Business and Planning Bill 2020

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED IN THE HOUSE OF COMMONS

Contents

1. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

2. The Secretary of State for Business, Energy and Industrial Strategy has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

   "In my view the provisions of the Business and Planning Bill are compatible with the Convention rights."

The Bill

3. This Bill includes a range of measures to help businesses adjust to new ways of working as the country recovers from disruption caused by the Covid-19 outbreak. These measures will support:
   a. the transition from immediate crisis response and lockdown towards economic recovery, and
   b. businesses to implement safer ways of working to manage the ongoing risks from Covid-19, in particular the need for social distancing.

4. Changes are limited to those necessary to help businesses as the country enters the next phase of the response to Covid-19. Thus, all the measures in the Bill are temporary or concern temporary measures, except for:
   a. clause 13 which permanently broadens an already existing power to grant certificates of temporary exemption. The intention is to use the expanded power temporarily in response to the Covid-19 outbreak.

b. clause 20 which makes changes to provide for more flexible Planning Inspectorate appeals in line with changes already in place successfully in Wales.

5. The measures in the Bill would:

a. temporarily provide for a new streamlined process for premises selling hot or cold food for takeaway or consumption on the premises including cafes, snackbars, bars, pubs and restaurants to be able to put tables and chairs and associated restaurant furniture on the highway, via an application to the local council (*Clauses 1-10: Pavement licences)*;
b. give premises (with a licence that allows the sale of alcohol for consumption (i) only on the premises or (ii) on and off the premises but in a narrower set of circumstances than those permitted by the measure) temporary permission to sell alcohol for consumption off the premises *(Clause 11: alcohol licensing)*;
c. disapply the 'unfair relationships' provisions in sections 140A to 140C of the Consumer Credit Act 1974 in relation to loans made to a particular group of borrowers under the Bounce Back Loans Scheme. This will allow the scheme to operate effectively and for loans to quickly reach small businesses. (*Clause 12: Bounce back loan scheme*);
d. expand the powers to make regulations governing the issue of certificates of temporary exemption from roadworthiness testing to enable such certificates to be issued to HGVs and Public Service Vehicles (buses and coaches) on the basis of road safety risk, rather than just by blanket exemption. This will enable the Driver and Vehicle Standards Agency to manage demand for testing in a manner that prioritises road safety (e.g. to test vehicles used for carrying dangerous goods on schedule while delaying tests of safer vehicles). **This would be a permanent change, although the intention is to use the expanded power temporarily in response to the Covid-19 outbreak**. (*Clause 13: Certificates of temporary exemption for public service vehicles and goods vehicles*);
e. temporarily reduce the validity period of certain licenses for Heavy Goods Vehicles (HGV) and Passenger Carrying Vehicles (PCV) from 5 years to 1

year. The measure would ensure that these drivers will be required to renew the validity period and thus produce a medical report after that shorter time frame, for the better management of road safety risks. (*Clauses 14 and 15: Temporary reduction in duration of certain driving licences in GB and NI*);

f. temporarily provide for a streamlined process for obtaining a temporary variation of planning restrictions on construction site working hours imposed via direct condition, or through a condition with a requirement to submit a Construction Management Plan which details working hours, to enable developers to request extended construction site working hours. *(Clause 16: Modification of conditions relating to construction working hours);*

g. extend (until 1 April 2021) the period within which relevant works must be commenced under planning permissions and listed building consents that have expired or would otherwise expire in the period 23 March 2020 – 31 December 2020 (subject to obtaining an 'additional environmental approval' in the case of planning permissions which lapsed before this provision comes into force); and extend the deadline for submission of reserved matters (sometimes called 'details') for approval. (*Clauses 17-19: Extension of certain permissions and consents*);

h. provide powers for Planning Inspectors (acting on behalf of the Secretary of State) to decide that a planning appeal will be determined by any one or more of the existing different procedural methods, namely written representations, inquiry or hearing, speeding up appeals and helping to deal with the backlog arising from coronavirus-related disruption. **This would be a permanent change.** (*Clause 20: Procedure for certain planning proceedings); and*

i. temporarily suspend a requirement imposed on the Mayor of London to make physical copies of the spatial development strategy ("SDS") available for inspection by the public, if the strategy is published online. This will help accelerate progress of the emerging SDS to unlock development and support the economy. It will make it safer for planning officers and the general public, and reduce administrative burdens.

(Clause 21: Mayor of London's spatial development strategy: electronic inspection).

Human Rights Issues

6. A number of provisions of the Bill engage, or might be considered to engage, Convention Rights.

7. The Department notes that certain of the provisions of the Bill are retrospective; specifically, clause 12 (removal of powers of court in relation to unfair relationships) which is treated as having come into force on 4 May 2020 and clause 14 (temporary reduction in duration of certain driving licences) in Great Britain. The retrospectivity of clause 12 is discussed below at paragraph 27. The Department does not however consider that this retrospectivity gives rise to additional issues under the Convention.

Article 2: Right to life

Clause 13: Certificates of temporary exemption for public service and goods vehicles

Potential engagement and analysis

8. States have a duty to provide a regulatory framework and to take preventative operational measures to protect the right to life against foreseeable risk, subject to proportionality.

9. Roadworthiness tests are undertaken to ensure that vehicles are kept in a good condition. Following the suspension of vehicle testing due to Covid-19, certificates of temporary exemption were issued for all heavy vehicles due to be tested from late March to July as the alternative - requiring vehicles that could not be tested to be taken out of use - would have severely disrupted the supply of essential goods and movement of persons, including key workers. The risk associated with this approach was lower than with other vehicle types as the overwhelmingly majority of heavy vehicles are kept by the holders of operator's

licences, who carry out regular vehicle inspections/maintenance and are accountable to traffic commissioners, and driven by professional drivers. Heavy vehicles are also targeted for inspections at the roadside by the Driver and Vehicle Standards Agency. Accordingly, a good standard of road safety has been maintained. The powers in this clause will further enhance road safety by allowing for the existing backlog of tests to be managed in a way that prioritises vehicles considered to be riskier for testing (through the issuing of certificates of temporary exemption to safer vehicles).

10. Therefore, we consider that there will be no breach of Article 2 (duty on the state to provide a regulatory framework, and to take preventative operational measures to protect life, subject to proportionality) as a result of the clause.

Clauses 14 and 15: Temporary reduction in duration of certain driving licences in GB and NI

Potential engagement and analysis

11. As above, as a result of Article 2, states have a duty to provide a regulatory framework and to take preventative operational measures to protect the right to life against foreseeable risk, subject to proportionality. The waiver of the requirement for a medical report as a condition of granting a HGV or PCV licence is a potential relaxation of road safety regulation. However, the waiver itself is within the discretion of the Secretary of State (in Great Britain) or the Department for Infrastructure (in Northern Ireland) and is not dependent on the Bill. The Bill enables the grant of a licence with a 1-year validity period instead of 5 years where the medical report requirement has been waived.

12. The driver licensing regime will continue to deliver a good standard of public safety. Although drivers who apply to renew licences under the schemes enabled by the Bill will not have to submit a medical report signed by a qualified medical practitioner, the separate requirements to complete a medical questionnaire and/or declaration will continue. Drivers will also be required to submit a medical report in support of any further renewal when the 1-year validity period granted under the Bill expires.

13. Therefore, we consider that there will be no breach of Article 2 as a result of the clause, because the UK continues to maintain a good standard of public safety that is compliant with Annex III of the 3rd Driving Licences Directive 2006/126/EC.

Article 6: Right to a fair trial

Clauses 1-10: Pavement licences

Potential interference

14. Clause 1 provides for a less onerous mechanism for cafés, restaurants and bars to obtain licences to place temporary furniture on a pavement or highway.

15. This new mechanism will be separate to the existing regimes for pavement licensing[1]. Importantly, the host of consents required under the existing Highways Act 1980 regime from non-statutory bodies, from 'walkway consent', and 'frontagers' (who all have a right to withhold consent, albeit not unreasonably, or give consent subject to reasonable conditions) will not be required. There will also be a shortened consultation: from a minimum of 28 days to 7 days, which allows those with an interest to comment on the proposal, and after 14 days after receipt of a valid application, should the council not issue the applicant with a decision there will be deemed consent. The licence will be valid for a 12 month period from the day after consent is deemed and the local authority could revoke the licence in certain circumstances, but no licence will be able to run to later than 30 September 2021. When these licences are granted the land will also benefit from automatic planning permission, for change of use of the land from pavement use to use for outdoor furniture.

16. It could be argued that the introduction of this application process infringes the rights of interested parties under Article 6 because the provisions of the new Bill do not include protections for frontagers and others afforded by the current scheme (particularly the right to withhold consent – albeit that consent cannot be

[1] See the London Local Authorities Act 1990 for most London boroughs, the City of Westminster Act 1999 for the City of Westminster and Part 7A of the Highways Act 1980 for other local authorities including those London boroughs which have chosen not to use the London Local Authorities Act 1990 provisions.

withheld unreasonably – and the arbitration procedure to resolve disputes over consent); together with the reduced consultation period, the short decision-making timeframe and the grant of a deemed consent in default of a decision on the application. Further, the licence can be revoked in certain circumstances by the council, for example, where there has been a breach of a condition attached to the licence, or there are issues such as a risk to public and safety.

17. However, there is no breach of Article 6 rights. In relation to the application process, people have the right to make representations and there is a need for the council to take those representations into account in making their determination. Judicial review in respect of any decision to grant or revoke a licence will also be available and will also be available should the council fail to take into account representations where a licence is deemed to be granted. Further, the council will itself be under an obligation to act in accordance with Article 6 rights and more broadly with section 6 Human Rights Act 1998 when representations are made and when making a determination to grant or revoke a licence.

Clause 11: Modification of premises licences to authorise off-sales for limited period

Potential engagement

18. Article 6 is potentially engaged in the extension of existing on sales licences to allow for off sales. The automatic extension of these licences will mean that procedures set out in the Licensing Act 2003 to enable responsible authorities and the public to raise concerns and for their consideration by the licensing authority will not be followed. The permission for off-sales will be valid until the premises licence expires or until 30 September 2021 whichever is the earlier. Any licence holder whose licence expires before September 2021 would need to apply for a licence for both on- and off-sales using the normal procedures under the Licensing Act 2003.

19. The Department considers that there are sufficient safeguards in place. The new off-sales permission will only be granted to existing licence holders who will have satisfied licensing authorities that they are responsible and will therefore likely

operate their new licences in a responsible manner. Hours of operation of the off sales of alcohol will be limited to the current hours of operation of the on sales permission in the licence, to reduce problems of noise nuisance and ensure that any existing licence restrictions as to hours of operation are respected. There is also a new expedited review process available so that action can be taken speedily if any breaches occur. A review can be triggered by any responsible authority, as defined in the Licensing Act 2003 (bodies including the police and local authorities) and can be brought in relation to breach of any of the four licensing objectives (the prevention of crime and disorder, public safety, the prevention of public nuisance, and the protection of children from harm). This allows for a review by a larger number of persons on a larger number of grounds which should ensure that any irresponsible behaviour can be dealt with swiftly.

Clause 12: Removal of powers of court in relation to unfair relationships

20. This clause disapplies sections 140A to 140C of the Consumer Credit Act 1974 ("CCA") in relation to loans made by lenders to individuals, unincorporated bodies of persons and partnerships of fewer than four partners under the Bounce Back Loan Scheme ("BBLS") from 4 May 2020.

<u>Potential interference</u>

21. It may be argued that Article 6 is engaged by this clause because it will remove the borrower's ability to seek redress under sections 140A to 140C of the CCA in respect of an unfair relationship between the lender and the borrower arising as a result of the loan entered into under the BBLS.

22. Section 140A of the CCA provides a power for the court to make an order in connection with a credit agreement if it determines that the relationship between the lender and the borrower arising out of the agreement is unfair to the borrower for one or more of the of the following reasons:

    a. any of the terms of the agreement or a related agreement;

    b. the way in which the lender has exercised or enforced any of his rights under the agreement or any related agreement; or

c. any other thing done (or not done) by, or on behalf of, the lender (either before or after the entering into of the agreement or any related agreement).

23. Section 140B then sets out the broad powers that the court may exercise when making an order under section 140A. This includes requiring the lender to do or not do anything specified in the order in connection with the agreement, reduce or discharge the sum owed under the agreement, or otherwise alter the terms of the agreement. Section 140C sets out interpretative provisions in relation to sections 140A and 140B.

24. These sections provide very broad powers, and broad discretion in exercising those powers, to the court, which represent significant consumer protections. We have therefore considered whether the disapplication of these provisions may contravene a person's Article 6 rights. A borrower under the BBLS will be required to make a declaration that they are aware that the full range of consumer protections provided under the CCA will not apply to the credit agreement they enter into with a lender. Entry into the agreement is voluntary and the borrower is free to enter into a credit agreement that is not an agreement under the BBLS and which would attract the additional protections afforded by sections 140A to 140C. Therefore, the disapplication of sections 140A to 140C, in respect of a BBLS credit agreement, will not represent a removal of pre-existing rights of recourse to the courts in respect of a credit agreement entered into after the primary legislation comes into force – rather, the borrower will never have had recourse to the courts under those sections because they do not apply.

<u>Justification</u>

25. To the extent that a borrower could successfully argue that there is an interference with their Article 6 rights by this provision, we consider that any such interference is a proportionate means of achieving the legitimate aim of removing barriers to lending and getting funds to small businesses as quickly as possible and as such, is justified. The intended effect of this is to mitigate, where possible, the economic impact of Covid-19 and allow businesses in receipt of such funds to continue as going concerns. There are substantial benefits to helping small businesses continue to operate, including to the employees of those businesses

who may get to keep their jobs and not have to find new employment in what may well be a depressed job market.

26. We consider that any interference with borrowers' Article 6 rights created by the clause is proportionate because:

    a. without access to the funds being made available under the BBLS, many small businesses will be unable to continue as going concerns. This would result in the insolvency of small businesses and associated losses for business owners, employees and lenders. This will also impact not only upon the employees' ability to provide for themselves and their families, but also tax revenues, which would decrease, and taxpayers' expenditure on the welfare system, which would increase as those without employment begin applying for and receiving benefits. This would also mean that those business were not available to provide goods and services and contribute to the economy when the Covid-19 restrictions are lifted;

    b. The terms of loans issued by lenders under the BBLS, are more generous than normal commercial business loans issued by lenders. In particular, under the BBLS the government will cover the cost of interest for the first 12 months of the loan and the interest rate is fixed at 2.5 percent per annum which is very competitive. In addition, the lender is not required to make any repayments for the first 12 months of the loan. And the lender is not permitted to charge any fees. Furthermore, the borrower may make early repayments without incurring any charges or fees. It is important to note that as part of the application process, borrowers will be required to sign a form to indicate that they understand that a BBLS loan is not subject to the usual consumer protections that apply to business lending and that they will not have the benefit of the protection and remedies that would otherwise be available to them under the CCA. In addition, borrowers are also able, should they wish, to apply for a normal bank loan or a loan under the existing Coronavirus Business Interruption Loan

Scheme, both of which would attract CCA protections where the loan was for £25,000 or less.

c. Lenders cannot ask for personal guarantees and no recovery action can be taken against a borrower's main home or primary personal vehicle. Were security being provided – and thereby borrowers ceding control of their property to the lender in question – then it could be argued that removing such right to redress disproportionately affected the borrower's rights. Although lenders are still expected to try to recover any unpaid amounts from borrowers, as the Government is guaranteeing one hundred percent of the loans, the borrowers retain more control over their property than they ordinarily would, thus moving some way to redressing the balance between the parties.

d. These loans are intended, in part, as a stopgap until payments due under the Coronavirus Self-employed Income Support Scheme ("CSISS") are issued to eligible borrowers. The generous terms of the loan set out in paragraph 'b', including, in particular, the right to make early repayments without incurring charges means that any loans entered into in anticipation of the CSISS payments will be able to be repaid without any financial cost being incurred by those borrowers.

27. In relation to the retrospective element of the clause, we note that case law suggests the issue of retrospectivity when considering potential interference is not a matter of strict liability. The extent of retrospectivity is important. A case where the level of severity of the retrospectivity is low[2] is more likely to be considered legitimate and proportionate than a case[3] where the extent of the retrospectivity is larger. In the case of BBLS loans, relevant borrowers will have had notice in advance of taking on the loan that these rights would be not be available to them. Borrowers expectations about this are set from the start of the loan process and those expectation are not changed or altered by the provisions

[2] *Walapu v HMRC* [2016] EWHC 658 (Admin)
[3] *R. (on the application of Cartref Care Home Ltd) v Revenue and Customs Commissioners* [2019] EWHC 3382 (Admin)

in this clause. Therefore, our view is that the level of severity of retrospectivity is low and so is legitimate and proportionate.

28. It is worth noting that whilst the unfair relationship provisions in the CCA are a useful means for the courts to scrutinise unfair aspects of a relationship between a lender and borrower, they are not the only means by which borrowers will be able to challenge, by complaint or legal claim, any poor behaviour by lenders. In particular, borrowers' common law rights will remain unaffected by the legislation, and borrowers will also continue to be able to take their complaint to the Financial Ombudsman Service (FOS).

29. Although the loans will not amount to regulated agreements for the purpose of the Financial Services and Markets Act 2000, any debt collection in relation to BBLS loans of £25,000 or less, up until the point that the government provides payment under the guarantee, will amount to a regulated activity for the purpose of section 22 of that Act. In addition, the Financial Conduct Authority's (FCA) regulatory oversight for debt collection will continue to apply to loans under the BBLS. This will ensure that lenders comply with the FCA's detailed rules regarding debt collection and provide regulatory protection if there is poor lender practice where a borrower defaults on a loan. Borrowers will also be able to take their complaints to the FOS in respect of this regulated debt collection activity. In addition, it is a condition of the BBLS that any debt collection carried out by lenders after payment under the guarantee (between the lender and the British Business Bank) will be done in accordance with principles set out in the scheme's guarantee agreement and the Lending Standards Boards' standards, as adapted for the BBLS.

30. It is in any event unlikely that borrowers (or those representing them) would bring a legal claim using sections 140A to 140C of the CCA during the short period after the scheme goes live before the primary legislation is passed. In particular, this is because borrowers are not required to make any repayments during the first 12 months of the loan and are therefore unlikely to encounter any perceived unfairness under the loan agreement during that period.

31. For all the reasons above, we do not consider that the disapplication of sections 140A to 140C of the CCA represents a contravention of any person's Article 6 rights.

Clauses 16-21: Planning

Clause 16: Modification of conditions relating to construction working hours

Clauses 17-19: Extension of certain permissions and consents

Clause 20: Procedure for certain planning proceedings

Clause 21: Mayor of London's spatial development strategy: electronic inspection

Potential interference

32. It has been held that planning decisions generally involve the determination of civil rights to which Article 6 applies (*Bryan v UK* (1995) 21 EHRR 342) and each of these measures concern planning decisions or the process by which such decisions are made and has features, set out below, which it might be argued are unfair to either an applicant for planning permission or an interested party in relation to an application for planning permission. They might argue that these are defects in the planning decision process which cannot later be remedied by review in the High Court on a point of law.

33. ***Clause 16: Modification of conditions relating to construction working hours:*** It could be argued that the introduction of this application process infringes the rights of interested parties under Article 6 because there is a reduction in procedural fairness as there is no requirement for the LPA to consult such parties in relation to the application in contrast to the position in relation to certain other existing types of planning application[4] where consultation with specific statutory consultees is required.

[4] For example article 18 of the Town and Country Planning (Development Management Order) (England) 2015 provides that authorities must consult certain persons in relation to a planning application, and article 20(2) provides that before varying or removing a condition on an application

34. ***Clauses 17 to 19: Extension of certain permissions and consents***: The extension of certain relevant permissions will take effect automatically, pursuant to these provisions, and this does not involve any determination. In these cases, we consider that Article 6 is not engaged. However, for relevant planning permissions which were due to expire between 23 March 2020 and the date these provisions come into force, the extension of the commencement deadline is contingent on the local planning authority (or Secretary of State on appeal) granting, or being deemed to grant, an 'additional environmental approval'.

35. The LPA should grant additional environmental approval if it is satisfied that (a) if the development is EIA development[5], its reasoned conclusion on the environmental effects remains up-to-date and (b) if the development would require a Habitats Regulations Assessment (HRA)[6], an HRA was previously carried out which concluded no adverse effect on a protected Habitats site, and which remains up-to-date. If it is not satisfied on either of those points (or would require substantial further information/assessment in order to reach a view), additional environmental approval should be refused.[7]

36. It might be said that the introduction of this additional approval process infringes the rights of interested parties under Article 6 because there is an unfair determination of rights as there is no requirement for such parties to be consulted in respect of such an application.

37. ***Clause 20: Procedure for certain planning proceedings:*** It could potentially be argued by appellants that, notwithstanding the fact that a Planning Inspector is

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under section 73 of the TCPA (determination of applications to develop land without compliance with conditions previously attached) authorities must consult with such statutory consultees as they consider appropriate.

[5] I.e., if planning permission were being granted for the development now, the development would contain any EIA development as defined in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and would therefore require an Environmental Impact Assessment ("EIA") to be carried out.

[6] I.e., if planning permission for the development were being granted now, regulation 63(1) of the Conservation of Habitats and Species Regulations 2017 would require an assessment to be carried out first of the implications of the development to which the permission relates for a European site or a European offshore marine site.

[7] In this circumstance, the developer would need to apply for a fresh planning permission in order to carry out the development.

required to notify the parties of any determination as to the procedure by which planning appeals are to be considered, the introduction of flexibility for Planning Inspectors to determine both the type and process of an appeal ("hybrid appeals process"), including during the passage of the appeal, removes a degree of procedural certainty as to how an appeal will be dealt with from the outset of the process, particularly as it is anticipated that the Inspector has full discretion over the use of all procedures and will be able to overrule parties' preferences as to the procedural modes for accessing evidence on multiple occasions. This could be argued to introduce a degree of unfairness to the appeal process. It could also be argued that the increased flexibility concentrates procedural power unfairly in the Inspector by giving the Inspector a dynamic and flexible power throughout the appeal/hearing to make practical decisions as to the best method of approaching the evidence.

38. ***Clause 21: Mayor of London's spatial development strategy: electronic inspection:*** It could potentially be argued by interested parties that the removal of the requirement to make a copy of the current version of the strategy available for inspection at premises and the introduction of electronic inspection to a planning process leading to a planning decision that affects them (decisions in respect of compulsory purchase orders, development consent orders, local development documents and spatial development strategies would fall into this category) is unfair and/or not a 'public hearing' in circumstances where an interested party had no or limited access to the internet, and therefore were unable to effectively participate in the decision-making process. It could be contended that this was a defect in the planning decision-making process.

Analysis

39. We consider that there is no breach of Article 6 rights in relation to these measures for the following reasons.

40. Existing statutory procedures have been held to be compatible with Article 6 ECHR in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295*.

41. *Clause 20: Procedure for certain planning proceedings* and *Clause 21: Mayor of London's spatial development strategy: electronic inspection* do not alter the checks and safeguards of existing statutory procedures but deliver them through a combination of existing means in the case of the hybrid appeals process and by the availability of the relevant documents for inspection online in the case of virtual inspections. Existing procedures, including the ability of parties to be made aware of appeals and/or the publication or amendment of a SDS planning document, to make timely representations as to the appropriate process to be adopted and to make representations in relation to planning decisions, will remain available. Further, in relation to the use of hybrid appeals and the virtual inspection of documents, the Planning Inspectorate and MHCLG will publish guidance[8] to seek to ensure that those without access to the internet are still able to participate by making their views known as part of the planning process.

42. *Clause 16: modification of conditions relating to construction working hours* may appear to alter some of the consultation checks and safeguards in the planning system, however, taken as a whole, our view is that the overall process remains fair and there is no actual limitation of rights under Article 6 by these provisions. This is because we consider an application to extend construction working hours for a development that has already obtained planning permission (where necessary) can be distinguished from other existing and more substantive types of application (requiring consultation) which relate to the grant of planning permission itself, or the substantive variation or removal of conditions to which the original grant of permission is subject.

43. Instead, an application to extend construction working hours is similar to an application for a non-material amendment to an existing planning permission under s.96A of the TCPA 1990 or an application for consent, agreement or approval pursuant to an existing condition attached to an existing planning permission made under article 27 of The Town and Country Planning (Development Management Order) (England) 2015 as it relates to a tangential or non-substantive matter (the conduct or management of the development site for the time-limited construction) where there is no provision for compulsory

[8] For further details see article 14 analysis below.

consultation with statutory consultees rather than to the substantive permission (which relates to the resulting permanent development). Just like these analogous non-substantive applications, the construction working hours measures relate to sites and development proposals in relation to which planning permission has already been granted pursuant to a process in which representations and objections from interested parties have already been made and fully considered.

44. Furthermore, the working hours provisions cover a temporary relaxation of restrictions on working hours and, in the current circumstances, it is not considered necessary nor practicable for the LPA to mandatorily consult widely for every construction site that applies to vary its operating hours to identify any new particular issues or matters that have arisen since the granting of planning permission given that it is likely that internal consultation with other departments of the council, such as environmental health officers will be undertaken in some cases, as local authorities also have statutory duties in respect of control of noise from construction sites under the Control of Pollution Act 1974, and in respect of statutory nuisance the Environmental Protection Act 1990 and that, as is the case in other similar non-substantive applications, LPAs may also exercise their discretion to consult more widely, if they believe it is appropriate on the facts of any particular application. Furthermore, the LPA will be required to consider the impacts on neighbouring properties in accordance with the statutory guidance, and its understanding of those impacts will need to be informed by the representations made in relation to the original grant of planning permission and any internal (and additional discretionary external) consultations conducted.

45. Likewise, in respect of applications for *additional environmental approval* in connection with *extensions of planning permissions / consents* it is considered that mandatory consultation with interested parties on every application is not necessary nor proportionate and that the lack thereof does not render the overall process unfair from the standpoint of Article 6:

    a. We consider that such an application for approval is comparable to an application for the approval of details under a planning condition, in accordance with articles 27–30 of the Town and Country Planning

(Development Management Procedure) Order 2015 ("DMPO 2015"). DMPO 2015 does not require an LPA to undertake any particular consultation, and provides for a deemed approval after 8 weeks, in the case of an application for the approval of details under a planning condition.

b. As noted above, an 'additional environmental approval' is, in essence, a confirmation that any previous statutory environmental assessments carried out in respect of the planning permission remain up-to-date. It should be noted that those assessments would have been scrutinised by the decision-maker in relation to the initial grant of planning permission (and potentially re-scrutinised on the submission of subsequent applications for the approval of details) in a way which would have involved public consultation, and which would have been subject to rights of appeal and judicial review.

c. The analogy with approval of details under a planning condition is particularly apt, as under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the submission of details for approval under a planning condition is a 'subsequent application' automatically triggering a consideration of whether the previous environmental impact assessment remains up-to-date. No mandatory public consultation is provided for in those circumstances, unless additional environmental information is submitted with the application. The new 'additional environmental approval' process does not anticipate any substantive additional environmental information being submitted as, if on the facts of any particular application such information is required to determine that application, that application is to be refused and applicants will need to apply for a fresh planning permission (with accompanying environmental assessments and information).

d. Finally, LPAs will have the power and opportunity on a case-by-case basis, where they consider it appropriate to do so, to consult with interested parties on any particular approval application received.

46. Finally, on the basis of a fair and impartial prior planning process as to matters of fact (as described above), the availability of judicial review has been held (both

domestically and at the ECtHR) to provide Article 6 compliance in planning decisions (*ISKCON v United Kingdom* Application No 20490/92, 8 March 1994, and applied in *Bryan v United Kingdom* (1995) 21 EHRR 342 and *Chapman v United Kingdom* Application No 27238/95, 18 January 2001 and *Alconbury*.

Article 8: Right to respect for private and family life, home and correspondence

Clauses 1-10: Pavement licences

Potential interference

47. An application for a pavement licence has the potential to engage Article 8 rights (right to private and family life) for occupants of nearby properties who could be affected by noise and other impacts caused by the use of outdoor furniture associated with restaurants, bars and cafes.

Justification

48. We consider that the scheme, considered as a whole, provides sufficient safeguards to prevent any interference with or infringement of Article 8. In *R (RLT Built Environment Ltd) v Cornwall Council* 2016 EWHC 2817 (Admin), Hickinbottom J (as he then was) stated [at 81]: "[I]n considering whether a statutory scheme (including policy) is compliant with article 8, it is necessary to look at the scheme as a whole, including the checks and balances that are designed to protect – or have the effect of protecting – an individual from any potential breach of article 8. A regime is compliant with article 8 if, as a whole, it is capable of protecting relevant article 8 interests (see Manchester City Council v Pinnock (No 1) [2010] UKSC 45, especially at [45(c)], and [71]-[74])."

49. The protections currently afforded to interested persons (in the broadest sense) will be reduced by the scheme. However, the proposed scheme will allow frontagers and others who consider that their rights would be infringed through the grant of a licence to raise objections to the council. The council will as part of the application process consider the impacts on those in neighbouring properties

and other users of the highway, in accordance with local and statutory requirements. Should the proposed arrangements lead to impacts which the council considers to be disproportionate, it will either refuse the application or grant it subject to conditions. This is a measure to be applied locally with local discretion. The question will be in any particular case (a) what the impacts on those in neighbouring properties and other users of the highway might be and (b) balancing any interference with private rights against the economic interest of the country. Any consent, including a "deemed consent" in default of a determination by the council will be amenable to challenge by way of judicial review.

50. To the extent that the proposals might lead to any interference with qualified rights, we consider that interference to be justified. Under the Government's latest social distancing guidelines, cafés, restaurants and bars will be allowed to open for indoor seating from early July (this is the current estimate which may be subject to change), providing the businesses adhere to social distancing guidelines (including 2m distancing[9]). In practice, this means significantly less indoor seating capacity which will have a considerable impact on financial sustainability of these businesses.

51. Accordingly, the Government wants to enable such businesses to place temporary outdoor seating on the pavement and highway outside their premises, to address reductions in their seating capacity and enhance their financial capacity, where it is safe and appropriate to do so. The main current scheme set out in Part 7A of the 1980 Act already provides a system of pavement licensing but imposes a complex regulatory framework. Such licences can therefore be costly and time-consuming to acquire. Some local planning authorities also require planning permission[10]. The regimes set out in the London Local Authorities Act 1990 and the City of Westminster Act 1999 will also be disapplied so that there is a uniform fast, temporary process in place for the whole of England.

[9] https://www.hse.gov.uk/coronavirus/social-distancing/index.htm

[10] On the basis that the use of the highway for tables and chairs is a change of use for which planning permission is required.

52. We consider therefore that any potential interference caused by the granting of licenses under these measures is likely to be proportionate, particularly given that any licence granted would be valid until 30 September 2021.

53. Finally, there are strong public interest arguments in favour of the measure. It will:

    a. support a faster economic recovery as social distancing measures are relaxed[11];

    b. enable food and drink establishments such as cafes, bars and restaurants to continue to trade whilst implementing social distancing (whether 2 metres or a reduction to 1 metre, should that be introduced) in a quicker and less burdensome way than using existing provisions in the HA 1980;

    c. minimise the risk of an unmanageable upsurge in applications received by councils through making the process as burden free as possible.

Clause 11: Modification of premises licences to authorise off-sales for limited period

Potential engagement

54. The automatic extension of on sales alcohol licences potentially engages Article 8 rights (right to private and family life) for occupants of nearby properties who could be affected by noise and potentially disorder caused by more customers drinking outside of licensed premises.

55. However, there will be an expedited review process introduced in order to allow any responsible authority to seek a review in relation to individual premises which do not operate responsibly and which allow for excessive noise or other disruption in the vicinity of their licensed premises. This will allow for responsible licence holders to continue to trade while respecting social distancing measures

[11] The hospitality sector plays a significant role in the UK economy. Pubs and restaurants generate £74bn in revenue and employ 2m people. In 2019, they generated £395m in GVA. Hospitality was the earliest hit sector by C-19 and is likely to be the last to recover, particularly if social distancing measures remain in place because they will inevitably reduce the number of people allowed in venues and in turn the businesses profitability.

but also allow those who abuse their new licensing powers to be quickly prevented from doing so.

56. There will also be new guidance issued by the Home Office detailing the expectation of how licence holders should behave. Any breaches of licence conditions or of the four licensing objectives could be taken into account in any future review or consideration of a future licence application. The four licensing conditions are the prevention of crime and disorder, the prevention of public nuisance, public safety and the protection of children. The Department therefore considers that the scheme provides sufficient safeguards to prevent interference with or infringement of Article 8 rights.

Justification

57. To the extent that the proposals might lead to any interference with Article 8 rights, the Department considers that interference to be justified. Under the Government's latest social distancing guidelines licensed premises will be allowed to open from early July, providing the businesses adhere to social distancing guidelines. So licensed premises with only on sales licences will be able to open but with a substantially reduced capacity (estimated at 30-40%) which will not allow them to operate profitably.

58. Accordingly, the Government wants to enable such businesses to increase their earning potential by allowing holders of only on sales licences to sell alcohol off sates to customers outside of the premises. This will increase the profitability of the affected licensed premises and allow them to operate while the current social distancing measures are in place.

59. We consider therefore that any potential interference caused by the granting of permissions under these measures is likely to be proportionate, as this is a temporary measure introduced only to operate during the ongoing pandemic.

60. In summary, there are strong public interest arguments in favour of the extension of alcohol on sale licences in this way. It will boost the economy by supporting licensed premises to operate profitably, enable those licensed premises to quickly adapt their businesses in ways that will allow them to operate while

lockdown measures are in place and allow for an expedited review process to ensure that any premises that operate irresponsibly can have their new licence freedom reviewed and curtailed if necessary.

Planning: Clause 16: Modification of conditions relating to construction working hours

Potential interference

61. An application to lengthen construction site working hours has the potential to engage Article 8 for those in neighbouring properties who could be affected for example by noise and dust over a prolonged period.

Justification (in relation to qualified rights)

62. We note there will be a filter placed on applications to vary construction working hours as before a variation is granted, the LPA will consider the impacts on neighbouring properties, in accordance with the statutory guidance and its obligations under section 6 of the Human Rights Act 1998. Should the proposed changes lead to impacts which the LPA[12] considers to be disproportionate, it will either refuse the application or, with the agreement of the applicant, grant it on a more limited basis. This is a measure to be applied locally with local discretion. The question will be in any particular case (a) whether there is a significant increase in effects such as noise and dust affecting mental or physical health, the length of time that such an increase will last for and whether measures such as "reduced noise procedures" are put in place and (b) balancing any interference with private rights against the economic interest of the country.

63. We consider that such potential interference is likely to be proportionate given:

    a. its temporary nature;

[12] Given that such applications are deemed approved if the LPA does not notify the applicant of a contrary decision within 14 days, we have considered whether there is any risk associated with LPA's capacity to take such decisions within that timeframe. Against the background that a typical LPA would receive approximately 300 planning applications per month and that planning applications are presently down 10-15% MHCLG is of the view that LPAs will have the necessary capacity.

b. that although the effects of such a variation may be felt by neighbouring properties over an increased number of hours from the baseline, as the principle of the measure is to ensure that construction sites may continue to make progress, given social distancing measures, the overall degree of interference (e.g. dust and noise) should be comparable to that which would take place under more intense working practices, over a shorter timeframe, in normal circumstances.

64. Finally, there are strong public interest arguments in favour of the measure:

65. Reduced construction starts and completions could be accelerated by increasing capacity for activity to take place on sites to allow longer operating hours. This is because more activity can take place on sites whilst operating with reduced productivity from social distancing measures.

66. There are also wider economic benefits that follow from supporting the housebuilding sector. Each housing start through to completion is estimated to support 2.3 jobs directly in the construction sector as well as wider jobs in the supply chain. In addition, there are significant revenues for the exchequer (an average of £4,700 in stamp duty for each home when purchased by a second stepper).

Planning: Clauses 17-19: Extension of certain permissions and consents

Potential interference

67. The automatic extension of planning permissions / listed building consents has the potential to engage the Article 8 rights of those in neighbouring properties.

68. However, we consider that the number of cases in which an issue under Article 8 is likely to arise will be small because the extension will only apply in respect of development sites that have already been granted planning permission / consent, and where a balancing exercise weighing up competing interests including human rights considerations (dealt with in more detail in relation to Article 6 above) has already been determined as in favour of development.

Justification (in relation to qualified rights)

69. Any interference is however likely to be justified for the following reasons.

70. A key measure of UK economic growth is the productivity of the construction sector. The construction sector (including product manufacturing and associated professions) had a turnover of £413bn in 2018, representing 8.6% of GDP and generating £149bn in GVA. However, following the measures introduced by Government to implement social distancing to contain the spread of Covid-19, many development sites have reduced and/or ceased operations leading to the risk of the permission lapsing if they cannot be implemented before the deadline for commencement imposed by condition.

71. Applicants could, of course, resubmit their planning applications to secure a new planning permission or consent with a new extended time limit for commencement. However, this presents numerous problems, not least the increased costs, uncertainties and time delays on applicants and LPAs associated with reapplying. This could deter some applicants from reapplying, further impacting economic recovery at both a local and national level. Such consequences are clearly undesirable, and it therefore becomes imperative that any measures brought forward ensure that extant permissions are kept 'alive' and extended, removing the need for planning permission or listed building consent to be reapplied for.

72. Given the importance of the sector, this measure is necessary to help reduce the impact that Covid-19 is having on the development industry, and is therefore proportionate.

Planning: Clause 20: Procedure for certain planning proceedings

Potential interference

73. It is possible that an interested party might argue that planning decisions made or confirmed via the new hybrid appeal process will result in a breach of their Article 8 rights, because the new hybrid process prohibited or prevented full examination and testing of these rights as a material consideration, by narrowing or reducing the 'full' public local inquiry process via a power to limit certain issues in any

inquiry to written representations only, i.e. no ‘speaking to’ or cross-examination of evidence submitted to the inquiry.

74. However, we consider that the number of cases in which a new issue under Article 8 explicitly attributable to these reforms is likely to arise because of the introduction of the hybrid appeals process, is likely to be very small.

75. That is because such a case is most likely to be dependent upon an interlocutory point arising from any perceived Article 6 issues (see above). Furthermore, it is worth noting that Article 8 is first engaged and considered at an earlier stage of the existing wider process when decisions are made about the detailed technical design of any development which may determine the level of impact, if any, a development will have. Both a LPA and any subsequent appeal may currently fully consider any such impact on a case by case basis as part of existing procedures, and the availability of a hybrid appeal process (which brings together existing appeal procedures only and does not inevitably curtail existing procedural safeguards) will not alter this.

Justification (in relation to qualified rights)

76. Even in cases where it might successfully be argued that, on an interlocutory basis with Article 6, the impact of a decision made pursuant to a hybrid appeal process which might not have been made had the process not been introduced, is sufficiently substantial to engage Article 8 and/or Article 1 Protocol 1, any limited interference on either of these bases is likely to be justified for the following reasons:

77. When undertaking the required weighing up of the competing interests at stake in relation to the new hybrid procedure, it is necessary to look at the purpose and impact of the proposed provisions (as per *Hatton and Others v. the United Kingdom 36022/97* [2003] ECHR 338 (8 July 2003)). The aim of the new hybrid appeal procedure is to give the Planning Inspectorate (PINS) some flexibility in how they apply existing modes of assessing evidence to enable timely and fair resolution of appeals for all parties. It will permit PINS to determine that different parts of a planning appeal will be dealt with by different existing procedures (rather than a single procedure), so, for example, parts of an appeal may proceed

by way of a local inquiry or hearing and others by way of written representations, which may ‘simplify’ (or simply reduce the scope and length of) the appeal inquiry and/or hearing process without sacrificing any opportunity to submit or consider representations and/or evidence in the appeal as a whole.

78. As at 15 June 2020 PINS currently had 2,758 undecided planning appeals which include new homes proposals (about 34% of current overall cases), representing 25,475 potential new homes in the ‘appeals pipeline’. This caseload has continued to grow under existing procedural powers and is also being particularly impacted by the current lockdown circumstances and is likely to continue to be impacted even as restrictions are lifted but social distancing measures remain. The increased procedural flexibility will mean that PINS will potentially be able to decide appeals, including some of the more complex appeals, more quickly (but not less thoroughly) which will arguably increase overall fairness in the planning system as a whole.

79. Many appeals cover matters that can be dealt with easily and fairly by way of written representations whilst also covering matters that are more appropriate for dealing with via a hearing or inquiry. Existing powers do not enable an Inspector to divide appeals up by issue and appropriate procedure. If PINS were able to apply the proposed hybrid process, some aspects of a hearing could be dealt with efficiently and fairly as written representations in parallel with a hearing or inquiry simplified by a reduction of issues to be determined therein, with an Inspector exercising his discretion to ensure fairness on a case-by-case, fact-sensitive basis. This would therefore potentially reduce the duration of the hearings and inquiries, and possibly the number of people who would have to physically participate in them, resulting in a streamlined but thorough and fair process. The overall effect should be that many of the appeals waiting in the pipeline could be brought forward more quickly and that an increased backlog is minimised, particularly (but not only) during the existing restrictive lockdown circumstances. Any limited interference with Article 8 rights that might be alleged as a result of a ‘streamlined’ procedure, for example by persons who might otherwise have elaborated on relevant material considerations in a more extended inquiry or hearing process (e.g. by ‘speaking to’ or cross examining

evidence) but are now limited to written representations, are justified both in the interests of a system that needs to operate smoothly and fairly to deliver timely decisions in the interests of overall fairness, and in the interests of the national and local economy, i.e. bringing forward decisions on potential housing developments.

80. Furthermore, the proposed new hybrid appeal procedure will not reduce the existing case-by-case protections and safeguards of the planning decision-making process as a whole in respect of Article 8. Human rights are relevant material considerations in planning decisions (*Stringer v MHLG* [1971] All ER 65). A balancing exercise is carried out during the planning decision-making process, including on any appeal, to ensure that a fair and proportionate balance is struck between competing interests of the individual and the community as a whole. There are opportunities in the existing decision-making process via the exercise of the Inspector's discretion (and the power to judicially review the application of that discretion) to either completely eliminate any impact on individuals (including in relation to Article 8 rights) or, in so far as is possible and proportionate, limit any such impact on individuals. A decision-maker can also require mitigation measures, such as design alteration (e.g. regarding height of a development) or planning conditions (e.g. noise restrictions), to be put in place. The ECtHR has found that, where there is an 'adequate decision-making process', action by authorities to limit the impact of nuisances by using such mitigation/condition-setting powers can ensure there is no violation of rights (*Flamenbaum and Ors v. France* [2012] ECHR 2069).

81. These existing procedures and powers are not altered or diminished by the new hybrid appeal provisions, and the safeguards that form part of these existing procedures remain a part of the planning decision-making process of which an appeal (including a 'hybrid appeal') is merely part. As regards whether or not the hybrid appeal process can be regarded as an 'adequate decision-making process' (as per *Flamenbaum* case above), the provisions do not introduce any substantive change to the planning decision-making process as a whole, but act to bring together in combination existing processes including their respective safeguards. Whilst an 'adequate decision-making process' is not necessarily

equivalent to the requirements under Article 6 ECHR, it should be noted that existing statutory procedures have been held to be compatible with Article 6 in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295). See further above on Article 6.

Planning: Clause 21: Mayor of London's spatial development strategy: electronic inspection

Potential interference

82. We accept that Article 8 is potentially engaged in relation to the virtual inspection measure, as the development of spatial development strategies, result in decisions being made that will potentially impact upon an individual's enjoyment of their property.

83. Although planning decisions are made in accordance with the development plan for an area (including an SDS in London) and those making representations do not *require* such access in order to make their views of any given scheme known it could potentially be argued that this is a hurdle that prevents them from effectively engaging with planning procedures and therefore, planning decision making[13] that may subsequently affect them and their family. This is because the starting point for an individual to participate in planning decisions, which may have a direct bearing on their home, family and property rights, is their ability to inspect the documentation on which LPA's will base their planning decisions, and if necessary, to provide comment and engage in the planning procedures related to the proposals contained in the documents.

[13] The SDS impacts on decision making by London boroughs because section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the development plan unless material considerations indicate otherwise. Section 19 of the Planning and Compulsory Purchase Act 2004 requires a LPA to have regard to a number of matters when preparing a development plan document which include, if the authority is a London borough or adjoins Greater London, the requirement to have regard to the SDS.

Justification

84. We consider that the number of cases in which an issue under Article 8 may arise because of virtual inspection is likely to be small. However, since human rights are relevant material considerations in planning decisions (*Stringer v MHLG* [1971] All ER 65), planning decision makers are required to ensure that a fair balance is struck between the competing interests of the individual and the community as a whole.

85. However, insofar as this measure or any decisions made pursuant to the virtual inspection process interfere with any individual's rights under Article 8 we consider that these are a justified and proportionate response to the exigencies of the Covid-19 crisis for the following reasons.

86. Firstly, planning legislation contains statutory provisions requiring planning decision makers and developers to make documents physically available for inspection by the public at certain stages in planning processes.

87. The Government's public health social distancing restrictions, put in place in response to the Covid-19 outbreak, have required many offices and public places, such as libraries, where planning documents would ordinarily be displayed, to close. The restrictions also prohibit gatherings and unnecessary travel by members of the public. Furthermore, those who are vulnerable to, ill with, or have been exposed to, the virus are advised to self-isolate.

88. In consequence, it may not be possible for the Mayor to comply with the requirements in section 43 of the Greater London Authority Act 1999 requiring the SDS to be available for inspection and for copies to be made available on request for a reasonable fee, and even if this requirement can be complied with, there is no guarantee that people will be able to travel to a place to view them. If this were to cause a delay to the publication of the new SDS then there will be a practical impact on Boroughs and applicants, who will delay taking forward their Local Development Documents and development schemes until there is more certainty regarding the publication of the new SDS and its contents.

89. Secondly, the aim of the virtual inspection measures is to *temporarily* remove the statutory requirements to make the SDS available for inspection and instead permit its publication online to ensure that planning applications can continue to be progressed, notwithstanding the disruption caused by the Covid-19 outbreak and social distancing restrictions. This is necessary in order to avoid damaging delay to nationally and regionally important development projects and to the interests of property owners who wish to develop their land.

Article 14

Clauses 1-10: Pavement licences

Potential interference

90. It is possible that certain interested persons affected could argue that an application for a pavement licence engages their Article 14 rights because the effects from the use of outdoor furniture will be disproportionately prejudicial to them. For example: the elderly, disabled or families with young children could experience additional difficulties in organising their activities to minimise the disruption caused by noise; and certain disabled persons might be more susceptible to negative effects from exposure to noise.

91. We consider that the scheme, considered as a whole, provides sufficient safeguards to prevent any interference with or infringement of Article 14, on the basis set out above in relation to Article 8.

Justification

92. The justification for any potential interference with Article 14 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Clause 12: Removal of powers of the court in relation to unfair relationships

Potential interference

93. If a borrower tries to argue that there is a breach of their Article 1 Protocol 1 or Article 6 rights, they may also attempt to argue that there is a breach of their Article 14 rights not to be discriminated against. The potential argument may be that the government, in deciding that it is necessary to disapply the unfair relationships provisions in the CCA, preferred the needs and concerns of UK institutional banks, as a group, over those of small businesses, as a group and thereby discriminated against those small businesses in breach of Article 14.

94. The ECHR has previously found, in *James v UK*[14], that different categories of property owners were relevant in the context of Article 14, whilst *Chassagnou and Others v. France*[15] found that a difference in treatment between large and small landowners was, in context, sufficient. We consider that what the parties in both *James* and *Chassagnou* shared was a common, vested interest. In *James* the interest was how property was treated and in *Chassagnou*, land. The small businesses in this matter are a different category (borrowers as opposed to lenders) and size ("small" businesses as opposed to institutional banks), but both parties have a shared interest in the operation of lending facilities under the BBLS. When considered in the "illustrative and non-exhaustive"[16] wording of Article 14 ("any such ground as") as cited elsewhere in caselaw[17], the combination of different categories, sizes and shared interests linking this matter with *James* and *Chassagnou* does, we consider, lend itself to the conclusion that small businesses and large, institutional banks, in the context of Article 14, could be sufficient to be considered as apposite grounds.

Justification

95. Our position is that any purported difference in treatment between the two groups (small business borrowers on the one hand and institutional banks on the other) is justified and proportionate for the following reasons:

[14] [1986] ECHR 2 at paragraph 74
[15] Nos. 25088/94, 28331/95 and 28433/95 at paragraphs 90 and 95
[16] *Clift v UK* [2010] ECHR 1106 at paragraph 55
[17] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 at paragraph 70; and *Engel and Others v. The Netherlands* [1976] 1 EHRR 647 at paragraph 72

a. the terms of the loan are more generous to borrowers when compared with normal bank loans;

b. debt collection will be a regulated activity, meaning that any action being taken by the lenders to enforce the debt will be regulated by the FCA, or carried out in accordance with agreed principles and industry standards;

c. borrowers will still have a route of redress through the FOS and the courts; and

d. the intention of the provision is to remove a barrier to lending (for both lenders and small businesses, who might not be able to get a loan otherwise) and ensure that funding is unlocked for small businesses suffering due to the Covid-19 pandemic whose need for a loan is significant.

96. For these reasons we consider that there is no discrimination under Article 14 but that, even were a court to reject these arguments and find that there was, there is a clear argument that the discrimination is objective and reasonably justifiable.

Clauses 14 and 15: Temporary reduction in duration of certain driving licences in GB and NI

Potential interference

97. The 1 year licence term is only available to drivers aged over 45. It is considered that Article 14 is not engaged because drivers under 45 are not prejudiced. The grant of a 1 year licence to drivers under 45 would be a reduction of their current entitlement. There are no grounds for drivers under 45 in GB to complain that exclusion from the class of driver entitled to a 1 year licence means that the Secretary of State is less likely to waive the requirement for a D4 to their benefit, since the Secretary of State would not in any event waive the D4 for drivers under 45 as it is a requirement of EU law for new licences.

98. The position is different in Northern Ireland because licence validity periods for drivers under 45 only last for 5 years so drivers in this age group need to apply for renewals. Consequently, the result of clause 15 is that drivers under 45 are treated differently to drivers over 45.

Justification

99. In Northern Ireland, drivers under 45 who do not have a notifiable medical condition will continue to be entitled to a 5 year licence. This differs from drivers over 45 who will be restricted to a 1 year licence as a result of the Bill, unless they can provide a medical report. All drivers, whether under or over 45, who have a notifiable medical condition or are first time applicants will not be granted a licence without medical clearance. Thus, although there is a difference in treatment it is not to the detriment of drivers under 45. If there is any interference it is justified.

Planning: Clause 16: Modification of conditions relating to construction working hours

Potential interference

100. It is possible that persons living in neighbouring properties could argue that an application for extended construction working hours engages their Article 14 rights because extended working hours will have a disproportionately prejudicial effect on them.[18] For example: the elderly, disabled or families with young children could experience additional difficulties in organising their activities to minimise the disruption caused by noise; and certain disabled persons might be more susceptible to negative effects from exposure to noise or dust.

Justification

101. The justification for any potential interference with Article 14 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Planning: Clause 21: Mayor of London's spatial development strategy: electronic inspection

[18] We also accept that this policy raises issues relevant to the public sector equality duty under section 149(1) Equality Act 2010 and these have been taken into consideration in the development of the policy.

Potential interference

102. Article 14 is potentially engaged by the removal of the requirement to make the SDS available for inspection at the GLA's offices and to provide a copy on request if the document is made available for inspection free of charge by appropriate electronic means. It could be argued that removing the legislative obligations requiring documents to be made available for public inspection, could disproportionately affect older people, those with disabilities and learning difficulties and people from certain socio-economic groups who do not have, or have limited, access to the internet and is therefore discriminatory.

Justification

103. The justification for any potential interference with Article 14 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Article 1, Protocol 1: Right to peaceful enjoyment of property

Clauses 1-10: Pavement licences

Potential interference

104. An application for a pavement licence has the potential to engage the Article 1 Protocol 1 rights of occupants of nearby properties who could be affected by noise and other impacts caused by the use of outdoor furniture associated with restaurants, bars and cafes.

105. We consider that the scheme, considered as a whole, provides sufficient safeguards to prevent any interference with or infringement of Article 1 Protocol 1, on the basis set out above in relation to Article 8.

Justification

106. The justification for any potential interference with Article 1 of Protocol 1 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Clause 11: Modification of premises licences to authorise off-sales for limited period

107. An alcohol licence is a possession and these provisions will amend the rights attached to existing licences issued before this legislation has effect. The legislation will therefore engage Article 1 Protocol 1. However, the legislation will not be diminishing or negatively affecting the licences and will not cause any detriment to licence holders who may choose to take no action at all and therefore remain unaffected by the changes to their licences. For those licence holders who do wish to take advantage of the easement there will be an added value to their licences allowing them to operate in new ways and over an extended area. We therefore do not consider there to be a breach of Article 1 Protocol 1.

Clause 12: Removal of powers of the court in relation to unfair relationships

Potential Interference

108. The clause will remove certain statutory grounds to bring a claim under the Consumer Credit Act 1974 (CCA) in relation to loans entered into by certain borrowers under the Bounce Back Loan Scheme and therefore the right of those borrowers to seek certain types of redress from lenders. Those borrowers will still be able to rely on the common law rules, such as those relating to contract, to bring a claim but the statutory protections in sections 140A to 140C of the CCA, as well as those provided in the subordinate legislation made under the CCA and the FCA rules, will not be available.

109. When entering into such loans, borrowers acquire proprietary rights to the funds provided, as well as the contractual right to use those funds for the benefit of their business. Proprietary rights and contractual rights have been found to be "possessions" for the purposes of Article 1 Protocol 1[19]. To the extent that the clause affects those existing rights (for credit agreements entered into prior to the

[19] *Beyeler v Italy* [2001] 33 EHRR 52 and *Mellacher v Austria* [1990] 12 EHRR 391 respectively.

clause being commenced), Article 1 Protocol 1 is engaged. However, to the extent that the clause may affect such rights in the future (for obligations and rights which exist after the Bill is commenced), Article 1 Protocol 1 is not normally engaged as future possessions are not generally caught by Article 1 Protocol 1[20].

110. However, it can be argued that a provision in legislation may engage Article 1 Protocol 1 even though the legislation was in force before the agreement giving rise to the affected rights was entered into. Such a law may be said to infringe Article 1 Protocol 1 if it creates an 'imbalance' between the parties which would result in one party being arbitrarily or unjustly deprived of his possessions for the benefit of the other[21]. Borrowers whose rights crystallise after the clause has come into force (i.e. were not existing possessions at the time) may argue that they are being unjustly deprived of their possessions for the benefit of lenders by the operation of the clause.

Justification

111. If it is correct that Article 1 Protocol 1 is engaged for both existing and some future contractual rights by the provision, then it falls to us to consider whether this interference can be justified in each circumstance. In order for such interference to be lawful, it must be made in pursuit of a legitimate aim and in a proportionate manner; recognising the need to balance the general interest being pursued with the need to protect the rights of the affected individuals.

112. The legitimate aim being pursued is to remove banks' (as lenders) obstacles to making funds available to small businesses as immediately as practicable. The intended effect of this is to mitigate, where possible, the economic impact of Covid-19 and allow businesses in receipt of such funds to continue as going concerns. There are substantial benefits to helping small businesses continue to operate, including to the employees of those businesses who may get to keep their jobs and not have to find new employment in what may well be a depressed job market.

[20] See *Marckx v Belgium* (1979) 2 EHRR 330.
[21] See *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, at paragraphs 42 and 43 (and *Bramelid v Sweden* (1983) 5 EHRR 249 at 256.

113. We consider that any interference with borrowers' Article 1 Protocol 1 rights created by the clause is proportionate for the same reasons set out in the justification for Article 6 in relation to this clause (see above).

114. For these reasons we consider that, if it were to be argued that there is an interference with Article 1 Protocol 1 rights, such interference is justified. The underlying policy aim is to make funds available to small businesses to ensure their continued viability which will benefit the businesses themselves, their employees and the wider economy.

Clauses 14 and 15: Temporary reduction in duration of certain driving licences in GB and NI

115. Article 1 Protocol 1 is not engaged because a vocational driving licence is not a 'possession' within the meaning of Article 1 Protocol 1. A licence that merely enables a future income stream that is incapable of being monetised is not a possession within the meaning of Article 1 Protocol 1.[22]

Planning: Clause 16: Modification of conditions relating to construction working hours

Potential interference

116. An application to lengthen construction site working hours has the potential to engage Article 1 Protocol 1 rights (the peaceful enjoyment of one's possessions) for those in neighbouring properties who could be affected for example by noise and dust over a prolonged period.

Justification

117. The justification for any potential interference with Article 1 Protocol 1 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

[22] *Countryside Alliance v Attorney General* [2005] All ER D 482 at paragraphs 169-174, [2007] QB 305 CA 115.

Planning: Clauses 17-19: Extension of certain permissions and consents

Potential interference

118. We accept that the automatic extension of planning permissions / listed building consents has the potential to engage the Article 1 Protocol 1 rights of those in neighbouring properties.

119. However, we consider that the number of cases in which an issue under Article 1 Protocol 1 is likely to arise will be small because the extension will only apply in respect of development sites that have already been granted planning permission / consent, and where a balancing exercise weighing up competing interests including human rights considerations (dealt with in more detail in relation to Article 6 above) has already been determined as in favour of development.

Justification

120. The justification for any potential interference with Article 1 of Protocol 1 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Planning: Clause 20: Procedure for certain planning proceedings

Potential interference

121. Article 1 of Protocol 1 is potentially engaged as a material consideration in the planning decision-making process (of which any hybrid appeal is part), because a planning decision pursuant to an appeal involves a determination affecting property which the proposed development relates to or impacts on and may therefore constitute a decision that controls the use of property.

122. Similarly to Article 8 rights, any process which is 'narrowed' may be argued to inhibit the required proper examination of such material considerations (including any potentially engaged Article 1 Protocol 1 rights). As with the analysis concerning Article 8, any interference with this right explicitly attributable to these

reforms is likely to be very small to non-existent, for essentially the same reasons as set out in relation to Article 8.

Justification

123. The justification for any potential interference with Article 1 Protocol 1 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

Planning: Clause 21: Mayor of London's spatial development strategy: electronic inspection

Potential interference

124. For the same reasons set out above in relation to Article 8, Article 1 Protocol 1 is potentially engaged in relation to the virtual inspection measure, as the development of spatial development strategies, result in decisions being made that will potentially impact upon an individual's proprietary rights and/or enjoyment of their property.

Justification

125. The justification for any potential interference with Article 1 Protocol 1 rights is as set out above in relation to the justification for any potential interference with Article 8 rights.

126. Furthermore, in mitigation of the risk of discrimination associated with this measure, the Bill introduces a requirement for the Mayor to have regard to any guidance issued by the Secretary of State as to (i) how the SDS should be made available by electronic means and (ii) the arrangements (if any) that may be appropriate to mitigate the effects on a person of not being able to inspect a copy of the strategy, or finding it difficult to do so, by electronic means.

127. The Government intends to release guidance regarding the proposed measure and will expressly deal with the risk of a consultation/participation deficit among certain groups in the community. It will require that proactive and targeted efforts should be made to reach out to those in the community who may be

affected by a planning proposal and who may have limited or no access to the internet, and therefore lack access to virtual inspection. In conjunction with the Mayor's duties under section 149(1) of the Equality Act 2010 this explicit requirement should reduce the likelihood of a person not being able to access a copy of the strategy, and input into the process therefore satisfactorily mitigating against any negative impact on people with disabilities and learning difficulties and people from certain socio-economic groups who do not have, or have limited, access to the internet.

Department for Business, Energy and Industrial Strategy

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