

## Supplementary ECHR memorandum

### IMMIGRATION BILL

### EUROPEAN CONVENTION ON HUMAN RIGHTS

### SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

#### **Introduction**

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Immigration Bill in relation to amendments made at Commons Committee and Commons Report Stage. The Parliamentary Under-Secretary of State, Lord Bates, has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights, on introduction of the Bill in the House of Lords.

#### **Analysis**

#### **Part 1. Labour Market and Illegal Working**

#### **Clause 11 and Schedule 2: private hire vehicles etc.**

#### **Articles engaged:**

Articles 6, 8 and 14

#### **Interference**

2. Clause 11 and Schedule 2 amend the Metropolitan Public Carriage Act 1869, the Local Government (Miscellaneous Provisions) Act 1976 and the Private Hire Vehicles (London) Act 1998 to make immigration checks mandatory and embed immigration safeguards into the existing driver and operator licensing regime for taxis and private hire vehicles.

3. Specifically, the new provisions provide that such licences must not be issued to persons who do not have leave to enter or remain in the United Kingdom and permission to work. Where leave is time-limited to less than the statutory length for a driver or operator licence, the licence will be issued for a duration which does not exceed the applicant's period of leave. Licensing authorities will be under a duty to have regard to guidance issued by the Secretary of State in making a decision about an applicant's immigration status. The new provisions add immigration offences and penalties (notices 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)) to the list of grounds on which these licences can be revoked. Where a licence holder's leave comes to an end (for example,

through curtailment) their licence automatically lapses and it is compulsory to return lapsed licences. Failure to do so will be an offence.

4. It is likely that, since grant and revocation of these licences relate to the applicant's right to make a living and pursue commercial activity, this falls within the scope of "civil rights and obligations" in Article 6(1).

5. 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.

6. Case law states that such a licence is not an item of property to which Article 1 Protocol 1 of the ECHR applies: see *Cherwell DC v Anwar* [2011] EWHC 2943 (Admin).

### Justification

7. To the extent that Article 6 is engaged, the existing framework under the Acts into which these measures are to be inserted will provide adequate protection for the rights of licence holders and applicants, through a statutory right of appeal.

8. Where it is proposed to make provision for licences to lapse it is intended that this will apply only in respect of licences granted after commencement.

9. With regard to Article 8, these are proportionate measures to tackle the significant problem of illegal working. The measures are necessary in addition to other measures, both existing and in this Bill, because the majority of drivers of taxis and private hire vehicles are self-employed and so are not subject to existing right to work checks undertaken by employers, leaving scope for this sector to be exploited. 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, and with an entitlement to work in, the United Kingdom should be able to apply for and hold 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.

10. The Department does not consider that Article 1 Protocol 1 is engaged by these provisions. If, however, Article 1 Protocol 1 were engaged, it is noted that this is a qualified right and similar justifications as those for interference with Article 8 would apply.

11. 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 United Kingdom from obtaining licences, primarily to protect the economic 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.

## **Part 2. Access to Services**

12. Various amendments were made at Commons Committee stage to clauses 13 to 16 which relate to residential tenancies. The Department has taken the view that, rather than set out an ECHR analysis which relates specifically to those amendments, it would be most helpful to offer a consolidated analysis of those clauses as amended. The text which follows, therefore, should be regarded as being substituted for the ECHR analysis in respect of the residential tenancies provisions which was set out in the Department's Memorandum of 17 September 2015.

### **Clause 14: Eviction**

#### Articles engaged

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

#### Interference

13. Clause 14 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 or notices notifying them that all of the occupants of a property are persons 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 or notices, the landlord can then issue a further notice to the tenant or tenants, stipulating the notice period to leave the property, which must be at least 28 days. 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.

14. Article 3 could potentially be engaged in extreme cases where destitution results from homelessness following eviction.

15. Article 6 may be engaged, insofar as it concerns the ability of those affected by the eviction process to challenge the decision of the Secretary of State or the actions of the landlord.

16. This proposal also raises issues under Article 8, Article 14 and Article 1 of Protocol 1 of the ECHR in relation to the rights of the occupants of the property. While there is no right under Article 8 ECHR to be provided with housing (*Chapman v UK (2001) 33 EHRR 18*), the scheme here will mean the eviction of people from their only or main home and it therefore has the potential to impact on an individual's right to respect for his home, private and family life. This also engages Article 1 of Protocol 1 and the individual's right to the peaceful enjoyment of his possessions.

17. Article 1 Protocol 1 of the ECHR may also be engaged in relation to the landlord's right to the peaceful enjoyment of his possessions. The expectation, supported by the insertion by clause 13(2) of a new offence in section 33A(1) to (6)

of the Immigration Act 2014 of letting a property to someone disqualified from renting, is that a landlord will take steps to remove someone occupying their property who is disqualified from renting as a result of their immigration status.

### Justification

18. In respect of Article 3, treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. This threshold may be crossed if an individual with no means and no alternative sources of support, unable to support himself, is by the deliberate action of the state, denied shelter, food or the most basic necessities of life (per Lord Bingham in *R (Limbuella) v SSHD [2005] UKHL 66*). This route to eviction will not have such an effect. Those persons who are evicted under this route 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 with the support of the Home Office to leave the United Kingdom in order to access accommodation. A disqualified person will be able to access short term accommodation, such as a booking of limited duration in a hotel or tourist 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 so emergency hostel accommodation will be available. In addition, the vulnerable and those in need of additional support will not be prevented from accessing any services to which they are entitled from other public services, including of a residential nature. 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. The Department is therefore satisfied that the provisions fully respect Article 3.

19. Insofar as Article 6 may be engaged by this new route to eviction, the fact that the exercise of the power by the Secretary of State is susceptible to judicial review means that a person affected by this route to eviction does have an avenue available to him for challenging the exercise of the power in his case. 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).

20. This route to eviction raises issues under Article 8 as it prevents individuals from accessing the private rented sector to provide their only or main home and obliges them to leave their current home. This prevents the individual living his own personal life as he chooses and disrupts his current living arrangements and in that respect engages his right to a private and family life. However, this measure can be justified on the basis that it is both necessary and proportionate in pursuit of the legitimate aim of immigration control and the economic wellbeing 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. It acts to support the effective operation of immigration controls by restricting the ability of persons disqualified from renting by virtue of their immigration status to obtain settled

accommodation in the private residential sector and thus encourages them to leave the United Kingdom. Such individuals will have had the option to regularise their stay in the United Kingdom and now have the choice to leave the United Kingdom to establish a home in their home state. Where there is a legitimate and/or practical barrier which prevents a person from leaving the United Kingdom, the Secretary of State has the discretion to certify that they are not disqualified from renting despite their immigration status. This helps to ensure that this provision is proportionate to the aim pursued and where the application of the restriction would result in a disproportionate impact, the effects can be ameliorated. Any interference with the occupiers' rights under Article 1 Protocol 1 can be justified as in the public interest and proportionate for similar reasons.

21. Similarly, in relation to the landlord's rights under Article 1 Protocol 1, any interference with the landlord's peaceful enjoyment of property is proportionate. The landlord has a range of different routes to eviction at his or her disposal and can take steps to let the property again once the occupants have left the property. The Department is satisfied that these measures to restrict persons disqualified from renting private residential accommodation, and the expectation on landlords that they will take steps to remove persons disqualified from renting from their property, are in the public interest to ensure compliance with immigration legislation and therefore compatible with Article 1 Protocol 1.

22. In relation to Article 14, to the extent that it is engaged, the Department considers that the margin of appreciation likely to be afforded to the United Kingdom is relatively wide given that any differential treatment is based on immigration status, which involves an element of choice, and the socio-economic nature of the subject matter (see *Bah v UK (2012) 54 EHRR 21, paragraph 47*). This measure 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 15: Order for possession of dwelling-house**

### Articles engaged

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

### Interference

23. Clause 15(2)-(5) provides for a new mandatory ground of possession available to a landlord following receipt of a notice from the Secretary of State. The new mandatory ground is inserted into the existing routes to possession in Part 1 of Schedule 2 to the Housing Act 1988 as new Ground 7B 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 will not be available. Instead, the landlord can rely on this new mandatory ground for possession.

24. For cases where tenancies enjoy protection under the Rent Act 1977, clause 15(6) inserts a new discretionary ground for possession into Schedule 15 to that Act. This route to eviction is also available where an occupant (tenant or occupier) is disqualified from occupying the property because of their immigration status. As a discretionary ground, this provides additional discretion to the court as to whether or not to grant an order for possession which reflects the enhanced protections available to tenants under the Rent Act 1977.

25. Article 3 could potentially be engaged in extreme cases where destitution results from homelessness following eviction.

26. Article 6 may be engaged, insofar as it concerns the ability of those affected by the eviction process to challenge the decision of the Secretary of State or the actions of the landlord.

27. This proposal also raises issues under Article 8, Article 14 and Article 1 Protocol 1 of the ECHR in relation to the rights of the occupants of the property.

### Justification

28. In respect of any potential interference with Article 3, the position is the same as that set out above in respect of the “no courts route” to eviction inserted into the Immigration Act 2014 as new clause 33A. The Department is satisfied that these provisions fully respect Article 3.

29. Insofar as Article 6 may be engaged in the granting of an order of possession, the landlord may only obtain possession of the property by obtaining a court order for possession and executing that order. Therefore, the usual procedural safeguards will apply through the court process. The Department is therefore satisfied that these provisions fully respect Article 6.

30. In addition to the points made in respect of the compliance of these provisions with Article 8 and Article 1 Protocol 1 in relation to the “no courts route” to eviction, these routes to eviction necessitate a court process and private law housing proceedings are accepted as being Article 8 and Article 1 Protocol 1 compliant (see *McDonald -v- McDonald* [2014] EWCA Civ 1049 24). This legislation makes clear provision in primary legislation about the circumstances in which landlords will be able to seek possession and any evictions must be carried out in accordance with that legislation. The new Housing Act 1988 mandatory ground of possession (new Ground 7A) inserted by this legislation also permits the court to order that the tenancy is transferred into the name of a tenant lawfully present in the United Kingdom. This helps to ensure that the provision is proportionate to the aim pursued.

31. These provisions may also impact on the right to family life enjoyed by both the disqualified individual and also British citizens, EEA nationals and those with an unlimited right to reside in the United Kingdom, whose living arrangements for themselves and any adult family member disqualified from occupation may be terminated by these provisions. Alternatively, the court may order that the tenancy is transferred into the name of a tenant who is lawfully resident in the United Kingdom which will mean that if they choose to remain in that property, those lawfully resident

can no longer reside with the disqualified family member. Consideration will already have been given to whether the disqualified person has the right to remain in the United Kingdom, taking into account Article 8 considerations, and the Department is therefore 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.

32. In terms of Article 14, the Department considers that a similar analysis to that in respect of the “no courts route” to eviction applies. The Department is satisfied that, to the extent to which Article 14 is engaged, any differential treatment serves the legitimate aim of immigration control and is proportionate to the aims pursued by these provisions. The restrictions here are therefore considered to be justified.

### **Part 3. Enforcement**

#### **Clause 29: supply of information to Secretary of State**

##### Articles engaged

Article 8 and Article 1 Protocol 1

##### Interference

33. Clause 29 was inserted at Commons Committee stage, and provides for an amendment to an existing data gateway in section 20 of the Immigration and Asylum Act 1999. The amendment permits any public authority to provide information and documentation to the Secretary of State voluntarily for immigration purposes. This engages Article 8 as a result of the possible transfer of personal data and also Article 1 Protocol 1 as the documents or articles being transferred could constitute personal possessions. The provisions also permit immigration officers to retain documents provided in order to facilitate the removal of migrants with no right to be in the United Kingdom. The Secretary of State may also require specified persons to provide nationality documents in order to facilitate a person’s removal from the United Kingdom.

##### Justification

34. The expansion of the existing data gateway to include any public authority is simply an enabling provision. As the provision does not override a restriction on the disclosure of information (however imposed), any data exchanged using the gateway must be compliant with the Data Protection Act 1998. Therefore, the safeguards in that Act concerning the protection of Article 8 are preserved and provide an existing ECHR compliant framework for the processing of data. The public authority taking advantage of the gateway will be required to act compatibly with the ECHR, as a result of section 6 Human Rights Act 1998.

35. The power to require certain persons to provide nationality documents may only be exercised where the Secretary of State has reasonable grounds to suspect

that that the public authority is in possession of the documents and that acquiring them would facilitate the removal of an immigration offender. The powers do not require a specified public authority to provide the documentation when it is required for the performance of that public authority's functions. Therefore, the power should not impact on the individual's Article 8 rights by disrupting other Government services to the individual. Retention of any documents supplied may only be for so long as the Secretary of State considers is necessary to facilitate removal.

## **Part 5. Support for certain categories of migrant**

### **Clause 38 and Schedule 9: Availability of local authority support**

#### ECHR Articles engaged:

Articles 3, 8 and 14

36. It may be argued that the amended provisions for local authority support to destitute migrant families without immigration status and to adult migrant care leavers engage Articles 3 and 8 (the latter arguably both in relation to family and private life). As regards migrant families, the effect of the new provisions is that in circumstances where accommodation and/or subsistence support is being provided to a family under new paragraph 10A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), or there are reasonable grounds for believing it will be so provided, the family cannot receive that form of support under section 17 of the Children Act 1989. Under paragraph 10A, support can be provided to destitute families who do not qualify for support under new section 95A of the Immigration and Asylum Act 1999 ("the 1999 Act") inserted by Schedule 8 to the Bill and (a) who have an outstanding specified non-asylum application or appeal, (b) who are Appeal Rights Exhausted and have not failed to co-operate with arrangements for departure, or (c) where the local authority is satisfied that the provision of support is necessary to safeguard and promote the welfare of a dependent child.

37. Adult migrant care leavers will not be entitled to care leaver support under the Children Act 1989 where support is being provided under new paragraph 10B or there are reasonable grounds for believing it will be so provided.

#### Interference

38. The argument in relation to migrant families would be that families who do not meet the conditions may face destitution and inhumane treatment contrary to Article 3 and Article 8. The same argument might be made in relation to adult migrant care leavers, i.e. that these changes could lead to a breach of Articles 3 and 8 if as a result the adults in question were to become destitute.

39. 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 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 of the 1999 Act could be discontinued when the ineligibility provisions of Schedule 3 to the 2002 Act 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.

40. *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.

41. 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 of the 2002 Act 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.

42. 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 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.

43. Given the case law discussed above, it is considered that any accommodation or subsistence support necessary to prevent a family's destitution will be provided under paragraph 10A (pending their being granted immigration status or their departure from the UK), to the extent required to prevent a breach of Articles 3 or 8 of the ECHR.

44. As regards adult migrant care leavers, since one of the conditions for receiving such support is that the local authority is satisfied that support needs to be provided to the person and a local authority in considering whether support needs to

be provided will be required to act in compliance with the ECHR, we do not consider the application of these provisions are capable of interfering with care leavers' Article 3 or 8 rights.

45. The changes to the local authority support provisions will apply to all migrant families or, as the case may be adult migrant care leavers, without immigration status regardless of their individual characteristics. Eligibility for continued support will be based solely on the criteria set out in paragraph 10A or, as the case may be, 10B. The Home Office is therefore satisfied that Article 14 is not engaged and that the provisions are compatible. A revised Policy Equality Statement covering these amendments will nevertheless be produced.

### Justification

46. For the reasons set out above, it is not considered that the application of these provisions may lead to a breach of the Article 8 rights of either migrant families or adult migrant care leavers. In any event, as regards any possible 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 publicly funded support for persons unlawfully present in the UK who have exhausted their appeal rights and who face no genuine obstacle to their departure from the UK.

47. 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 local authorities to make payments to put travel arrangements in place for persons who wish to leave the UK. Any migrant wishing to leave the UK who does not face a genuine obstacle to departure 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 local authority support.

48. The Government believes that the scheme of refusing support to persons unlawfully in the UK unless there is a genuine obstacle to their departure from the UK is a proportionate means of meeting the legitimate aim of protecting the economic well-being of the UK.

### UN Convention on the Rights of the Child

49. The Home Office is satisfied that the provisions for local authority support for migrant families are compatible with our obligations under the UN Convention on the Rights of the Child. Article 3 of the Convention requires that children's best interests are a primary consideration in all decisions affecting them. That will remain the case under the new arrangements. Support in the form of accommodation and subsistence will be available under new paragraph 10A under the criteria set out there, including where the local authority is satisfied that this is necessary to safeguard and promote the welfare of a dependent child. The local authority will continue to provide under section 17 of the Children Act for any other needs of a child or their family, beyond destitution, which they consider it necessary to meet in

order to safeguard and promote the child's welfare. In such a case the local authority will continue to draw on the range of services which may be provided under section 17. The local authority's duty to provide for the child's schooling and to address any special educational needs will also be maintained, including under the Children and Families Act 2014.

**Home Office**  
**26 November 2015**