Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018

Drawn to the special attention of the House:
Disabled Persons (Badges for Motor Vehicles) (England) (Amendment) Regulations 2019

Includes information paragraphs on:
Draft Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order 2019
Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2019

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HL Paper 361
Secondary Legislation Scrutiny Committee

The Committee’s terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Rt Hon. Lord Chartres
Lord Goddard of Stockport
Baroness O’Loan
Rt Hon. Lord Cunningham of Felling
Lord Haskel
Lord Sherbourne of Didsbury
Lord Faulkner of Worcester
Rt Hon. Lord Janvrin
Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn
Lord Kirkwood of Kirkhope

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee’s Reports are published on the internet at http://www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Helen Gahir (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser).

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.
Forty Eighth Report

PROPOSED NEGATIVE STATUTORY INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Proposed Negative Statutory Instruments about which no recommendation to upgrade is made

• EU Export Credits Legislation (Revocation) (EU Exit) (No. 2) Regulations 2019
This instrument extends the eligibility criteria for a disabled parking badge in England (Blue Badge) to people whose non-physical disability impacts on their ability to walk during the course of a journey. While the Department for Transport is unable to provide any detailed estimates, it expects that the changes will add around 44,000 badges in the first year to the 2.4 million badges already issued. The House may be interested in this change to the Blue Badge scheme and its expected impact.

These Regulations are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

1. The Department for Transport (DfT) has laid these Regulations before Parliament with an Explanatory Memorandum (EM). The purpose of the instrument is to extend the eligibility criteria for a disabled parking badge (Blue Badge) to people whose non-physical impairment impacts on their ability to walk during the course of a journey.

Background

2. The Blue Badge scheme, as set out in the Disabled Persons (Badges for Motor Vehicles) (England) Regulations 2000 (SI 2000/682) (“the 2000 Regulations”), gives the badge holder access to parking concessions and exemptions from parking charges across England. The scheme is administered by local authorities. Badges are usually issued for three years and typically cost £10. At present, 2.4 million Blue Badges have been issued in England.

3. The current system provides for an “independent mobility assessor” where an applicant’s eligibility for a Blue Badge is not self-evident, to certify that the applicant has a disability which causes inability to walk or very considerable difficulty in walking. The assessor needs to have a relevant professional qualification and expertise and be recognised by the local authority.

4. The Department explains that, while the current rules cover all disabilities (that is, physical or other conditions), evidence suggests that the 2000 Regulations and existing guidance are not understood sufficiently and are not administered consistently across England, making it difficult for some people with non-physical disabilities to access badges. According to DfT, the key issue is a lack of clarity about the wording in the 2000 Regulations in relation to “a permanent and substantial disability which causes inability to walk or very considerable difficulty in walking” that is used to assess eligibility.

What is changing

5. DfT says that this instrument changes the wording, so that eligibility is extended to include explicitly: people who are unable to walk; have
very considerable difficulty whilst walking, including very considerable psychological distress; or who cannot undertake a journey without there being a risk of serious harm to that person or any other person. The current requirement for a disability to be “permanent and substantial” is changed to “enduring and substantial”. DfT explains that this definition is more appropriate for non-physical conditions, such as mental or cognitive disabilities, which may vary over time and therefore may not be permanent but may still be enduring.

6. The instrument also changes the role of the “independent mobility assessor” to that of an “expert assessor” to include professionals who can assess accurately and fairly the impact of non-physical disabilities on an applicant’s ability to walk. DfT explains that, as it may be difficult for the expert assessor to assess such impacts without knowing the applicant, the current requirement for the assessor to be independent of the applicant is replaced with a requirement for the assessor to be impartial. The Department says that the changes will allow a wider range of healthcare professionals with specialist knowledge of mental, cognitive or learning disabilities and/or close knowledge of the applicant’s challenges and capabilities to carry out the eligibility assessment. Forthcoming guidance will include a non-exhaustive list of relevant professions, including, for example, clinical and educational psychologists and occupational therapists (see Appendix 1). As under the current rules, GPs will remain excluded from the assessment process to preserve the integrity of the doctor/patient relationship and to remove any potential bias in favour of the applicant.

7. The EM states that expert assessors will be able to certify that an applicant has the relevant disabilities to qualify for a badge where eligibility is not self-evident. We asked the Department for further information about the circumstances and conditions that demonstrate self-evident entitlement. DfT told us that forthcoming guidance will set out the conditions and behaviours that decision-makers should consider when assessing an applicant’s entitlement (see Appendix 1).

8. In relation to linkage to the benefit system, the instrument provides for an automatic entitlement to a Blue Badge for people who receive 10 points under the ‘Planning and Following Journeys’ activity of the Personal Independence Payment (PIP), specifically because they “cannot undertake any journey because it would cause them overwhelming psychological distress”. The Department’s original proposal was to provide automatic entitlement to those scoring 12 points under the activity against the criterion for being “unable to follow the route of a familiar journey without another person, an assistance dog or an orientation aid”. The Government’s Disabled Persons’ Transport Advisory Committee (DPTAC) and some local authorities disagreed, however, during consultation, suggesting that needing to be accompanied did not in itself equate to a need to park nearby or a difficulty getting from their vehicle to their destination.

**Appeals**

9. In line with the existing Blue Badge scheme, there will not be an appeals process for those whose applications have been refused under the new rules.
Support for applicants

10. We asked the Department about support for applicants who are unable to complete the application process themselves. DfT told us that:

“It is expected that applicants who would be likely to meet the new criteria would be assisted by those involved in their care. This principle applies to the existing scheme in respect of applicants with physical disabilities who might need help in completing their application. Provision of a dedicated assistance service would be a matter for local authorities.”

Consultation

11. The Department says that an eight-week public consultation between 21 January and 18 March 2018 received more than 6,300 responses from members of the public, local authorities, groups representing disabled people and other organisations. According to DfT, 89% of respondents from all groups supported the proposals to extend the Blue Badge eligibility criteria in principle, including 71% of local authorities, 84% of groups representing disabled people, 87% of other organisations and 89% of individuals who responded to the consultation. The Department’s original proposal for automatic entitlement in relation to certain activity scores with regard to PIP were changed in response to feedback from the DPTAC and local authorities (see paragraph 8).

12. Some stakeholders expressed concerns about pressure on on-street parking spaces. Groups representing disabled people suggested that more spaces would be needed, while local authorities were concerned that the proposals would increase the number of cars seeking to park in disabled parking spaces. The Department says that the impact on parking will vary from place to place and that local authorities may have to review parking provision once the impact of the changes on parking is understood. There were also concerns about a risk of greater abuse of the scheme. DfT highlights that misuse of a Blue Badge, for example by friends or family members, is already a criminal offence. The Committee notes the concerns about an increased risk of abuse and that it will be for local authorities to ensure that any risk is mitigated.

Guidance

13. The Department says that it has worked with medical professionals and stakeholders to develop guidance for local authorities on the changes. DfT told us that “the draft guidance has been completed and will be cleared by lawyers ahead of Ministerial sign-off” and that they “have committed to publish the guidance at the end of May”. The Committee believes that the Department should have made the guidance available when the instrument was laid before Parliament, to assist Parliament’s scrutiny of the Regulations.

Impact

14. The Department explains that local authorities raised concerns about the increased administration costs resulting from widening Blue Badge eligibility, but that it is not possible to estimate accurately the cost of the changes, with local authorities having provided widely diverging estimates. In Scotland and Wales, where similar changes have been made, the increase in the number

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of badges issued was less than 3%. For England, the Department’s planning assumption is for a 6% increase in applications (to 53,000) in the first year of the new scheme, leading to an estimated increase of 44,000 new badges (a rise of 5%). DfT will provide funding to local authorities to cover the expected additional costs of £1.7 million for rolling out the policy in the first year and will review the financial impact of the changes and possible funding solutions after 12 months.

15. In terms of the implementation timetable, DfT told the Committee that publication of the guidance at the end of May will provide local authorities with a three-month lead-in time to prepare and be ready for when the changes come into force at the end of August 2019. The Department added that the publication of its consultation response has attracted significant media coverage and that, subject to Ministers’ views, proactive media activity was proposed to coincide with the publication of the guidance at the end of May, including updating disability groups on the changes.

Conclusion

16. The House may be interested in the change to the Blue Badge scheme made by these Regulations, given the Department’s estimate that it may result in the issue of an additional 44,000 badges in its first year of implementation.
INSTRUMENTS OF INTEREST

Draft Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order 2019

17. This instrument provides for a sixth two-year extension of the provision that temporarily allows trial without jury for certain cases in Northern Ireland. Current provision will run out on 31 July 2019. The use of such courts is dependent on the Director of Public Prosecutions in Northern Ireland issuing a certificate stating that certain conditions, set out in the Justice and Security (Northern Ireland) Act 2007, are met, such as potential prejudice or witness intimidation. Concerns expressed in relation to previous renewal instruments have led to greater public consultation and to regular independent review of the operation of these provisions:² both exercises endorsed the view that the system is currently operating effectively. Use of the provision remains low: the Explanatory Memorandum states that there were 12 non-jury trial cases in the Crown Court in 2016 (out of a total of 1640), and a further nine in 2017 (out of a total of 1409). The Northern Ireland Office argues, however, that due to the recent increase in violence and paramilitary and sectarian intimidation, the option of trial without jury should remain available to the courts.

Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2019 (SI 2019/894)

18. When considering whether a person is eligible for Legal Aid, for either a criminal or a civil case, the Director of Legal Aid Casework must calculate an individual’s gross or disposable income and disposable capital to determine whether it exceeds the limits set out in legislation. This instrument provides that payments made to individuals in connection with the Windrush Compensation Scheme are disregarded for the purposes of those calculations. The Scheme opened for applications on 3 April 2019 and will run for two years until 2 April 2021. The Regulations set no time limit on the disregard, but the Explanatory Memorandum states that the Ministry of Justice will review the Regulations in five years’ time to ensure that the policy intent has been met.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order 2019

Instruments subject to annulment

SI 2019/893  Marine Licensing (Exempted Activities) (Amendment) Order 2019
SI 2019/894  Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2019
SI 2019/903  County Courts (Interest on Judgment Debts) (Amendment) Order 2019
SI 2019/906  Civil Service (Other Crown Servants) Pension Scheme (Amendment) Regulations 2019
SI 2019/908  Criminal Procedure (Amendment) (EU Exit) Regulations 2019
APPENDIX 1: DISABLED PERSONS (BADGES FOR MOTOR VEHICLES) (ENGLAND) (AMENDMENT) REGULATIONS 2019 (SI 2019/891)

Additional information from the Department for Transport

Q1: Are there examples of the types of professions or qualifications that will qualify people to be expert assessors?

A1: The guidance will include the following, non-exhaustive, examples of applicable professions:

<table>
<thead>
<tr>
<th><strong>Specialism</strong></th>
<th><strong>Specialist areas/conditions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinical Psychologist</td>
<td>ASD and Asperger’s Syndrome.</td>
</tr>
<tr>
<td>Educational Psychologist</td>
<td>Child and adolescent mental health for children with special educational and additional complex needs, ASD and Asperger’s Syndrome.</td>
</tr>
<tr>
<td>Gastroenterologist</td>
<td>Crohn’s Disease, Ulcerative Colitis, Irritable Bowel Diseases.</td>
</tr>
<tr>
<td>Neurologist</td>
<td>Paediatric Neurodisability, ASD, ADHD, learning problems, behavioural and associated mental health.</td>
</tr>
<tr>
<td>Neurologist</td>
<td>Seizures, epilepsy, amnesia, neuropathic pain.</td>
</tr>
<tr>
<td>Occupational Therapist</td>
<td>Wide range of conditions: most commonly difficulties due to mental health illness, physical or learning disabilities. Commonly facilitate independent mobility assessments on behalf of local authorities.</td>
</tr>
<tr>
<td>Physiotherapist</td>
<td>Ehlers-Danlos Syndrome, Huntington’s Disease, M.E./CFS, major trauma, Transverse Myelitis. Commonly facilitate independent mobility assessments on behalf of local authorities.</td>
</tr>
<tr>
<td>Psychiatrist</td>
<td>Older people’s mental health; dementia; applied health research &amp; policy.</td>
</tr>
<tr>
<td>Psychiatrist</td>
<td>ASD and other complex mental health disorders in children, young people, adults and families/carers.</td>
</tr>
<tr>
<td>Rheumatologist</td>
<td>Paediatric rheumatology, pain management, lupus.</td>
</tr>
<tr>
<td>Rheumatologist</td>
<td>General rheumatology, inflammatory arthritis.</td>
</tr>
</tbody>
</table>

Source: Department for Transport

Q2: The EM states that an expert assessor will be able to certify that an applicant has the relevant disabilities where eligibility is not “self-evident”. Apart from certain entitlements to Personal Independence Payments are there other circumstances and conditions that can demonstrate self-evident entitlement and are these set out anywhere, for example in the guidance
A2: The Instrument includes an automatic (thereby self-evident) entitlement to a Blue Badge only for people who receive 10 points under the ‘Planning and Following Journeys’ activity of Personal Independence Payment (PIP), specifically because they ‘cannot undertake any journey because it would cause them overwhelming psychological distress’.

In assessing self-evident qualification, the guidance recommends decision-makers consider, in the context of walking between a parked vehicle and a destination, behaviours that include, but not are limited to, the applicant:

- Becoming physically aggressive towards others, possibly without intent or awareness of the impact their actions may have.
- Refusing to walk altogether, dropping to the floor or becoming a dead-weight.
- Wandering off or running away, possibly without awareness of surroundings or their associated risks (e.g. nearby roads, car park environments).
- Disobeying, ignoring and/or being unaware of clear instructions.
- Experiencing very severe or overwhelming anxiety (e.g. through hypervigilance).
- Experiencing an overwhelming sense of fear of public/open/busy spaces.
- Experiencing serious harm or causing serious harm to others.
- Avoiding some/all types of journeys due to the kinds of experiences listed above.

The decision-maker should consider each aspect of walking difficulty first in isolation, and then in combination, to reach a holistic decision as to whether they combine to meet the criteria. When considering the evidence and insights available to them, the decision maker should also need to:

- Satisfy themselves that no practical coping strategies could be adopted which might render the need for a Blue Badge unnecessary in most circumstances.
- Consider any views from healthcare professionals involved in the applicant’s ongoing care as to the relevance of a Blue Badge to the individual’s agreed treatment plan, and whether receipt of a badge would be in the applicant’s best interests.
- Consider the degree of severity and likelihood of any risks associated with serious harm to the applicant/others when they are out walking. Receipt of a Blue Badge would be expected to significantly reduce such risks, thereby enabling an applicant to make journeys in greater safety and/or complete journeys that they would not otherwise be able to undertake.

If an administrative member of a local authority Blue Badge team was unable to reach a decision (for example in particularly complex cases, or where a diagnosis has not already been reached by healthcare professionals), it is strongly recommended
that the view of an expert assessor is sought to review the evidence and insights collated on behalf of the local authority.

The guidance also suggests that local authorities may be able to improve the efficiency of the decision-making process by routinely checking existing council records to establish whether there is sufficient existing evidence on an applicant to determine whether an applicant is ‘selfevidently’ eligible, or otherwise.

2 May 2019
APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

At the meeting on 14 May, the Committee held an oral evidence session with Mr Nadhim Zahawi MP, Parliamentary Under Secretary of State for Children and Families, on the Children’s Homes etc. Inspection Fees, Childcare Fees, Adoption and Children Act Register (Amendment) Regulations 2019 (SI 2019/835). Lord Russell of Liverpool, who is not a member of the SLSC, also asked the Minister questions, and declared the following interest:

Lord Russell of Liverpool
*Governor, Coram (Thomas Coram Foundation for Children)*

**Attendance:**

The meeting was attended by Lord Chartres, Lord Cunningham of Felling, Baroness Finn, Lord Goddard of Stockport, Lord Haskel, Lord Kirkwood of Kirkhope, Baroness O’Loan, Lord Sherbourne of Didsbury and Lord Trefgarne. Lord Russell of Liverpool also attended.