NATIONALITY AND BORDERS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS – SUPPLEMENTARY MEMORANDUM

Introduction

1. In its Human Rights Memorandum published on 6 July 2021 alongside the introduction of the Nationality and Borders Bill ("the Bill"), the Home Office ("the Department") said that it would publish a supplementary memorandum addressing the compatibility with the Convention rights of the Government amendments to replace the placeholder clauses.

2. This supplementary memorandum also addresses the compatibility with the Convention rights of the Government amendments in relation to Schedule 7 to the Terrorism Act 2000 and, in relation to deprivation of citizenship, to the British Nationality Act 1981.

Authorisation to work in the territorial sea – placeholder at clause 42 of the Bill as introduced

3. Amendments have been added to (a) leave out clause 42 from the Bill, and (b) replace it with a new clause to amend section 11 of the Immigration Act 1971 and insert a new section 11A and 11B into that Act.

4. Section 11 of the Immigration Act 1971 includes provision about when a person enters the UK for the purposes of that Act.

5. The new section 11A clarifies that where a person arrives in UK waters (which includes the territorial sea of the UK and other waters within the seaward limits of the territorial sea) for the purpose of working, and they have not already entered the UK (e.g. by arriving and disembarking on the UK landmass), they "enter" the UK when they start working in UK waters.

6. Under the provisions of the Immigration Act 1971, those who are subject to immigration control require leave to enter and remain in the UK, so the provision clarifies that those who are working in UK waters must obtain leave, unless covered by an exemption. Individuals will be able to obtain leave if they meet the requirements of any of the routes in the Immigration Rules.

7. The new section 11B contains a power for the Secretary of State to make regulations requiring a person working in UK waters, or their sponsor, to provide information about the dates of arrival, entry and departure to and from the UK. The regulations may make failure to comply with the requirement by the person working in UK waters a ground for variation or cancellation of their leave, or a ground of refusal of leave. Where the offshore worker has a

sponsor who is licensed under the sponsorship guidance, the obligation may be imposed on their sponsor and failure to comply with this requirement will be a relevant consideration as to their suitability to act as a sponsor.

8. These provisions will affect those who are coming to work in the UK territorial seas or inland waters. In particular, read together, section 11 and new section 11A make clear that a person who is working in the territorial sea requires leave whether they transit the landmass or not. This confirms that those seeking to come to work in UK waters are in the same position as those seeking to work on the landmass. The clause will therefore give rise to the same human rights issues as those arising from the existing immigration system (albeit this is likely to be to a lesser extent because of the nature and likely duration of individuals' presence).

9. In general, an application for leave to remain on a work route will not amount to a human rights claim. Were it to do so, however, the claim would be treated in the same way as any other human rights claim made to the Department in the exercise of its immigration functions, including in relation to rights of appeal.

Prisoners liable to removal from the United Kingdom – placeholder at clause 44 of the Bill as introduced

10. Government amendments have been added to: (a) leave out clause 42 from the Bill, and (b) to insert a new amendment. The amendment concerns the Early Removal Scheme ('ERS') in the Criminal Justice Act 2003, which provides for the removal from prison of determinate sentenced prisoners earlier than they would otherwise be released strictly for the purpose of deportation. The amendment will expand ERS in the following ways:

a. first, by making relevant offenders eligible for removal one year before the end of their requisite custodial period rather than the 270 days currently provided for;

b. secondly, enabling the removal under ERS of recalled offenders; and

c. thirdly, introducing a 'stop-the-clock' provision on the sentence once an offender has been removed so that if they were to return to the UK at any time they would be liable to be detained in pursuance of their sentence and returned to custody.

European Convention on Human Rights - Article 14 taken with Article 5

11. Article 5(1) provides that no one may be deprived of their liberty other than in the cases listed in paragraphs (a) to (f) and in accordance with a procedure prescribed by law. Article 14 prohibits discrimination in the enjoyment of the Convention rights, on the basis of a status within the meaning of Article 14, between those in an analogous position. However,

differential treatment under Article 14 may be justified if it is objective and reasonable.

12. In *Brooke v Secretary of State for Justice* [2009] EWHC 1396 (Admin) a British national alleged that ERS engaged Article 5 and was discriminatory within Article 14 because, when compared to a foreign national, the foreign national could be released from their sentence earlier under ERS. The High Court found that Article 14 did not apply as the different treatment was based on liability to removal and not nationality (the latter being a status under Article 14). Although there have been no further cases specifically on ERS, the fact that difference in treatment based on liability to removal (and not nationality, or immigration status) does not engage Article 14 has been endorsed by the High Court case of *R (Massey) v Secretary of State for Justice* [2013] EWHC 1950 (Admin) and the Court of Appeal in *Francis v Secretary of State for Justice* [2012] EWCA Civ 1200 (and followed by the High Court in R (Serrano) v SSJ and SSHD [2012] EWHC 3216).

13. Notwithstanding that case law on Article 14, the Department acknowledges that the first two of the ERS measures (increasing the removal window and enabling removal after recall) will increase the difference in treatment between British nationals and those foreign nationals who are liable to removal. However, the third measure, the proposed 'stop the clock' addition, provides important mitigation and in many ways narrows the difference in treatment as it makes clear that those removed under ERS do not 'escape' their sentence. If they ever return to the UK, the offender would be liable to serve the rest of that sentence, including any period required to be served in custody, in line with the way a domestic prisoner serves their sentence. Therefore, regardless of status under Article 14, the changes are justified as pursuant to a legitimate aim to remove prisoners who will in any event be deported upon release from prison.

14. It is therefore the Department's position that there is no unlawful interference with Article 14 when read with Article 5.

Age assessments – placeholder clause at clause 58 of the Bill as introduced

15. Nine new clauses have been added to form a new Part of the Bill, in place of clause 58 of the Bill as introduced. In summary, the first clause defines various terms used in the new Part, in particular the term "age-disputed person", which governs the persons to whom the provisions on age assessments will apply. The second clause will allow the National Age Assessment Board ("NAAB") (a division of the Department whose officials will be "designated persons") to conduct age assessments on age-disputed persons following referral from a local authority or other public authority, and makes provision as to when local authorities are under a duty to refer such persons to the NAAB or conduct their own assessment. The third clause will allow the NAAB to conduct age assessments on age-disputed persons for

immigration purposes, in cases where no referral has been made or where it disagrees with the local authority's assessment. The fourth clause provides for the use of scientific methods in age assessments. If a person refuses to consent to a method specified in regulations, this may damage their credibility. A method cannot be specified unless the Secretary of State determines, having sought scientific advice, that the method is appropriate for assessing age. Other (non-specified) scientific methods may be used in appropriate circumstances, but failure to consent to those would not affect credibility. The fifth clause enables the Secretary of State to make regulations about how age assessments under the new clauses inserted by the second and third clause must be conducted. The sixth clause provides a right of appeal to the First-tier Tribunal against an age assessment conducted by the NAAB or a local authority. The seventh clause makes procedural provision about appeals against age assessments, including providing a power for the First-tier Tribunal to grant interim relief. The eighth clause makes provision about the situation where new evidence comes to light after an age assessment or an appeal, allowing the decision-maker to conduct a further assessment (which would be subject to further appeal) if the new evidence appears significant. The ninth clause will enable a person appealing against a decision on an age assessment to apply for legal aid for their appeal.

European Convention on Human Rights - Article 8

16. An age assessment by itself does not necessarily engage article 8 (as held by the Court of Appeal in *A v Croydon London Borough Council* [2008] EWCA Civ 1445, at paragraph 88 (this point was not appealed to the Supreme Court and so remains good law, as explained in KA & Anor v London Borough of Croydon [2017] EWHC 1723, paragraphs 34-35)). However, the Department considers that age assessment could involve an interference with a person's rights under Article 8 ECHR (right to respect for private and family life). The Department considers that any such interference is justified and proportionate in pursuit of legitimate aims in that it aims to facilitate an accurate assessment of a person's age, which is relevant, in particular, to the prevention of adults from benefiting from immigration and social provisions designed to benefit children, ensuring the integrity of children's services (including preventing safeguarding risks which arise from adults from being placed with children in educational or care settings), ensuring effective immigration controls, and to preventing abuse of the immigration system.

17. The Department considers that scientific methods of age assessment which would involve a physical interference with a person and the use of the information obtained about them to make a determination of an aspect of personal identity such as age, or risk an adverse credibility inference being drawn, would be an interference with Article 8. The Department considers that use of appropriate scientific methods for age assessment can be a justified and proportionate measure in pursuit of the aims listed above, since the use of such methods aims to facilitate an accurate assessment of a person's age.

18. The fourth clause has been drafted so that the Secretary of State must be satisfied, having sought scientific advice, that a particular scientific method is appropriate for use in age assessments (and make Regulations specifying this), before the Secretary of State can take into account, as damaging to the person's credibility (in relation to statements they make about their age), a person's refusal to consent to the method in question. When determining whether the method is appropriate, having sought scientific advice, and making these Regulations, the Secretary of State must comply with the Convention rights (section 6 of the Human Rights Act). The Department considers that the power is capable of being exercised in a way which complies with the Convention rights. Further, a person can withhold consent to a specified scientific age assessment method, without their refusal to consent counting against them, if they have a good reason to do so. The Department intends to publish guidance setting out when a person has "good reason" to refuse to consent to a scientific method, and how decision makers will "take into account" refusal to consent to the method in question. This will include consideration of the particular method in question (for example, how invasive it is) as well as other relevant matters to be set out in the guidance, and the guidance will be compatible with the Convention rights.

19. Further, the fourth clause provides that a specified method may be used for an age assessment only if the appropriate consent is given. "Appropriate consent" is defined as the age-disputed person's consent (where they have capacity to give consent), or, if they do not, the consent of their parent or guardian, or some other adult specified in Regulations. The fifth clause also provides that the Secretary of State may make Regulations about the processes for assessing capacity to consent, seeking consent and recording decisions about consent, and in making any such Regulations the Secretary of State will comply with section 6 of the Human Rights Act.

20. As regards appeals, the Department considers that provision for appeals is compatible with ECHR rights.

21. In *R (A) v Croydon LBC* [2009] UKSC 8, one of the issues before the Supreme Court was whether the decision to provide accommodation under the Children Act 1989 was the determination of a person's "civil rights", such that the decision-making process has to comply with the requirements for a fair trial before an independent and impartial tribunal under Article 6 of the ECHR. However, because of the court's decision on the other issue before it was unnecessary for the Supreme Court to reach any firm conclusions this issue. Lady Hale commented (obiter) that "If this is a civil right at all, therefore, I would be inclined to hold that it rests at the periphery of such rights and that the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of article 6". Lords Scott, Walker and Neuberger agreed with her approach (paragraphs [66]-[68]). While agreeing that it was unnecessary to reach any firm conclusions on the point (paragraph [50]), Lord Hope doubted whether the duty of local authorities to provide accommodation under the 1989 Act gave rise to a "civil right" within the meaning of Article 6 of the ECHR

(paragraphs [55]-[65]).

22. The Department's view is that, if age assessment does engage Article 6, the appeal regime provided for is compatible with Article 6, because there will be the possibility of a full merits appeal to an independent and impartial tribunal. Further, the eighth clause also makes provision about the situation where new evidence comes to light after the Tribunal has made a decision on appeal or after an age assessment decision has been made, allowing the decision-maker to conduct a further assessment (which would be subject to further appeal) if the new evidence appears compelling. This means that, if new evidence comes to light, a person will be able to seek a new age assessment decision which will in turn benefit from a further right of appeal.

23. The ninth clause expands legal aid to cover appeals against age assessments. This adds to, rather than amends, existing entitlement to legal aid. It is relevant here in particular that legal aid is made available to an applicant under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") where there is a determination that failure to provide funding would be a breach of their ECHR or retained enforceable EU rights, or that it would be appropriate to make funding available having regard to the risk of breach. In an individual case there must also be a determination that the applicant is financially eligible for legal aid (the means test) and an application of the criteria as to the merits of the applicant's case (the merits test).

24. In *R (Gudanaviciene & Others) v Director of Legal Aid Casework &. Lord Chancellor [2014] EWCA Civ 1622*, the Court of Appeal confirmed that the procedural obligations of the Article 8 right can give rise to an obligation for the state to provide legal aid. The court confirmed that in practice it is unlikely that there is any real difference between the test for Article 6 compliance and the test for Article 8 compliance in this context. Whether legal aid is required "will depend on the particular facts and circumstances of each case (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity."(paragraph 72 of *Gudanaviciene*).

25. The provision of legal aid in relation to age assessment, in addition to what is already provided for in LASPO, helps to ensure that there is legal aid provided for those who need it most, i.e. for those subject to an age assessment by the Secretary of State or a local authority (appeals relating to age assessments). The Department is satisfied that the legal aid scheme is compatible with Article 8 in relation to legal aid provision for appeals relating to age assessments. However, legal aid is devolved in both Scotland and Northern Ireland and so the amendments to LASPO which expand legal aid to cover age assessment appeals only apply to legal aid in England and Wales. Scotland and Northern Ireland will, therefore, be making their own separate arrangements in relation to providing legal aid for age assessment appeals. Ministry of Justice policy colleagues have started discussions with Scotland and will also discuss with Northern Ireland as the Bill is going through

Parliament, to ensure they have appropriate equivalent provision.

26. The Department therefore considers that the age assessment provisions are compatible with Article 8 ECHR.

The United Nations Convention on the Rights of the Child ("UNCRC")

27. The UNCRC requires the best interest of the child to be a primary consideration in all actions concerning children, including actions undertaken by administrative authorities and legislative bodies. This requirement is implemented by section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Secretary of State to ensure that any functions relating to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

28. The Department has carefully considered the best interests of the child when formulating the age assessment provisions, as it has done in relation to all measures included in the Bill. And it will continue to comply with its section 55 duty in relation to the implementation of the provisions.

29. The Department is satisfied that the age assessment provisions are compatible with the UNCRC.

Processing of visa applications from nationals of certain countries – placeholder clause at clause 59 of the Bill as introduced

30. Government amendments have been addedd to leave out clause 59 from the Bill and replace it with new clauses.

31. The first new clause creates a power for the Secretary of State to impose visa penalties on a country that is uncooperative in relation to the return of its nationals who do not have a right to be in the UK. In considering whether a country is cooperative, the Secretary of State must take into account arrangements entered into with the relevant country to facilitate returns, the extent to which the country is facilitating returns and is doing so promptly, as well as other matters the Secretary of State considers appropriate. In determining whether a country is uncooperative, the Secretary of State must take into account the length of time the country has not been cooperating, the extent and reasons for the lack of cooperation, and any other matters the Secretary of State considers appropriate. The Secretary of State must give the government of the relevant country reasonable notice of the proposal to impose visa penalties.

32. The Secretary of State may apply one or more visa penalties to entry clearance applications made by nationals of the relevant country by provision in the immigration rules. The penalties include (i) slowing down the processing of visa applications, (ii) suspending the processing of visa applications, (iii)

treating visa applications as invalid, and (iv) requiring applicants to pay an additional £190 in connection with making a visa application. There is a power to amend this amount in secondary legislation; any increase will require affirmative regulations, while any decrease will require negative regulations.

33. The Secretary of State may make exceptions or exemptions by provision in the immigration rules, for example to ensure compliance with international obligations, to exempt particular cohorts of applicants or to allow exceptions on compelling and compassionate grounds.

34. The second new clause sets out the requirements regarding the review and revocation of visa penalty provisions. Once penalties are imposed, the Secretary of State must review the extent to which cooperation has improved, and whether it is appropriate to amend visa penalty provisions, every 2 months. If at any time the Secretary of State no longer considers the country to be uncooperative, she must revoke the penalty provisions as soon as practicable.

European Convention on Human Rights - Article 8 (right to respect for private and family life)

35. Article 8 may be engaged extra territorially in the context of family reunification. In *SSHD v Abbas* [2017] EWCA Civ 1393, the Court of Appeal said:

"In article 8 cases involving family life, even though the spouse or child seeking entry to the territory of a Contracting Party will be outside that territory, members of the family whose rights are affected are undoubtedly within it. That provides the jurisdictional peg."

36. In *Mostafa (Article 8 in entry clearance)* [2015] UKUT 112, the Upper Tribunal also considered this and held that:

"…it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

37. In exercising the power to make exceptions and exemptions for visa penalties, the Secretary of State must comply with section 6 of the Human Rights Act. The Department will ensure that exceptions and exemptions are

made so that the visa penalty scheme is compliant, including as regards proportionality in light of the legitimate aim of ensuring the integrity of the UK's system of immigration control, with the Convention rights including under Article 8.

Electronic Travel Authorisations (ETAs) – placeholder clause at clause 60 of the Bill as introduced

38. Government amendments have been added to leave out clause 60 and to insert two new clauses.

39. The first amendment will introduce a new Part 1A into the Immigration Act 1971, consisting of two new sections (11C and 11D). Section 11C introduces the ETA scheme and will allow the Immigration Rules to require specified individuals not to travel to the UK (even if transiting) unless they have a valid ETA, as well as specifying what the Immigration Rules must provide for (e.g. how to apply, grounds for being granted/refused an ETA, period of validity, how an ETA may be varied/cancelled and why) as well as providing for exceptions as to who must apply for an ETA. Section 11D ("Electronic Travel Authorisations and the Islands") sets out the legislative necessities for recognising authorisations granted by the Crown Dependencies ("CD"s) and being able to administer those schemes on behalf of the CDs, as well as for any of the four jurisdictions to be able to cancel/vary ETAs issued by another once the relevant provisions of section 11D have been extended to each CD jurisdiction via an Order in Council. Additionally, the first amendment will insert a definition of "an ETA" into section 33 of the 1971 Act, include ETA applications as a "relevant matter" for regulating immigration service providers by amending section 82 of the Immigration and Asylum Act 1999 and specify that an ETA application will require compulsory biometrics by amending section 126 of the Nationality, Immigration and Asylum Act 2002.

40. The second amendment will amend section 40 of the Immigration and Asylum Act 1999 to require carriers or check for ETAs and digital permissions before allowing passengers to board, else they risk a £2,000 fine.

European Convention on Human Rights - Article 8

41. While the cases of *Abbas* and *Mostafa* (see paragraphs 35 and 36 above) were decided in the context of entry clearance, there is clear read across to the ETA scheme and, as such, Article 8 may be potentially engaged extra territorially if an ETA is refused in circumstances relating to family reunification.

42. This has been acknowledged and the system will ultimately be designed to enable a person, who would be refused an ETA on the basis of their immigration position, to travel if necessary to avoid unjustifiable

interference with any rights under Article 8.

Special Immigration Appeals Commission – placeholder clause at clause 61 of the Bill as introduced

43. Government amendments have been added to leave out clause 61 from the Bill and replace it with a new clause. The new clause will amend the Special Immigration Appeals Commission (SIAC) Act 1997 providing for the Secretary of State, acting in person, to certify immigration decisions that relate to a person's entitlement to enter, reside or remain in the UK, or that relate to a person's removal from the UK under the Immigration Acts.

44. Certification is available to the Secretary of State where the immigration decision is not subject to a right of appeal or cannot currently be certified and is made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public (i) in the interests of national security, (ii) in the interests of the relationship between the UK and another country, or (iii) otherwise in the public interest. The effect of certification ensures that any immigration decision that may be challenged by way of an application for judicial review can be certified to ensure that the review of the decision is heard in SIAC, in the same way that any decision that can be challenged by appeal can be certified. The amendment closes the gap in the Secretary of State's ability to certify immigration decisions which has arisen following successive changes to immigration appeals legislation. It ensures any such challenge to an impugned immigration decision, that is capable of being certified, is heard before SIAC. SIAC is considered the most appropriate forum to consider legal challenges of this nature and was specifically created to consider sensitive material and accommodate closed hearings.

European Convention on Human Rights - Article 6

45. Article 6 does not apply to immigration and asylum matters (*Maaouia v France* and subsequent caselaw confirms).

46. To the extent that Article 6 would nonetheless be engaged in relation to providing for a closed material procedure, the special advocate system and disclosure procedure used in such hearings before SIAC, as well as other safeguards, are designed to provide individuals with a substantial measure of procedural justice, in the difficult circumstances where, in the public interest, material cannot be disclosed to them. The Department considers this is compatible with Article 6 ECHR. This clause does not change the criteria by which cases can be certified so that they are heard in closed proceedings. Further, and to the extent relevant, civil legal services provided in relation to proceedings before the SIAC are in scope of legal aid already under LASPO, Schedule 1, Part 1, paragraph 24.

Amendment of Schedule 7 to TACT

47. The purpose of this amendment is to ensure that powers available under Schedule 7 to the Terrorism Act 2000 – which allow examining officers to stop, question and search, and if necessary detain any person at port for the purpose of determining whether they are involved in terrorist activity – are available to use in respect of those who have arrived illegally by sea. The powers are currently exercised on a no suspicion basis. The current issue arises because the powers in Schedule 7 only allow examination at a port or border area. Although the existing definition of 'port' is quite wide and can capture any beach or stretch of coastline where a person might come ashore, in practice it is unfeasible for Schedule 7 powers to be exercised otherwise than at established ports as there are not the facilities or staff present to be able to carry out the Schedule 7 examinations or detain vulnerable individuals. The large volumes of arrivals in small boats who have not passed through the usual immigration controls at established ports undergo initial processing at the place they arrive and are then dispersed away from the 'port' for further immigration processing. This may take place before it has been possible to exercise Schedule 7 powers where appropriate, meaning the powers are no longer available.

48. The effect of the amendment is that examining officers will be able to examine and if necessary detain individuals under Schedule 7 away from port and border areas, provided that: (a) the individual has arrived in the UK from outside the UK by sea; (b) the individual is undergoing immigration processing having been either detained under a provision of the Immigration Acts or arrested under Paragraph 17(1) of Schedule 2 to the Immigration Act 1972 and having been arrested or detained within 24 hours of arrival, and the individual has not been released on immigration bail or otherwise, and (c) it has been no more than 5 consecutive days after their initial arrest or detention.

49. Schedule 7 to TACT will apply in full, meaning that individuals examined in this way will be subject to the same powers and safeguards in that Schedule.

50. The effect of the provisions is that individuals who have arrived in the UK via small boat or otherwise illegally by sea will be subject to the same power to determine their involvement in terrorist activity as if they had entered the UK through conventional border controls.

European Convention on Human Rights – Article 8

51. In *Gillan v UK [2010]* ("*Gillan*") Strasbourg considered provisions of the Terrorism Act 2000 ("TACT 2000") that permitted a senior officer to designate an area within which persons could be stopped and searched without suspicion, if the senior officer considered that such designation was expedient in order to prevent acts of terrorism. Strasbourg found that this power was disproportionate and was not in accordance with the law, because the power

did not contain sufficient safeguards to prevent abuse. The Court reached this conclusion because the test of "expediency" was a low threshold, and that in practice it had led to wide areas being designated on a continuous basis rather than in response to a specific need. The Court also noted that because the power was exercisable in relation to any person anywhere within the relevant area, this had led to abuse and persons were being subjected to searches despite there being nothing to suggest that they posed a terrorism risk.

52. However, in *Beghal v DPP* ("*Beghal*") [2015] UKSC 49 the Supreme Court considered whether the powers under Schedule 7 to TACT 2000 that allow for persons to be detained, searched and questioned while passing through the UK Border, without the need for a basis of suspicion, were in accordance with the law for the purposes of Article 8. The Court found that the powers were compatible with Article 8 and that this power differed to that which had been considered by Strasbourg in *Gillan*:

***"84** We do not read the decision in the Gillan case as ruling that any random stop and search system… cannot be "in accordance with the law" This view is supported by the Third Section's decision in Colon v The Netherlands (2012) 55 EHRR SE45, which upheld a universal right of stop and search in a particular area, albeit for a limited, but not inconsiderable, period. While the court in Colon relied in paras 73 and 76–78 on certain factors which distinguished it from the Gillan case, its decision emphasises how the determination of lawfulness is very sensitive to the facts of the particular case…"*

53. In finding that the Schedule 7 power was in accordance with the law, the Court noted various factors, including: the powers could be exercised only against a relatively limited and identifiable group (those passing across the UK's borders); the powers could be used only to determine whether the person concerned "appears to be" a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism"; and it was not extraordinary for persons passing through ports or airports (where use of the powers was limited to) to be subjected to stop, search and questioning.

54. In the light of the decision in *Beghal* and given the safeguards in the amendment which limit the exercise of the power beyond ports, and when set against the legitimate aim of safeguarding national security, the Department considers that the amendment is a proportionate and justified extension of the powers in Schedule 7 so that they are available in relation to those arriving in small boats (and others arriving illegally by sea) and that it is compatible with Article 8 ECHR.

Deprivation of citizenship

55. The amendment amends section 40 of the British Nationality Act 1981 ("BNA 1981") to disapply, in certain circumstances, the requirement in section

40(5) to give notice to a person before an order is made to deprive them of their citizenship. The effect of the amendment will be that the requirement to give notice will not apply where contact details are not held for the person, or it is not practicable to give the notice, or would not be in the interests of national security or foreign relations or otherwise in the public interest.

56. The amendment will also make a consequential amendment to section 40A BNA 1981, so that where the decision to deprive has not been notified to the person, they still have a statutory right of appeal.

57. The amendment will also include a retrospective provision which provides that any failure to comply with the notification requirements in section 40(5), before the above amendments to section 40 come into effect, does not affect the validity of any deprivation order made under that section.

European Convention on Human Rights and Statelessness Conventions

58. The amendment does not affect the way in which decisions on deprivation of citizenship are made. Such decisions are made in accordance with any relevant Convention rights and with the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

59. The retrospective provision will prevent people from seeking to challenge a deprivation order made in relation to them on the basis that they were not provided with prior notice of the deprivation decision in accordance with section 40(5) BNA 1981. This is to address the potential consequences for national security arising from such challenges, including in particular a recent decision of the High Court, which the Department is appealing. To the extent that the retrospective provision engages Article 6, the Department considers that the national security concerns constitute compelling grounds in the public interest, which justify the interference. Failure to legislate retrospectively as proposed could result in individuals, whom the Home Secretary has assessed should be deprived of their British citizenship because such deprivation would be conducive to the public good, bringing legal challenges that could result in their citizenship being reinstated. This would enable them to travel freely in and out of the UK and potentially cause harm.

60. Subsection (7) of the clause will ensure that the retrospective provision does not affect the ability of individuals to bring a statutory appeal against the decision to deprive them of their citizenship under section 40A BNA 1981. If an individual has not received prior notice of the deprivation decision, when the person subsequently makes contact with the Department, they will be given a copy of the deprivation decision notice, explaining their appeal rights. If the Department becomes aware that notice was not given in accordance with section 40(5) BNA 1981 due to an administrative defect (for example, an error in the address to which the notice was served), then it will seek to remedy that by re-serving, so long as there are no overriding reasons not to give notice at that time. The individual can then seek to exercise their

statutory right to appeal against the decision under section 40A. Where prior notice of the deprivation decision was not given to a person, the Department would not object to an application to bring an appeal out of time, so long as the appeal is brought reasonably promptly after they become aware of the deprivation decision.

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