to be the effective possibility of challenging the removal decision. The relevant issues must be examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality but the appellant does not need to remain in the country.

98. Certification under this power would not constitute a declaration that the human rights claim is bound to fail at appeal, but rather that the issues do not require a suspensive appeal, because even if the appeal were successful, no breach of human rights would result from the removal of the person whilst his appeal was resolved. Each case will be considered on its merits. Where it is considered that removal would or may be unlawful under section 6 of the Human Rights Act 1998, or where removal will give rise to serious irreversible harm, the case will not be certified.

99. These changes retain an effective remedy in the form of an appeal for potential breaches of the ECHR / Human Rights Act attendant on permanent removal, so we do not anticipate a breach of either Article 13 ECHR or section 8 of

that Act. ECtHR case law confirms that where no breach of human rights will result from the remedy being non-suspensive, a suspensive remedy is not imperative. An opportunity to challenge the decision to certify is also available by way of judicial review.

100. For these reasons, we assess these provisions to be compatible with the ECHR.

101. We note that there is on-going litigation in the Court of Appeal in relation to the Secretary of State's application of section 94B (case of Kiarie / Byndloss v SSHD). The appellants do not seek to argue (and for the reasons set out above could not legitimately argue) that the provision is itself incompatible with the ECHR. The cases are therefore fact-specific. However, the appellants raise arguments that have a potential read-across to other cases so certified. In particular, notwithstanding the ECtHR case law mentioned above, they argue that the Secretary of State has applied the incorrect legal test in reaching a decision to certify in these cases, substituting a test of "serious irreversible harm" for whether the decision would be unlawful under section 6 of the HRA 1998, such that it is incompatible with Article 8. Moreover, they argue that removal renders them unable to effectively pursue their appeal, because of the difficulties inherent in accessing legal support and in presenting cases from abroad.

102. The case has been expedited, and is listed for hearing in the week commencing 21st September 2015. It is to be hoped that judgment will be handed down shortly thereafter. This ongoing litigation and any judgment given while this proposed clause is subject to Parliamentary scrutiny will clearly be of interest and relevance to that process.

Part 5. Support for certain categories of migrant

Clause 34 and Schedule 6: Support for certain categories of migrant

Articles engaged:

Articles 3, 6, 8 and 14

103. It may be argued that the new power to support failed asylum-seekers (new section 95A of the Immigration and Asylum Act 1999) engages Articles 3 and 8. The criteria for provision of support under this new power will be very narrowly drawn, and accordingly the argument would be that applicants who do not meet the criteria may face destitution and inhumane treatment contrary to Article 3 and Article 8. Challenges to decisions refusing support under this power will engage Article 6.

Interference

104. The abolition of the power to support failed asylum-seekers in section 4 of the Immigration and Asylum Act 1999, and the creation of a new, more narrowly defined power as a new section 95A, may be said to engage Article 3 and Article 8 as regards family life. This may be said to be the case where failed asylum-seekers are

destitute to the point that their condition constitutes inhumane and degrading treatment but they do not meet the additional criteria which will need to be met in order for support to be granted, which is that they face a genuine obstacle to leaving the UK. (Such persons are not eligible to work and would not be eligible for support by local authorities due to the operation of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.) Any destitution is also likely to engage a person's Article 8 right to private life.

105. The Court of Appeal found in *R (Kimani) v Lambeth Borough Council* [2003] EWCA Civ 1150 that neither Article 3 nor Article 8 imposes a duty on the State to provide a person with support when they are free to return to leave the UK in order to avoid the consequences of withdrawal of support. The case was decided in the context of whether support under section 95 could be discontinued when the ineligibility provisions of Schedule 3 were engaged. Schedule 3 provides that certain categories of person (one of which the claimant fell into) are ineligible to receive section 95 support, but Schedule 3 does not operate to prevent such support being granted if to do so would be necessary to avoid a breach of human rights. The claimant had not been granted leave to enter or remain in the UK. The Court found that neither Article 3 nor Article 8 imposed a duty on the state to provide support to foreign nationals who were in a position freely to return home.

106. *Kimani* was upheld and applied in *Clue v Birmingham City Council* [2010] EWCA Civ 460. However the Court of Appeal found that given the circumstances in *Kimani*, that case extended to Article 3 and Article 8 as regards family life, not private life. In *Clue*, the Court found that the Article 8 right to private life could be engaged by virtue of the length of time that a person had been present in the UK and whether they had an extant application for leave to remain in the UK. The result in the context of a statutory duty on a local authority to provide support was that the local authority could not pre-empt the outcome of the Secretary of State's decision on the leave application and would be required to provide support where Schedule 3 would otherwise be applicable, because to fail to do so would be in breach of a person's human rights.

107. A separate and well known line of case law which is often cited in this field relates to the threshold for "inhumane and degrading treatment" in circumstances where Article 3 is found to be engaged. The issue arose in *Limbuela* [2005] UKHL 66, where it was found that the Secretary of State could not withhold support under section 95 on the basis of the statutory "late application" exemption because of the requirement in the same statutory scheme that section 55 should not prevent the exercise of a power to the extent necessary to avoid a breach of Convention rights. *Kimani* was not considered in the Court's judgment in that case, but the context of *Limbuela* was that the Claimant had an outstanding application for asylum at the time (and would otherwise have qualified for support but for not making his asylum application as soon as reasonably practicable) and that the statutory scheme included a requirement that section 55 should not be applied to the extent necessary to avoid a breach of human rights.

108. The Government's position is that *Kimani* remains good law and that Article 3 and Article 8 do not give rise to a duty on the State to provide a person with support when they are free to return to leave the UK and return to their country of origin. To

the extent that *Kimani* is qualified by *Clue*, in that the Article 8 right to private life may be capable of giving rise to such a duty, any breach of Article 8 in this regard is justified. In light of this analysis, the Government does not propose to make any provision in the new power (in new section 95A) to the effect that support will be provided (in situations where it would otherwise not be available) if to withhold support would result in a breach of a person's Convention rights.

109. As regards Article 6, there is no provision for decisions refusing support under section 95A to attract a right of appeal to the Tribunal; however any decision to this effect would be susceptible to judicial review and emergency injunctive challenge where appropriate. In the context of any judicial scrutiny of the exercise of the power, the person would be entitled under Article 6 to a fair and public hearing within a reasonable time by an independent tribunal established by law.

110. The changes to the asylum support provisions will apply to all failed asylum seekers regardless of their individual characteristics. Eligibility for continued support will be based solely on whether there are any genuine barriers to leaving the United Kingdom. The Home Office is therefore satisfied that Article 14 is not engaged and that the provisions are therefore compatible. A Policy Equality Statement will nevertheless be produced, taking into account and reflecting any responses received to the asylum support consultation, which closed on 9th September.

Justification

111. As regards any breach of the Article 8 right to family life and its justification under Article 8(2), the measure is in accordance with the law because it is set out in precise terms in primary legislation. There are strong grounds for arguing that it is necessary in a democratic society in the interests of the economic well-being of the country to restrict access to publically funded support for persons unlawfully present in the UK who have exhausted their appeal rights and who have no genuine obstacles for returning to their country of origin.

112. It is also relevant that the power is circumscribed by important safeguards; and related to this, the power and the strict criteria which attach to it should be seen in the context of the related power to support asylum seekers.

113. The exercise of the power will be subject to criteria set out in the power itself and/or in regulations, which will set out an objective standard for destitution and for the criteria for whether there is a "genuine obstacle" to departure.

114. Before becoming eligible to apply for this form of support, potential applicants are highly likely to have been supported under section 95 of the 1999 Act during the period that their asylum claim was outstanding. After their asylum claim is finally determined, they will have a grace period during which support will continue under section 95 before it is terminated. This grace period exists in order to give these people time to adjust to their new situation and make plans to leave the UK as soon as possible.

115. Although it is envisaged that applications for the new form of section 95A support will need to be made within the grace period, there will be provision for an application to be made out of time where certain criteria are met.

116. The "Assisted Voluntary Return" (AVR) scheme will be available to any persons who wish to leave the UK, and there are separate existing powers available to make payments to put travel arrangements in place for persons who wish to leave the UK. Any failed asylum-seeker wishing to leave the UK who does not face a genuine obstacle to removal should be able to obtain the assistance to do so in order to avoid any deterioration in living conditions which they may face in the UK due to their ineligibility for section 95A support.

117. The Government believes that the scheme of refusing support to persons unlawfully in the UK unless there is a genuine obstacle to them returning to their country of origin is a proportionate means of meeting the legitimate aim of protecting the economic well-being of the UK. Decision-makers will also need to ensure in each case where they choose to exercise the power that it is proportionate in that particular case.

Part 6. Border Security

Clause 35 and Schedule 7: Penalties relating to airport control areas

Articles engaged

Article 6 and Article 1 Protocol 1

Interference:

118. Clause 35 and Schedule 7 create a civil penalty regime which applies when people connected with aircraft, ships or ports fail to ensure that passengers embark or disembark in accordance with conditions set by the Secretary of State. In the case of *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 the Court of Appeal held that a civil penalty regime established to penalise hauliers and drivers carrying clandestine entrants into the UK was penal in nature. The civil penalty regime provided for in relation to the failure by port operators and owners/agents of aircraft to comply with the conditions imposed by the Secretary of State in the designation of an airport control zone under paragraph 26(2) or (3) of Schedule 2 to the Immigration Act 1971 may also be argued to be criminal for the purposes of the ECHR and so Article 6(2) and (3) may also be engaged. The further specific concerns that the Court had with the regime in *Roth* were the scale and inflexibility of the penalty without the possibility of mitigation or the right for the penalty to be determined by an independent tribunal and the fact that the scheme imposed an excessive burden on the carriers and drivers which was disproportionate to the objective to be achieved and was a breach of Article 1 Protocol 1.

119. The scheme set out in this Bill does not constitute an interference with Article 6(1) and is similar in structure to existing civil penalties schemes, for example the

scheme for breach of authority to carry schemes made under section 24 of the Counter-Terrorism and Security Act 2015. The scheme is compatible with Article 6 and Article 1 Protocol 1 because the level of penalty will be flexible and can reflect the level of culpability, there will be a right of objection to the Secretary of State's decision and there will be a right of appeal where the court will be able to consider evidence which was not before the Secretary of State and will have regard to supporting guidance.

120. The Home Office considers that the civil penalty scheme is compatible with Article 6 and that it does not amount to criminal penalties for the purposes of the ECHR. The aim of the scheme is to address two ongoing problems: (a) the misdirection of passengers arriving on scheduled aircraft whereby the passengers are sent to the wrong part of an airport on arrival, and (b) the abuse by passengers and non-operational crew of crew channels on arrival. In both circumstances these passengers or non-operational crew are entering the United Kingdom without examination. The civil penalty scheme allows for a more proportionate response to the failure by port operators and owners/agents of aircraft to comply with the conditions imposed by the Secretary of State in the designation of an airport control zone under paragraph 26(2) or (3) of Schedule 2 to the 1971 Act than pursuing a criminal prosecution for the existing criminal offences in immigration legislation (at section 27(b)(iv) and (c) of the 1971 Act).

121. The civil penalty scheme proposed here is not to be regarded as an alternative to the criminal charge.

Justification:

122. The Home Office considers that the potential interference with Article 1 Protocol 1 can be justified as these penalties will be imposed in the pursuit of a legitimate aim in the public interest and are proportionate to that aim. This is to prevent illegal entry, to assist in targeting response on arrival and to ensure compliance with and enforcement of the immigration laws.

Clause 36 and Schedule 8: Maritime enforcement

Articles engaged:

Articles 5 and 8 and Article 1 Protocol 1

Interference:

123. Clause 36 and Schedule 8 confer maritime powers intended to combat immigration offences in the territorial waters of the United Kingdom. The powers are modelled on those in Part 3 of the Modern Slavery Act 2015. Both suites of powers permit arrest in UK territorial waters and contain no extension of safeguards in the Police and Criminal Evidence Act 1984 ("PACE") which govern the treatment of those in detention, including the imposition of statutory time limits on that detention. Such considerations are relevant to Article 5.

124. Article 8 and Article 1 Protocol 1 are engaged by the exercise of the powers to search and seize evidence and documentation, together with the arrest powers.

Justification:

125. The leading case on the application of Article 5 in relation to arrests at sea is that of *Medvedyev v France* (Application No. 3394/03). The Department has considered whether it is necessary to extend PACE safeguards in respect of the operation of the maritime powers in the Bill. It has concluded that no such extension is necessary and all that Article 5 requires, as considered by the court in *Medvedyev*, is that any power of arrest must be clear in domestic legislation and that the arrested person must be taken to the Article 5 compliant regime as soon as reasonably possible. In other words, the person must be taken to the United Kingdom as soon as possible where PACE (or a similar regime in respect of Scotland and Northern Ireland) applies. Section 6 of the Human Rights Act 1998 will ensure that officers exercising the powers are bound as a matter of law to act compatibly with Article 5 and deliver the suspect to the shore. These powers are therefore assessed to be compatible with Article 5.

126. Any interference with Article 8 and Article 1 Protocol 1 is justified as a proportionate interference for the prevention of disorder or crime, and to provide for the effective enforcement of immigration control. It is essential that officers can obtain and preserve evidence which might be relevant to the prosecution of the offences. It is also considered that the nature of the maritime environment and the additional health and safety risks of operating at sea justify a wide protective search power for any person on board a detained ship, even if they are not suspected of an offence themselves. The protective search power may only be exercised where the officer has reasonable grounds to believe that the person may have an article which could be used to cause injury, damage to property or otherwise endanger the safety of a ship. The interferences with Article 8 and Article 1 Protocol 1 can also be justified in relation to the power to require the production of, and to search for, nationality documents in light of the nature of the offences in relation to which the powers may be exercised and the fact that it is much easier to dispose of such documents at sea than on land. Immigration officers already have powers to examine nationality documents of any person arriving in the United Kingdom (on a non-suspicion basis), and the power to search for nationality documents at sea is therefore a geographic extension of an existing power to ensure the effective enforcement of immigration control. Accordingly, it is justified as a proportionate interference with Article 8 and Article 1 Protocol 1.

EU Charter of Fundamental Rights

127. The Charter rights corresponding to the ECHR provisions discussed throughout this Memorandum are engaged by the provisions of the Bill which are within the scope of EU law. Similarly, the limitations to those rights permitted by the Charter correspond to those permitted to the equivalent rights under the ECHR. In particular, Article 7 of the Charter corresponds to Article 8 ECHR. The interferences to the rights guaranteed by Article 8(1) ECHR permitted by Article 8(2) correspond, in broad terms, to those permitted by Article 52(1) of the Charter. EU law, as

reflected by Article 47 of the Charter, confers a greater level of procedural protection than is provided by Article 6 of the Convention. Article 47 imposes a requirement to disclose the "essence of the grounds" in all situations within the scope of EU law. By contrast, Article 6 of the Convention is not engaged in an immigration context, and when it is engaged it does not always require the essence of the grounds to be disclosed.

Home Office
17 September 2015