

BORDER SECURITY, IMMIGRATION AND ASYLUM BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS SUPPLEMENTARY MEMORANDUM

Introduction

1. This memorandum supplements the memorandum dated 30 January 2025 prepared by the Home Office which addressed issues under the European Convention on Human Rights (“ECHR”) in relation to the Border Security, Immigration and Asylum (“BSAI”) Bill.
2. This supplementary memorandum addresses the issues under the ECHR that arise in relation to the Government amendments tabled on 10 March for Commons Committee stage. It has been prepared by the Home Office.

ECHR analysis

New clause: “Conditions on limited leave to enter or remain and immigration bail”

3. Currently, there is a discrepancy between measures that can be imposed on a grant of immigration bail under Schedule 10 to the Immigration Act 2016 (“the 2016 Act”) and measures that may be imposed upon a grant of leave under section 3(1)(c) of the Immigration Act 1971 (“the 1971 Act”). Immigration bail must cease, and a form of leave granted, when it becomes apparent that a person (P) cannot be removed from the UK for ECHR reasons. It is not however considered that there exists a proper basis to differentiate between a grant of immigration bail and a grant of leave when the public interest is for P to be removed or deported from the UK but ECHR barriers prevent immediate removal. If P’s risk to public safety is such that conditions are required on a grant of bail, it follows that, assuming the risk remains, the same conditions should apply on a grant of leave.
4. This new provision therefore intends to introduce a number of additional restricted measures that can be imposed on a grant of leave under section 3(1)(c) of the 1971 Act. Commensurate amendments will also be introduced to Schedule 10 to the 2016 Act to reflect the above policy rationale and clarify the powers available.

Article 5 ECHR

5. The clause permits the Secretary of State to impose conditions of leave that would engage Article 5 ECHR, namely electronic monitoring, curfews and inclusion/exclusion zones.

6. Compatibility with Article 5 on conditions that restrict liberty on a grant of bail is permitted pursuant to Article 5(1)(f) as P would be liable to be detained and therefore conditions that restrict liberty would be a less restrictive option to detention, as well as specifically prescribed by law under that provision. In addition, even if P were no longer liable to be detained but remained on immigration bail (to which, see section 61 of the 2016 Act), action would still be being taken with a view to deportation and therefore the imposition of these conditions is expressly permitted under Article 5(1)(f). Moreover, for the applicability of conditions being imposed on a grant of immigration bail, paragraph 2(7)(b) of Schedule 10 to the 2016 Act only permits such conditions if doing so would not be 'contrary to the person's Convention rights', replicating section 6 of the Human Rights Act 1998.
7. Notwithstanding any similar reference or restraint in the 1971 Act, imposing conditions on a grant of leave will also be prescribed by law and permitted under Article 5(1)(f) for the following reasons:
 - a. It will have been assessed that deportation (or removal) is conducive to the public good. Accordingly, for the purposes of section 3(5) of the 1971 Act, P will remain 'liable to deportation'.
 - b. Any condition that can be imposed on a grant of leave that infringes Article 5 will therefore only be permissible under Article 5(1)(f) to those who are liable to deportation or removal. However, it should be open to the Secretary of State to regulate and control how a person liable to deportation should remain in the UK, even if, at the time of imposition, deportation or removal cannot be achieved for ECHR reasons. Such conditions may be considered necessary to protect the UK public. Strasbourg has accepted a member state's right to control their borders and refuse migrants the same general rights to liberty enjoyed by their citizens (see *Saadi v UK* (2008) ECHR 29).
 - c. Any imposition of conditions that engage Article 5 on a grant of leave will be case specific but permissible on the basis that any of those conditions will be temporary, and the Secretary of State will still be able to demonstrate action is being taken with a view to deportation in the form of regular assessments.
8. The above is compatible with the current Home Office policy on restricted leave. The fact guidance will need to specifically set out what circumstances need to exist to permit conditions that may be imposed does not imply the clause is not capable of being compatible with Article 5. Rather, it reflects the fact that any application of the new measures will be fact sensitive and case specific with bespoke assessments necessary for the powers to be exercised compatibly with Article 5.

9. The clause is compatible with Article 5(4) as P will have the ability to challenge any conditions imposed by way of an application for judicial review, therefore affording individuals impacted with a substantial measure of procedural justice (see *Al-Nashif v Bulgaria Application* [2002] Application no.50963/99).
10. Accordingly, the Government is satisfied that the measure is compatible with Article 5.

Article 8 ECHR

11. The proposed clause will permit the Secretary of State to impose conditions of leave that will be of such gravity as to likely engage Article 8.
12. The Court of Appeal in *MS (& anor) v Secretary of State for the Home Department* [2017] EWCA Civ 1190) considered whether the application of the restricted leave policy (i.e. the policy that determines the extent of restrictions to be imposed on a grant of leave under s3(1)(c) of the 1971 Act) was incompatible with Article 8. At paragraph 109 the Court of Appeal held:

“Such a degree of interference is entirely proportionate to the legitimate aims of the Secretary of State’s policy. (I should spell out, to avoid any misunderstanding, that that conclusion does not preclude the possibility of challenge to individual decisions taken under the policy. Such decisions need, as the UT says, to be taken on a fact-sensitive and case-specific basis.)”
13. While the policy in that case could only provide guidance as to the imposition of the conditions set out currently in section 3(1)(c) of the 1971 Act, and the additional measures more likely to infringe on an individual's rights under Article 8 (and to a greater degree), that does not impact the rationale for the measure being considered lawful and compatible with Article 8. The legitimate aims being pursued by this measure are that it is in the interest of national security, public safety and the economic well-being of the country, for the prevention of disorder or crime, and for the protection of the rights and freedom of others. All of those aims are the intended pursuit of this new measure which would be available to the Secretary of State to exercise (proportionately in accordance with Article 8) in the case of an individual who is liable for deportation, but cannot be removed, and is assessed to pose a risk to the UK public to warrant such conditions being imposed on a grant of leave.
14. Accordingly, the Government is satisfied that the measure is compatible with Article 8.