

# IMMIGRATION BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### MEMORANDUM BY THE HOME OFFICE

#### INTRODUCTION

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Immigration Bill. The memorandum has been prepared by the Home Office and HM Treasury, the Department for Communities and Local Government, the Department for Health and the Department for Transport. The Home Secretary proposes to make a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights, on introduction of the Bill in the Commons.

#### **Summary**

2. The Bill is in 7 parts:
  - Part 1 makes provision for removal;
  - Part 2 makes provision for appeals;
  - Part 3 makes provision for access to services;
  - Part 4 makes provision for marriage and civil partnerships;
  - Part 5 makes provision for oversight;
  - Part 6 makes miscellaneous provision;
  - Part 7 makes final provisions.
3. The Department considers that clauses of and schedules to this Bill which are not mentioned in this memorandum do not engage rights protected under the ECHR.

#### **The ECHR and immigration control**

4. A primary aim of the Bill is to introduce measures that seek to make it more difficult for those who are not entitled to remain in the United Kingdom (herein referred to as illegal migrants) by limiting their access to services and benefits enjoyed by those legally resident here. A further important focus of the Bill is in measures designed to make it easier to remove illegal migrants from the United Kingdom. Proper consideration of the Convention compatibility of these Parts of the Bill therefore requires an understanding of the interaction between the ECHR and a State’s right to maintain immigration and border controls. To assist in this understanding the Department proposes to make some broad statements about United Kingdom immigration law, as well as the broad approach

the European Court of Human Rights (ECtHR) has taken to immigration controls when ECHR issues are raised, which will be relevant to the consideration of the ECHR compatibility of a number of the particular measures. This memorandum then contains a detailed analysis of the ECHR issues at play in respect of each Part of the Bill.

5. Like almost all other States the United Kingdom has for many years operated a system of immigration controls aimed at regulating which foreign nationals are entitled to enter and remain on its territory. The basis for the current system of immigration control is found in the Immigration Act 1971 which has been followed by a number of further pieces of primary legislation, with six important Acts passed since 1999, five of which were passed after the Human Rights Act 1998 came into force.<sup>1</sup> This primary legislation is supplemented by a number of pieces of secondary legislation and the Immigration Rules. This legislative framework regulates who may seek leave to enter the United Kingdom and who may seek to remain lawfully in the United Kingdom by reference to detailed criteria specified in the Immigration Rules.
6. Foreign nationals (other than those exercising EU rights) who wish to enter or remain in the United Kingdom must make a formal application to the Home Office (including at the border) who will grant or refuse the application. A person whose application is successful is given leave to enter or remain in the United Kingdom. This may be time limited or subject to conditions. Detailed legislative provisions referred to later in this Memorandum provide when a person has a statutory merits based appeal against that decision and when that appeal can be brought in the United Kingdom. That system allows applications to be made for asylum, humanitarian protection or human rights. The legislative framework also sets out the circumstances in which a person with leave may have their leave cancelled and how they, and persons without leave, may be forcibly removed from the United Kingdom. In Part III of the Immigration Act 1971 are a number of criminal offences relating to immigration. These include, under section 24 and 25, offences of knowingly entering the United Kingdom without leave, or remaining in the United Kingdom beyond the time limited by one's leave, as well as offences that apply to persons who facilitate illegal migration. Other parts of this legislative framework seek to prevent illegal entry to the United Kingdom by imposing obligations on carriers and hauliers. In addition, in order to deter illegal migrants from remaining in the United Kingdom, the Immigration, Asylum and Nationality Act 2006 sets out a statutory scheme to prevent illegal migrants from working in the United Kingdom. This is achieved through criminalising the knowing employment of a foreign national who is not allowed by United Kingdom immigration law to work, together with a civil penalty scheme that allows the Home Office to fine employers who employ illegal migrants where the required status checks have not been undertaken.
7. The Department would suggest that any analysis of the ECHR compatibility of this Bill needs to begin with the recognition that under the United Kingdom's current

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<sup>1</sup> Please see the definition of "Immigration Acts" in Schedule 1 to the Interpretation Act 1978.

immigration system foreign nationals in the United Kingdom who have a right to remain in the United Kingdom under our domestic law, the ECHR, or other international instruments, have the opportunity to exercise that right and to obtain, or maintain, legal status. The Department considers that this underlying proposition is relevant in particular to the measures in Part 3 on landlords, financial services and driving licences, as the persons to whom that Part will apply and for whom the legislation is seeking to limit access to services and benefits in the United Kingdom, could if they had a legal right to remain in the United Kingdom exercise that right, obtain lawful status and not be subject to those measures. Indeed, none of those measures themselves has any bearing on whether an individual foreign national has a legal right to remain in the United Kingdom.

8. As indicated, there are a number of underlying ECHR principles that the Department suggests are worth reciting before looking in detail at the ECHR compatibility of the different Parts of the Bill. The ECHR rights most commonly considered in the immigration context are Article 3 and Article 8. Of most relevance to this Bill are cases concerning Article 8 that contain a number of general principles about the ability of a State to enforce immigration controls where they might effect a person's right to respect for private and family life. The first key principle is that the ECHR does not guarantee the right of an alien to enter or reside in a particular country (see para 39 *Boultif* [2001] - 54273/00 [2001] ECHR 497) and that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (para 54 *Uner v Netherlands* (46410/99 [2006] ECHR 873). The ECHR cases then recognise that States enjoy a certain margin of appreciation when balancing the competing interests of the individual and of the community as a whole (para 68 *Nunez v Norway* - 55597/09 [2011] ECHR 1047). *Boultif* and *Uner* form part of a line of case law concerning the deportation of foreign criminals where the ECtHR has consistently recognised that the prevention of disorder and crime can be a justification under Article 8(2) for the expulsion of foreign criminals. A separate line of ECtHR case law including *Chandra v Netherlands* - 53102/99 (13 May 2003), *Rodrigues da Silva v The Netherlands* - 50435/99 [2006] ECHR 86, *Osman v Denmark* - 38058/09 [2011] ECHR 926 (para 58), *Nunez* (para 70) and *Antwi v Norway* - 26940/10 [2012] ECHR 259 (paras 87-93) confirms that immigration control is itself a legitimate aim under Article 8(2). This latter case law is recognised domestically as being based on immigration control being mainly a means of protecting the economic well being of a country (see para 18 of *ZH (Tanzania)* [2011] UKSC 4 and Elias LJ para 76 *Treebhowan* [2012] EWCA Civ 1054).
9. These broad principles were developed almost exclusively in the context of expulsion cases. They provide a basis for arguing that wider measures of immigration control are compatible with Article 8 where those who have a legal right to be in the United Kingdom can have their status recognised. It is suggested they provide the starting point for saying that as the United Kingdom can lawfully remove illegal migrants for both crime prevention and wider immigration control reasons, it can take other measures that

seek to encourage such persons to leave by limiting their access to services and benefits in the United Kingdom - provided such actions are in themselves proportionate and do not run counter to other ECHR rights such as Article 3.

10. A final introductory point concerns Article 14 ECHR. The Bill's measures are designed to reinforce the maintenance of immigration control, and it is integral to the concept of immigration control that some people are subject to it and some people are not. Those subject to immigration control are to be treated differently from those who are not. This is a fundamental assumption reflected in the Immigration Acts by the fact that a person subject to immigration control requires leave to enter or remain in the United Kingdom. He can be removed or deported from the United Kingdom in particular circumstances. He can be subject to coercive powers, for example, detention and he can have his biometrics taken and retained. The ECtHR has established in its case law that only differences in treatment based on identifiable characteristics or "status" are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*). But in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v The Czech Republic [GC]*, no. 57325/00, paragraph 175, ECHR 200). Then, such a difference of treatment is discriminatory if it has no objective and reasonable justification. The courts have held that States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom*, no. 13378/05, § 58, ECHR 2008). The scope of the margin will vary according to the circumstances, subject matter and the background (*Carson and Others v. the United Kingdom*, no. 42184/05, § 61, 16 March 2010). A wide margin is usually allowed to States when it comes to general measures of social policy because of their direct knowledge, unless it is "manifestly without reasonable justification" (*Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006). In *Bah v. the United Kingdom* 56328/07 [2011] ECHR 1448 (paragraph 46) The ECtHR confirmed that immigration status is "another status" under Article 14. However, it is suggested that for measures concerning actual immigration control there is no direct comparator between those subject to immigration control and those not – for example only the former require leave or can be removed from the United Kingdom. So this memorandum does not seek to justify those measures under Article 14. However, with the provisions in the Bill that restrict access to services the contrary can be argued. Accordingly, for those matters justification is given, noting that the margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status, which involves an element of choice, and the issue is a socio-economic one (*Bah v United Kingdom* [2012] 54 EHRR 21, paragraph 47).

## **PART 1: REMOVAL AND OTHER POWERS**

### **Single power of removal**

11. Clause 1 and related Part 1 of Schedule 8 (amendments relating to removals) simplify the processes in relation to decisions to remove foreign nationals who require but do not have leave to enter or remain in the United Kingdom. Currently, different categories of those who require but do not have leave are potentially subject to a number of different ‘decisions’. These can include refusal of leave to enter or remain, cancellation of leave to enter or remain, a decision to remove under paragraphs 8 to 10A of Schedule 2 to the Immigration Act 1971 (‘the 1971 Act’), a decision to remove under section 10 of the Immigration and Asylum Act 1999 (‘the 1999 Act’) or a decision to remove under section 47 of the Immigration, Asylum and Nationality Act 2006 (‘the 2006 Act’). Under current arrangements, the separate decisions to remove under either section 10 of the 1999 Act or section 47 of the 2006 Act both generate appeals. In addition, they introduce formal and potentially complicated steps which need to be taken before removal can be enforced.
12. Clause 1 amends section 10 of the 1999 Act, while paragraph 3 of Part 1 of Schedule 8 repeals section 47 of the 2006 Act. The result of the changes is that people who require but do not have leave may be removed without any further formal decisions having to be taken. Section 10 of the 1999 Act as amended provides that those who require but do not have leave may be removed under the authority of the Secretary of State, and that the Secretary of State may issue removal directions of the sort set out in paragraphs 8 to 10 of Schedule 2 to the 1971 Act. This will simplify the process of removing those who require but do not have leave, and will therefore complement the amendments to the appeals system in the Bill.
13. The changes introduced by these provisions do not allow people to be removed who cannot currently be removed. Nor do they affect common law principles of access to justice, which prevent removals taking place so quickly that those subject to removal decisions have no opportunity to challenge *Medical Justice v Secretary of State for the Home Department [2011] EWCA Civ 1710*). Rather, these provisions merely simplify the process of removal. Given that the ECHR is not concerned with the formal processes which states adopt in relation to removal, provided they do not deny an individual the right to an effective remedy under Article 13, it is considered that these provisions are clearly compatible with the ECHR.

### **Enforcement Powers**

14. Clause 2 and Schedule 1 make provision in respect of persons who are detained under paragraph 16 of Schedule 2 to the Immigration Act 1971 on the basis that they are required to submit to a further immigration examination, they have had their leave to enter or remain in the United Kingdom suspended pending a decision about whether or

not it should be cancelled or on the basis that there are reasonable grounds to suspect that they are someone in respect of whom removal directions may be given. These provisions may engage Article 8 and Article 1 of Protocol 1 of the Convention.

15. In particular paragraph 2 gives immigration officers a power to search detained persons for anything which might be used to cause physical injury or to assist in their escape from lawful custody. In practice this will be used in cases before an immigration officer escorts a detained person to a removal centre or short term holding facility to ensure their and the other person's safety. Where there are reasonable grounds for believing that anything found in pursuance of such a search might be used by the detained person as a weapon or to facilitate their escape, it can be seized and retained pending their release from detention.
16. This search power does not include a power to require the detained person to remove any clothing, other than an outer coat, jacket or glove, save where there are reasonable grounds to believe that they have an item that could be used as a weapon or to facilitate their escape concealed. Although there is a power to require the detained person to open their mouth for the purpose of a search, this is not to be construed as a power for the officer to physically search inside that person's mouth. In all cases, any search is only to be carried out to the extent that is reasonably required for the purpose of finding items that can be used to cause injury or assist in the person's escape and there is no power to carry out an intimate search.
17. The Department considers that any interference with Article 8 or Article 1 of Protocol 1 is in pursuance of a legitimate aim, namely public safety (including the safety of immigration officers when exercising their escorting functions) and the prevention of disorder or crime and that the statutory safeguards summarised above render this power proportionate to achieve those aims. Searches will only be undertaken for the very specific purposes prescribed and will only be carried out by immigration officers who have received proper training.
18. Paragraph 3 makes provision for immigration officers to obtain a warrant to search premises that are not obviously connected with a person who is liable to removal from the United Kingdom, for the purpose of finding relevant documents, namely those that might be used to facilitate that person's removal.
19. Although this search power permits immigration officers to search premises that are not obviously connected with a detained person (in the sense that they have not been occupied or controlled by the detained person), the court will only issue a warrant authorising the search of premises where there are reasonable grounds to believe that relevant documents may be found on those premises and where either it is not practicable to communicate with a person entitled to grant entry by consent or where such communication would frustrate or seriously prejudice the search. The further statutory safeguards which are applicable in relation to this power are contained in

sections 28J and 28K of the Immigration Act 1971 and include the fact that a search warrant only authorises entry on one occasion (s.28J(6)) and that it is to be executed within one month and should be conducted at a reasonable hour (s.28K(3)).

20. The Department considers that any interference with Article 8 or Article 1 of Protocol 1 is justified in pursuance of the legitimate aims of ensuring an effective immigration control, in the interests of national security and for the prevention of disorder or crime. Owing to the safeguards summarised above, it is also considered that the degree of any interference is proportionate in order to achieve those aims.
21. Paragraph 5 of Schedule 1 also makes provision to ensure that immigration officers have the power to use reasonable force when it is necessary in the exercise of their powers under any of the Immigration Acts, as defined at section 61 of the UK Borders Act 2007. This is to ensure that immigration officers have an explicit power to use reasonable force in the exercise of all their enforcement powers, for example when searching premises for evidence of nationality pursuant to section 44 of the UK Borders Act 2007 there is currently no express provision for reasonable force to be used.
22. The use of reasonable force, only where it is necessary to do so, does not itself provide a power of detention, nor does it reach the relatively high threshold of subjecting a person to inhuman or degrading treatment for the purposes of Article 3. The Department does not therefore consider that this clause is contrary to the Convention.
23. In addition to the above, immigration officers are bound to act in a manner that is compatible with a person's Convention rights pursuant to section 6 of the Human Rights Act 1998, as indeed is the justice of the peace when issuing a warrant under paragraph 5.

## **Bail**

24. Clause 3 and related Schedule 8 Part 2 introduce two changes to the bail regime in relation to immigration detention. First, they require changes to the Tribunal Procedure Rules and the Special Immigration Appeals Commission Rules so that the First-tier Tribunal ('FTT') and the Special Immigration Appeals Commission ('SIAC') will be required to reject without a hearing applications for bail under either paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 ('the 1971 Act') if they are made within 28 days of a previous, unsuccessful, application for bail and the applicant has not demonstrated a material change in circumstances. Second, they provide that the Secretary of State should be able to prevent bail being granted if removal directions have been set for a date within 14 days of the date of the decision on whether an applicant should be granted bail.
25. These provisions have the potential to engage Article 5(4) of the ECHR. The Department considers, however, that the provisions are compatible with the ECHR. The

provisions requiring the FTT and SIAC to reject bail applications without a hearing limit, rather than remove, the power to grant bail. They are intended to ensure that the resources of the FTT and SIAC are not wasted on repetitive and so unnecessary hearings.

26. The provisions allowing the Secretary of State to prevent bail being granted within 14 days of removal are also regarded as compatible. Refusal of bail in those circumstances is designed to facilitate removal. Bail applications in the FTT are not the means by which the lawfulness of detention is to be reviewed for the purposes of Article 5(4). Rather, the lawfulness of detention may be reviewed by applications for judicial review or *habeas corpus* applications (see *R (Konan) v SSHD [2004] EWHC 22 Admin*). It is established that applications to SIAC for bail may be a means by which the lawfulness of detention may be reviewed (see *R (Othman) v Special Immigration Appeals Commission, SSHD and Governor of HMP Long Lartin [2012] EWHC 2349 (Admin)*). But, first, the Secretary of State is not required to prevent bail when removal is scheduled to take place within 14 days of the application: she remains bound by section 6 of the Human Rights Act 1998. Second, it is still possible for those subject to SIAC bail to apply to the High Court for judicial review or a writ of *habeas corpus*.
27. The Department is therefore satisfied that these provisions are compatible with the ECHR.

### **Biometrics**

28. Clauses 4 to 10 and Schedule 2 are concerned with powers to obtain, use and retain biometric information. “Biometric information” is defined as information about a person’s external physical characteristics that can be obtained or recorded by an external examination, but this does not include information about a person’s DNA. Fingerprints and features of the iris are specified in the Bill as being biometric, but there is an order-making power (subject to the affirmative procedure) that will permit other types of information to be specified for these purposes.
29. The exclusion of DNA from this definition is relevant in view of the recent European judgement in the case of *S and Marper v United Kingdom, [2008] ECHR 1581*, in which a distinction was made between the level of interference with Article 8(1) constituted by taking and retaining DNA as opposed to taking and retaining fingerprints. Taking and retaining an individual’s DNA was regarded as particularly intrusive, given the amount of genetic and health information it contains and the purposes for which such samples and related data could potentially be used, both now and at a future date.
30. The Department accepts that any powers requiring a person to provide, and permitting the retention of, biometric information nonetheless constitutes some interference with a person’s private life under Article 8.

31. It is not accepted that these provisions engage Article 14 of the Convention for the reasons expressed in the introduction above. The powers to take and retain biometric information relate only to persons who are, or in respect of whom there are reasonable grounds to suspect that they are, subject to immigration control. All biometric information is to be destroyed as soon as reasonably practicable where the Secretary of State no longer thinks that its retention is necessary for use in connection with the exercise of an immigration or nationality function or where the Secretary of State is satisfied that the person to whom it relates is a British citizen or a Commonwealth citizen with the right of abode. Thus once a person's British citizenship application has been granted, biometric information held in relation to them will be destroyed and they will no longer be captured by the scope of these provisions. As stated above, the Department considers that this different treatment is not potentially discriminatory on the basis that a person who is subject to immigration control is not in a comparable category to a person who is not.
32. The Department considers that the taking and retention of biometrics achieves the legitimate aims of ensuring effective immigration controls, the prevention of crime and is in the interests of national security. Biometrics are stored on a dedicated immigration database and are used to check the individual's data when subsequent applications are made. Biometrics are essential to detect those travelling on false documents, those subject to a deportation or exclusion and those otherwise engaging in illegal activity, as well as where there are difficulties with establishing the identity of a person subject to immigration control. In this latter respect, their retention also makes it easier for those making further applications to come and stay in the United Kingdom.
33. The purpose in taking biometrics is to ensure that any subsequent applications/encounters can be matched against previous applications and that the identity of persons who enter and remain in the United Kingdom is thereby secured. It is accepted that many people who visit the United Kingdom depart at the end of their stay and never return to the United Kingdom. However, it is only possible to know this if their biometric information is retained and checked against subsequent applications/encounters. It is well-documented that there are a very significant number of people who have overstayed their leave or, having been refused leave, have gone to ground. It is not uncommon for these individuals to make subsequent claims, which, until the Home Office had the power to take and retain biometrics would often be in a different identity. That problem has significantly reduced *because* of the existing powers to take and retain biometrics.
34. The Department further considers that each of the new provisions in relation to the taking, use and retention of biometric information are proportionate in order to achieve these legitimate aims. The reasoning in support of this contention is addressed separately in relation to each provision below.

35. Clause 4 amends section 126 of the Nationality, Immigration and Asylum Act 2002 to provide the Secretary of State with a regulation making power to require the provision of biometric information from transit visa applicants and non-EEA nationals who are making or seeking to make an application for a document that evidences their entitlement to enter or remain in the United Kingdom (such as an EEA residence or family permit). It also provides that any regulations made under this provision, may apply generally or to any specified class of person, for example persons making or seeking to make a specified kind of application and may provide for biometric information to be recorded on any document issued as a result of the application in relation to which the information was provided.
36. In practice, part of the effect of this provision will be to ensure that persons applying for EEA documentation will have some of their biometric information uploaded onto that document so that it can be used to more quickly verify their identity and immigration status when engaging with the authorities. This provision is important for the following reasons:
- a. To verify the true identity of persons who submit applications for EEA documentation, thereby assisting in the identification of cases involving marriages of convenience (which nullify enforceable EU rights) and other abuses of Union law rights.
  - b. To support strategic plans to secure a biometric format standalone document as the principal means by which a non-EEA national can demonstrate their right to reside in the United Kingdom and gain access to employment or other entitlements such as social welfare benefits;
  - c. To ensure that non-EEA nationals with enforceable EU law rights can evidence those rights through a secure stand alone document which is biometric in format so facilitating their daily residence in the United Kingdom and the exercise of their free movement rights; and
  - d. To help ensure that documentation issued to non-EEA nationals with enforceable EU law rights should be (in some cases) in the format of a standalone card – not, as at present, in the format of a vignette (sticker) affixed to a passport.
37. Although this will introduce a new *category* of immigration applicants in respect of whom biometric information might be required, the Department considers that this provision is both a necessary and proportionate measure to achieve the legitimate aims of securing effective immigration controls and preventing crime and disorder for the reasons set out above. Accordingly, the Department considers that this clause is compatible with Article 8 of the ECHR.

38. Similarly, although clause 4 will also extend the categories of persons in respect of whom biometric information might be required when submitting immigration applications to transit visa applicants, the Department considers that the interference that this clause will have to the Article 8 rights is justifiable. It is the Home Office's stated aim to count the number of people coming into and leaving the United Kingdom in the pursuit of both immigration control and the prevention of crime and to establish a fixed and secure identity for individuals arriving in and entering the United Kingdom, linking biometric and biographic information. Taking the biometrics of all those requiring transit permission is fundamental to achieving this goal and to fulfil the aims of preventing crime and ensuring effective immigration control by ensuring that those who enter and depart the United Kingdom are travelling under genuine documents and identities.
39. Clause 5 amends paragraph 18 of Schedule 2 to the Immigration Act 1971 to provide immigration officers with a power to require biometric information from persons who are "liable to be detained under paragraph 16" of Schedule 2 to the Immigration Act 1971. Biometric information taken under this new power will, however, be used only for the purpose of verifying a person's identity (and thus immigration status) and will not be retained.
40. The Department recognises that there might be a degree of overlap in respect of this provision insofar as there is an existing power to require biometric information under section 141(7)(d) of the Immigration Act 1999, from persons who have been detained under paragraph 16 or those who have been arrested under paragraph 17 of Schedule 2 to the Immigration Act 1971, but the Department considers that this provision raises no new ECHR considerations and that it is therefore compatible with Article 8 of the Convention.
41. A person is "liable to be detained under paragraph 16(2)" where there are *reasonable grounds to suspect* that the person is someone in respect of whom removal directions may be given<sup>2</sup> (emphasis added). Any person who is "liable to be detained under paragraph 16" is automatically vulnerable to the paragraph 17 arrest power.
42. The objective behind this amendment is to enable immigration officers to ascertain whether or not their suspicions are well-founded by checking the person's fingerprints i.e. to establish whether or not the person is someone in respect of whom removal directions might *in fact* be given. This will mean that where it is established the immigration officer's suspicions are unfounded, the person will not be detained or arrested. Thus the effect of this provision is to limit the circumstances in which persons will be detained. Although an increased number of persons might be compelled to have their fingerprints checked under this new power, the objective is to only exercise the power in respect of persons who would in any event have been liable to arrest and its

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<sup>2</sup> Paragraph 16(2) of Schedule 2 to the IA 1971

exercise will in all cases be in pursuit of the legitimate aims of securing effective immigration controls and preventing crime and disorder.

43. Clause 6 amends section 41 of the British Nationality Act 1981, to provide the Secretary of State with a power to make regulations requiring a person making an application for British citizenship to provide biometric information in connection with that application. Provision is made for section 126(4) to (7) of the 2002 Act, which set out the framework within which regulations may be made and the circumstances in which the power to take biometric information might be exercised in relation to children, apply equally to regulations made under this power.
44. Although this will introduce a new *category* of immigration applicants in respect of whom biometric information might be required, the Department considers that this provision is both a necessary and proportionate measure to achieve the legitimate aims of securing effective immigration controls and preventing crime and disorder for the reasons set out above. Accordingly, the Department considers that this clause is compatible with Article 8 of the ECHR.
45. Clause 10 makes provision for a new regime governing the use and retention of biometric information taken for immigration purposes. In particular, this clause imposes an obligation on the Secretary of State to make regulations about the use and retention of biometric information that has been provided in accordance with regulations made under section 5 of the UK Borders Act 2007, section 126 of the Nationality, Immigration and Asylum Act 2002 or section 41(1)(bza) of the British Nationality Act 1981 and/or taken pursuant to section 141 and regulations made under section 144 of the Immigration and Asylum Act 1999.
46. Such regulations:
  - a) must provide that biometric information may be retained only if the Secretary of State thinks that it is necessary to retain it for use in connection with the exercise of an immigration or nationality function;
  - b) may include provision for retained biometric information to be used in connection with any of the following statutory purposes; the prevention, investigation or prosecution of an offence; for a purpose which appears to be required in order to protect national security; in connection with identifying victims of an event or situation which has caused loss of human life or human illness or injury; for the purpose of ascertaining whether any person has failed to comply with the law or has gained, or sought to gain, a benefit or service, or has asserted an entitlement, to which he is not by law entitled; or for any other purpose specified by regulations; and
  - c) must require the Secretary of State to take all reasonable steps to ensure the destruction of biometric information if it is no longer necessary for it to be retained for use in connection with the exercise of an immigration or nationality function or if the Secretary of State is satisfied that the person to

whom the information relates is a British citizen or a Commonwealth citizen with the right of abode. For example, biometric information will be destroyed where it is no longer likely to be of use for immigration purposes or once a person's British citizenship application is granted. The exception to this general requirement relates to photographs submitted as part of a person's British citizenship application pursuant to regulations made under section 41(1)(za) of the British Nationality Act 1981, which may be retained until their first British passport has been issued.

47. The practical effect of these provisions is that the approach currently taken in respect of the use and retention of biometric information, which is contained in section 8 of the UK Borders Act 2007, is strengthened and extended to cover all biometric information held by the Secretary of State. In particular, the general statutory ten year limit for the retention of biometric information taken under the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002 is removed.
48. In the case of *Marper v United Kingdom*, which post-dated the introduction of section 8 of the UK Borders Act 2007, the ECtHR held that the system – based on section 64 of the Police and Criminal Evidence Act 1984 - for taking and indefinitely retaining the fingerprints of two individuals who were arrested, later charged but not convicted, constituted an interference with their right to respect for private life under Article 8(1) and that this interference could not be justified under Article 8(2) as it was not proportionate to the aim pursued.
49. The Department considers that the biometrics measures in the Bill are distinguishable from those applicable to police officers that were considered in *Marper* and are, in any event, a proportionate response to the legitimate aims being pursued, notably securing effective immigration controls and the prevention of crime or disorder. The power of immigration officers to require the provision of biometric information, which is then retained on the Home Office database, relates only to persons who are subject to some form of immigration control, i.e. to persons who have no automatic entitlement to enter or remain in the United Kingdom and who are therefore required to make some form of immigration application for leave to enter or remain. Thus, whereas in the case of the section 64 powers available to the police they are potentially applicable to all persons in the United Kingdom, these provisions apply only to persons who have *sought* to enter or remain in the United Kingdom. The continued retention of biometric information relating to someone who has sought to enter or remain in the United Kingdom and who remains capable of being subject to immigration controls (i.e. before they acquire British or Commonwealth citizenship with a right of abode) is likely to be of continued relevance for the purpose of achieving the legitimate aims being pursued. For example, where a person has been deported from the United Kingdom the retention of their biometric information would be a key tool in being able to identify them should they make an attempt to enter the United Kingdom in breach of that deportation order or

lodge a subsequent immigration application. As stated above, biometric information is essential to detect those travelling on false documents, those subject to an expulsion order and those otherwise engaging in illegal activity, as well as where there are difficulties with establishing the identity of a person subject to immigration control. In this latter respect, the power to retain biometrics while a person is subject to immigration control and where it is necessary for use in connection with the exercise of an immigration or nationality functions is a high threshold that is considered to be proportionate to achieve the legitimate aims stated above.

50. Removal of the statutory ten year limit reflects the fact that prescribing a fixed maximum time limit for which biometric information is retained might be considered to be arbitrary. In some cases, illegal migrants remain undetected in the United Kingdom for in excess of 10 years and in some cases retaining a person's fingerprints for this length of time would be neither necessary nor proportionate. In addition there are those people who have been removed from the United Kingdom, for example a deported foreign criminal where to delete biometrics after 10 years would significantly affect the Home Office's ability to identify and prevent their re-entry to the United Kingdom. The details of when biometrics will be destroyed will need to be carefully considered for each category of applicant on the basis of when it is no longer necessary for them to be retained for use in connection with the exercise of an immigration or nationality function.
51. The detail of the retention scheme contained in regulations made under section 8 would in any event need to be compliant with Convention rights.
52. The power to retain the photographs of British citizens until they have been issued with their first British passport, is also necessary in pursuit of the legitimate aims of securing effective immigration control and preventing crime and disorder by ensuring that all applicants' identities are verified before they are registered or naturalised as a British citizen, thereby preventing imposters from wrongfully acquiring citizenship. It is imperative that the application photograph is retained until their first passport has been issued in order to ensure that British passports are not issued to persons other than British citizens.
53. For the reasons expressed above, the Department considers that this clause is necessary and proportionate in order to achieve the stated legitimate aims of securing effective immigration controls and preventing crime and disorder.

## **PART 2: APPEALS ETC**

### **Appeals**

54. Clauses 11 and 12 and Schedule 8 Part 4 deal with rights of appeal in the immigration context. Clause 11 substitutes a new section 82 of the Nationality, Immigration and

Asylum Act 2002, and provides for a right of appeal to the Tribunal where there has been a refusal of a protection claim, defined as a claim for asylum or humanitarian protection, or a human rights claim, or a revocation of refugee or humanitarian protection status. The procedure for making and determining these claims is set out in the Immigration Rules. Many of the claims will be made under Article 3 or Article 8, but it is possible for other human rights claims to be made.

55. Clause 11 also substitutes a new section 84 of the Nationality, Immigration and Asylum Act 2002 which provides for the grounds on which an appeal can be brought. Where the appeal is against the refusal of a protection claim, the appeal may be brought on the grounds that the removal of the appellant would breach the United Kingdom's obligations under the Refugee Convention, or to persons entitled to humanitarian protection, or would be unlawful under section 6 Human Rights Act. Where the appeal is against the refusal of a human rights claim, the appeal may only be brought on the ground that the decision is unlawful under section 6 Human Rights Act. Where the appeal is against the revocation of refugee or humanitarian protection status, the appeal may only be brought on the grounds that the decision to revoke would breach the United Kingdom's obligations under the Refugee Convention or to persons entitled to humanitarian protection.
56. Clause 11 amends section 85 of the Nationality, Immigration and Asylum Act 2002 which provides for the matters which the Tribunal may consider when an appeal is before it. The amendment substitutes a new section 85(5) to provide that a new matter, which is defined in a new subsection (6), may only be considered by the Tribunal where the Secretary of State has given the Tribunal consent to do so. This ensures that the Secretary of State is the decision-maker on such a claim.
57. Clause 12 substitutes a new section 92 of the Nationality, Immigration and Asylum Act 2002, which provides that where the claim to which the appeal relates was made while the person was in the United Kingdom, the person may appeal from within the United Kingdom unless the claim is certified under section 94(1), 94(7) or 94B. Clause 12 also inserts a new section 94B, which allows certain human rights claims brought by foreign criminals to be certified by the Secretary of State when removal would not breach the United Kingdom's obligations under the Convention, for example, where the appellant would not face a real risk of serious irreversible harm if removed to another country while the appeal is pending.
58. Clause 13 makes provision about the jurisdiction of the Special Immigration Appeals Commission but raises no ECHR issues. Schedule 8 Part 4 sets out minor and consequential amendments to Part 5 of the Nationality, Immigration and Asylum Act 2002.
59. As clause 11 provides for a right of appeal against the refusal of a human rights claim, a person has an effective remedy, which ensures compliance with Convention obligations.

It is noted that, while a person would have a right of appeal where a claim is made and refused under Article 6 (right to a fair trial), it has been established that Article 6 does not apply to the immigration decision itself (see *Maaouia v France (2001) 33 EHRR*). However, the right of appeal against the refusal and revocation of asylum and humanitarian protection also gives effect to the duty to provide an effective remedy against a refusal of asylum or a withdrawal of refugee status under Article 39 of Council Directive 2005/85/EC. The provision made in clause 11 that the permitted grounds of appeal relate directly to the decision in question but do not provide rights of appeal in relation to matters outside the scope of that decision, for example the refusal of a human rights application cannot be appealed on the basis that removal would be a breach of the United Kingdom's obligations under the Refugee Convention, also ensures compliance with Convention and human rights obligations as it provides an effective remedy to the appellant on the claim made.

60. Clause 11 removes the right of appeal against immigration decisions as defined in the previous version of section 82. It is submitted that removing these previous rights of appeal does not breach the Human Rights Act or the United Kingdom's obligations under the Convention. Clause 11 restructures appeal rights so that cases which do not raise human rights, asylum or humanitarian protection do not benefit from a right of appeal but where an asylum or human rights claim is made, a right of appeal will remain. Clause 11 therefore reflects the legal obligations to provide effective remedies for these decisions under the ECHR and EU law. If a person who is the subject of an immigration decision that is unappealable does wish to assert that his removal from the United Kingdom would be a breach of his human rights, they may make a human rights claim, and appeal against the refusal of that claim.
61. The changes to section 85(5) and (6) provided for in clause 11 will prevent the Tribunal from considering new matters that have not previously been considered by the Secretary of State in the context of a human rights or protection claim or a notice served under section 120 of the Nationality, Immigration and Asylum Act 2002, unless the Secretary of State has given the Tribunal consent to do so. This prevents an individual from raising new matters for the first time at the appeal hearing, except in cases where the Secretary of State considers that they can provide a fully reasoned response to the new matters raised such that it is appropriate for them to be dealt with at the appeal. But if the new matter cannot be dealt with in this way, the decision under section 82 will be withdrawn by the Secretary of State and the appeal will fall away under section 104. A fresh decision will be taken, having regard to the new matter raised, which could give rise to a new right of appeal. These arrangements ensure that the appellant will have one appeal, and remove the possibility that they may have a further right of appeal against the new matter raised at the appeal hearing. This provision therefore does not breach the Human Rights Act or the United Kingdom's obligations under the Refugee Convention and EU Directive as an effective remedy is provided where grounds are raised at the appropriate time.

62. In certain circumstances, rights of appeal can be removed or required to take place once the individual has left the United Kingdom. For example, there is a power to certify a claim in certain circumstances under sections 94 and 96 of the Nationality, Immigration and Asylum Act 2002. Under section 94, an appeal will be non-suspensive where it is certified as clearly unfounded, meaning that an appeal can only take place once the individual has left the United Kingdom. However, an individual is able to challenge the certification of their claim under section 94 by judicial review which is suspensive and will take place before removal from the United Kingdom. The effect of certification under section 96 is to remove the right of appeal altogether, however this will only arise where a person has already raised the ground of appeal at a previous appeal, or had the opportunity to raise the ground by virtue of a notice issued under section 120 of the Nationality, Immigration and Asylum Act 2002, but failed to do so. It is submitted that section 96 exists to ensure that the correct process is followed, and that appellants submit their grounds at the appropriate time, or to prevent them from arguing the same ground more than once. Had the individual followed the proper process, for which they had notice and ample opportunity, they would have been able to raise the matter on appeal. In addition, it is possible to bring a judicial review to challenge the certification under section 96 and the underlying refusal decision.
63. New section 94B may engage Article 13. However, it is considered to be compatible because the ECtHR has acknowledged that not all challenges to removal decisions need to be in-country. The ECtHR has drawn a distinction between challenges based on Articles 2 or 3, and those based on Article 8. In Article 2 or 3 challenges, if the challenge is arguable, there could be a real risk of serious irreversible harm if the person is removed before the challenge is heard. Consequently, a substantive challenge must be determined before removal. By contrast, in Article 8 cases, the ECtHR has said there will often be no such risk. Therefore challenges in such cases may be determined after removal. This issue was considered most recently in *De Souza Ribeiro v France* [GC], no. 22689/07 (at paragraph 82), and reflects the approach adopted in *MSS v Belgium and Greece* [GC], no. 30696/09 (see, for example, paragraph 388).
64. New section 94B only permits removal prior to an appeal where such removal would not breach the subject's human rights, including on the particular grounds that removal prior to the outcome of the appeal would not cause serious irreversible harm. It is therefore restricted to cases in which the human rights claim is clearly unfounded or, if arguable, would not give rise to a real risk of serious irreversible harm.
65. Nevertheless, in all cases there must be some suspensive means of challenging an assessment that removal prior to a substantive appeal being heard would not breach a person's human rights. This is and will continue to be achieved in the United Kingdom by adherence to the common law principles of access to justice, under which those subject to a removal decision will, subject to limited exceptions, have enough time to seek legal advice and lodge an application for a judicial review before removal is

carried out. Such principles were examined most recently by the Court of Appeal in *Medical Justice [2011] EWCA Civ 1710*.

## **Article 8**

66. An ECHR memo was issued when the new Immigration Rules were made in June 2012 which addressed many of the issues raised by this clause. These provisions are not an exhaustive list of the circumstances in which Article 8 issues arise in an immigration context. For example, they do not cover family life other than with a qualifying partner or child, or Article 8 claims based on “physical and moral integrity”. However, as with the relevant Immigration Rules, the provisions deal with the most common situations where Article 8 issues arise. The Immigration Rules will continue to provide for the detailed requirements for leave to enter or remain on the basis of family and private life, and will do so in the context of these provisions.
67. Clause 14 inserts into the Nationality, Immigration and Asylum Act 2002 a new Part 5A “Article 8 of the ECHR: Public Interest Considerations”. New section 117A of the 2002 Act requires a court or tribunal considering Article 8 in an immigration case to have particular regard to the public interest as defined in this Part. The ECHR cases recognise that States enjoy a certain margin of appreciation when balancing the competing interests of the individual and of the community as a whole (para 68 *Nunez*) and requiring the court to have particular regard to the public interest when considering the extent to which a decision is in breach of the right to respect for private and family life does not detract from the requirement of the court or tribunal to act compatibly with Convention rights.
68. New sections 117B and 117C set out some statements of the public interest, first for all Article 8 cases, and then additional considerations for cases involving foreign criminals. The impact of a statement of the public interest on the interpretation of Article 8 is explained in the recent case of *SS (Nigeria) v SSHD [2013]EWCA Civ 550* where the Court of Appeal, considering the provisions in the 2007 Act, confirmed the importance of this statement being endorsed by Parliament-

*“...the margin of discretionary judgment enjoyed by the primary decision-maker, though variable, means that the court's role is kept in balance with that of the elected arms of government; and this serves to quieten constitutional anxieties that the Human Rights Act draws the judges onto ground they should not occupy. These points matter especially where the area in question is controversial, as is the edge between a child's rights and the deportation of a foreign criminal...Where such potential deportees have raised claims under Article 8, seeking to resist deportation ...I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals...The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express*

*declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.”*

69. The proposed statements in the Bill reflect the principles which underlie the current Immigration Rules. Under each statement below there is a summary of the ECHR consideration and relevant case law.

***New section 117B(1): The maintenance of effective immigration controls is in the public interest.***

70. Whilst arguably self evident there are both ECtHR authorities and domestic authorities that support this basic proposition as described in paragraph 8 of this memo.

***New section 117B(2): It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English because persons who can speak English –***

- (a) are less of a burden on taxpayers, and  
(b) are better able to integrate into society.***

71. The Court of Appeal in *Bibi* [2013] EWCA 322 recently upheld the English language requirement in the Rules:

*“The pre-entry test was conceived as a benign measure of social policy with the purpose of facilitating the integration of non-English-speaking spouses. Where a State seeks to change its immigration rules in order to produce a benign result, it would be regrettable if, in order to justify the measure, whether pursuant to Article 8.2 or Article 14, it faced a burden which could only be discharged by irrefutable empirical evidence. The Secretary of State's perception is essentially one of predictive judgment. Many a well-intentioned social change is supported by a rational belief in its potential to achieve its benign purpose but without being susceptible to empirical proof prior to its introduction. It is for this reason that it is appropriate for the State authority to be accorded a margin of appreciation in the formulation of its social policy. Without such an indulgence, many benign reforms would be stifled in limine. Of course the implications of the change of policy may be so dubious that it is demonstrably not justifiable. However, in some situations a margin of appreciation has to be pitched at a level which allows for change, even if there is some risk to some individuals, that they will be adversely affected by it. The principle was articulated in *Stec v United Kingdom* (2006) 43 EHHR 47, a case concerning Article 14, together with Article 1 of the First Protocol, but relevant to the present case, not least because the appellants emphasise the discriminatory aspect of the pre-entry test requirement (to which I shall return). The Strasbourg Court said (at paragraph 52):*

*“... a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. ... Because of their*

*direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."*

***New section 117B(3): It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—***

***(a) are not a burden on taxpayers, and***

***(b) are better able to integrate into society.***

72. When considering the income threshold in the Rules the High Court, although objecting to the detail of the Rules, accepted the income threshold had a legitimate aim in *MM v SSHD* [2013] EWHC 1900 (Admin):

*"I am satisfied from the respondent's evidence and the submissions of Ms. Giovannetti QC that the measures both have a legitimate aim and are rationally connected with the aim. The Secretary of State is entitled to conclude the economic and social welfare of the whole community is promoted by measures that require spouses to be maintained at a somewhat higher level than the bare subsistence level set under previous interpretations of the rules. The facilitation of social integration by requiring some basic pre-entry knowledge of the English language was considered a legitimate aim justifying the interference with family life in Chapti/Bibi. Here the Secretary of State considers that an income above subsistence level is an important contribution to integration, and gives the foreign spouse sufficient resource to develop skills and community ties. Such a requirement may also serve to combat a negative view of family migration based on densely occupied extended family homes operating at a very basic level of economic sustainability. This reflects the approach of the AIT in the case of KA and others (Adequacy of maintenance) (Pakistan) [2006] where it observed:*

*'It is extremely undesirable that the Rules should be interpreted in such a way as to envisage immigrant families existing (and hence being required to exist, because social security benefits are not available to them) on resources less than those which would be available through the social security system to citizen families. To do so is to encourage the view that immigrant families need less, or can be expected to live on less, and in certain areas of the country would be prone to create whole communities living at a lower standard than even the poorest of British citizens.'*

*I agree with the AIT's observations in that case. In any event, the Secretary of State is entitled to conclude that public concern about immigration and its effects on British society, require a fresh approach to the maintenance requirements. She is accountable to a democratically elected Parliament for that policy choice.*

*I am further satisfied that she is entitled to make that judgment on the extensive data before her without having to demonstrate it by empirical proof. Such a consideration involves a political judgment for which again she is answerable to Parliament.”*

***New section 117B(4): Little weight should be given to -***

***(a) a private life, or***

***(b) a relationship formed with a qualifying partner,***

***that is established by a person at a time when the person is in the United Kingdom unlawfully.***

***New section 117B(5): Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.***

73. As indicated in the introduction to this memo the ECtHR case law has recognised that the ECHR does not guarantee the right of an alien to enter or reside in a particular country (see *Boultif*) and that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (*Uner*). In considering the proportionality balance the immigration status of the individuals is highly relevant. This is both the case where the individuals are unlawfully present and where their lawful status is short term. The United Kingdom immigration system permits lawful temporary migrants to subsequently “switch” and obtain status by reference to family life and private life provided certain conditions are met. However, to achieve status by reference to private life is dependent on long residence so in that sense a lawful short term migrant’s status is, bar a family connection, precarious (see *Aponte v Netherlands (App 28770/05 decision 3<sup>rd</sup> November 2011)*). In *Nunez* the ECtHR noted “Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where this is the case the removal of the non national family member would be incompatible with Article 8 only in exceptional circumstances.” This principle is recognised domestically, albeit issue has been taken with an “exceptional circumstances” test. The tension between these two approaches is discussed by the Upper Tribunal in *Izuazu [2013] UKUT 45(IAC)*, and considered below. The principles set out in new section 117B(4) and (5) are a reflection of both sets of case law.

***New Section 117B(6): In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where***

***(a) the person has a genuine and subsisting parental relationship with a qualifying child, and***

***(b) it would not be reasonable to expect the child to leave the United Kingdom.***

74. This is self-explanatory and is intended to broadly reflect case law. It provides that certain countervailing factors will not justify removal in an immigration case (it does not apply to criminals or other non-conducive deportations).

***New section 117C(1): The deportation of foreign criminals is in the public interest.***

***New section 117C(2): The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal.***

75. In addition to domestic law cases, such as *SS (Nigeria)* (see above), there is a line of ECtHR case law, including *Boulitif* and *Uner*, which has consistently recognised that the deportation of a foreign criminal for the prevention of disorder and crime is a legitimate aim under Article 8(2). Domestic case law has also recognised that deportation can serve to deter and to express society's revulsion at the offence (*N (Kenya)* [2004] EWCA Civ 1094). Indeed, where the offence is very serious and the person is not likely to re-offend, it is possible for "the sole or principal justification for the...deportation...[to be] the deterrence of others": *Samaroo and Sezek* [2001] EWCA Civ 1139. *Gurung* [2012] EWCA Civ 62 endorses this, noting further that the policy of deporting foreign criminals (whether or not they are likely to reoffend) through the UK Borders Act 2007 has Parliamentary endorsement.

***New section 117C(3): In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.***

***New section 117C(4): Exception 1 applies where C-***

***(a) has been lawfully resident in the United Kingdom for most of C's life,***

***(b) is socially and culturally integrated in the United Kingdom, and***

***(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.***

***New section 117C(5): Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.***

76. These new subsections recognise that for foreign criminals who receive sentences of below 4 years there may be circumstances where deportation may be contrary to Article 8. Exception 1 applies when considering the private life of a foreign criminal. Exception 2 applies to consideration of family life.

77. The jurisprudence on Article 8 private life does not establish a consistent line of authority as to what constitutes the minimum time spent in a particular country in order for private life to be prima facie established (contrast *Bouchelkia v France* [1997] ECHR 1 and *AA v UK* [2011] ECHR 1345). Having regard to a broad survey of Article

8 private life jurisprudence (relating to cases that involve criminality and non-criminality) and the absence of clear authority on this point, the Rules provide for 20 years' continuous residence to give rise to a right to stay on long residence grounds subject to countervailing factors such as criminality.

78. Where there is criminality there is a substantial body of ECtHR case law which explains the general approach to be applied when assessing the proportionality of a removal of a foreign national by reference to Article 8. But it primarily covers family life.
79. The ability to relocate outside the United Kingdom is a key factor. The case of *EB (Kosovo)* [2008] UKHL 41 rejected insurmountable obstacles as the correct test. However, in establishing the level of the threshold it is suggested it proceeded on the incorrect basis that the criterion of "reasonable expectation" which the ECtHR applied in *Boultif* applies to Article 8 removal/deportation cases across the board. It is clear from the ECtHR case law, however, that this is incorrect. The ECtHR applies the above criterion in cases in which couples have formed relationships in circumstances in which they themselves could not reasonably expect that they would face the risk of separation: the Court applies the different criterion of "insuperable obstacles" in cases in which the relationship was formed when the couple's situation was precarious, and they knew that this was so.
80. ECtHR caselaw is clear that the Convention does not guarantee a person/couple a right to reside in a particular country, and in respect of criminality in particular, there is a margin of appreciation afforded to states in setting the right balance. Most of the relevant cases involve family life, but in those cases the precariousness of the applicant's position in the United Kingdom and the need for insurmountable obstacles to exercising family life outside the United Kingdom were key. In *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, drawing on previous statements in its jurisprudence, the ECtHR explained the approach at para. 39, as follows:

*"The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Art.8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important*

*consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Art.8.”*

81. This has been repeated and adopted by the ECtHR as its reasoning in near identical terms in many cases since then<sup>3</sup>.

82. This case law amounts to clear and constant jurisprudence of the ECtHR. In *Nagre [2013] EWHC 720 (Admin)* the Admin court held that this test was still valid:

*“Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in “exceptional” or “the most exceptional” circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member’s own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8. In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case would nonetheless be disproportionate, one would need to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh.”*

83. However, with a slightly different focus in *Maslov v Austria [2009] INLR 47*, the ECtHR reviewed and reaffirmed its previous case law (notably *Boultif* and *Uner*), adding (paragraphs 74 and 75) that it is also necessary to have regard to the age at which the person came to this country and the extent to which he was brought up and educated here. In a sentence that is frequently cited (in subsequent ECtHR cases and domestically) the Court said that *“in the case of a settled migrant who is lawfully present and has spent the major part of his childhood and youth in this country very serious reasons are required to justify removal”*.

84. The Exceptions 1 and 2 have been formulated with these principles in mind. Exception 1 seeks to provide for the *Maslov* “settled migrant”. It is consistent with this approach to state that private life established or developed when immigration status is precarious should be given very little weight and, where there is in addition the public interest in

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<sup>3</sup> *Useinov v The Netherlands*, App.61292/00, ECtHR, decision of 11 April 2006; *Konstatinov v The Netherlands*, App. 16351/03, ECtHR, judgment of 26 April 2007, para. 48; *M v United Kingdom*, App. 25087/06, ECtHR, decision of 24 June 2008; *Omoregie v Norway*, App. 265/07, ECtHR, judgment of 31 July 2008, para. 67; *Y v Russia*(2010) 51 EHRR 21, para. 104; *Haghigi v The Netherlands*, App. 38165/07, ECtHR, decision of 14 April 2009; *Nunez v Norway*, App. 55597/09, ECtHR, judgment of 28 June 2011, para. 70; *Arvelo Aponte v The Netherlands*, App.28770/05, ECtHR, judgment of 3 November 2011, para. 55; *Antwi v Norway*, App. 26940/10, ECtHR, judgment of 14 February 2012, para. 89; *Biraga v Sweden*, App. 1722/10, ECtHR, decision of 3 April 2012, paras. 49-51; and *Olgun v The Netherlands*, App. 1859/03, ECtHR, decision of 10 May 2012, para. 43.

deporting a foreign criminal, the public interest will be in deportation unless there are very significant obstacles to the person relocating. The current Rules seek to deal with this category of person through a “no ties” test and the person having spent a significant amount of time in the United Kingdom. However, the recent Tribunal case law of *Ogundimu [2013] UKUT 60 (IAC)* has diluted this test, by saying a “tie” means something more than remote or abstract links to the country – rather that it involves there being a continued connection to life in that country; something which ties an applicant to his or her country of origin. This is fairly vague and open to interpretation and it is considered goes further than the ECtHR case law requires. Instead therefore the more precise language about integration is used in Exception 1 together with the requirement that the person has been in the United Kingdom for most of their life.

85. Exception 2 in new section 117C(5) is designed to capture the circumstances where the Article 8 case law would be likely to prevent deportation of a foreign criminal on family life grounds. The definitions of qualifying partner and child meaning those who are British, or those who are settled in the United Kingdom as partners or who have lived here for 7 years as children. In applying an “unduly harsh” rather than “insurmountable obstacles” test, particularly in respect of foreign criminals who are also illegal migrants. it reflects the principles in the current Rules and the domestic jurisprudence in this area such as *ZH (Tanzania)* that states the best interests of a child are a primary consideration, particularly where they are British. It also reflects judicial comment in domestic partner cases. It is intended to reflect the interpretation of “insurmountable obstacles” in ECtHR case law which applies a higher threshold than “reasonableness”. A discussion of these matters in a criminality case can be seen in *JO (Uganda) [2010] EWCA Civ 10* where the Court of Appeal states

*“Concentration on whether family members can reasonably be expected to relocate with the applicant ensures that the seriousness of the difficulties which they are likely to encounter in the country to which the applicant is to be deported (the relevant criterion in the Strasbourg case-law) is properly assessed as a whole and is taken duly into account, together with all other relevant matters, in determining the proportionality of deportation. One must not limit the enquiry to whether there are “insurmountable obstacles” or whether (in the language of Onur) it is “impossible or exceptionally difficult” for the family to join the applicant: a broader assessment of the difficulties is called for. As it seems to me, however, the actual language used is not critical (and the Strasbourg court itself has used various expressions in describing the seriousness of the difficulties of relocation in individual cases), provided that it is clear that the matter has been looked at as a whole and that no limiting test has been applied. It must also be borne in mind, of course, that even if the difficulties do make it unreasonable to expect family members to join the applicant in the country to which he is to be deported, that will not necessarily be a decisive feature in the overall assessment of proportionality. It is plainly an important consideration but it may not be determinative, since it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be*

*strong enough to render deportation proportionate even if does have the effect of severing established family relationships.”*

So Exception 2 is drafted to reflect this range of caselaw. It does not use the term “insurmountable obstacles” but instead draws on the concept of deportation having “harsh” consequences as mentioned in *Nagre*. The margin of appreciation granted to contracting states means that the United Kingdom is entitled to reach its own view on where the public interest lies in deportation.

***New section 117C(6): In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.***

86. The periods selected in the statements are not arbitrary, but are based on judgments in a number of fact specific domestic ECtHR deportation cases such as *Grant v UK* (App 10606, decision 8<sup>th</sup> January 2009), *Onur v UK* (App 27319/07, decision 17<sup>th</sup> February 2009), *AA v UK* (App 8000/08 decision 20 September 2011) and *Balogun* (App 60286/09, decision 2<sup>th</sup> September 2012) as well as the lead cases of *Uner* and *Maslov*. It is considered the approach is not out of kilter with the general tenor of these cases but it is accepted that some ECtHR decisions are more generous than others and therefore it is recognised in the statement that there may be some exceptions. A custodial sentence of at least four years represents such a serious level of offending that it will almost always be proportionate to outweigh any family life issues, even taking into account that the best interests of a child are a primary consideration. The four year threshold also accords with Parliament’s approach in enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which amended the rehabilitation periods in the Rehabilitation of Offenders Act 1974). A four year sentence will be the level at which an offence can never be spent. The consequence of this new section is that the court or tribunal will have to have regard to the public interest and that makes it clear that Parliament’s view is that falling within Exception 1 or 2 is not sufficient to displace the public interest in deportation. Rather, additional and/or different and more weighty considerations will be required.

### **PART 3: ACCESS TO SERVICES, ETC**

#### **Residential Tenancies**

87. Part 3 Chapter 1 provides for a prohibition on landlords renting property for the use of people disqualified from renting accommodation as a result of their immigration status and an associated civil penalty regime. Unless the Secretary of State gives permission otherwise, an adult who is not a British citizen or EEA national, and who has no right to be present in the United Kingdom is disqualified from renting or occupying property in

the private rented sector as his only or main residence. The civil penalty regime applies to landlords who allow the occupation of premises by this category of people in contravention of the prohibition.

88. There will be two circumstances where a contravention of the prohibition may arise. The first is where the landlord grants a residential tenancy agreement which, at the time of the grant, will confer a right to occupy to a person who is disqualified by their immigration status. The second is where a residential tenancy agreement has been granted at a time when the occupant is not disqualified but has limited leave to enter or remain in the United Kingdom, where that person subsequently becomes disqualified by their immigration status and remains in occupation of the premises.
89. The maximum penalty which may be issued by the Secretary of State will be £3,000 per adult illegal occupant and there will be a statutory code of practice setting out the matters which must be considered when determining the level of the penalty.
90. It is a defence for the landlord to demonstrate compliance with prescribed requirements which will involve checking, verifying where necessary and copying certain documents, or in the case of the second type of contravention, the prompt reporting of the occupant's presence to the Home Office. In the case of the second type of contravention, there is no requirement on the landlord to take any action to evict the occupant from the accommodation. Documentary checks will only need to be complied with at the point of grant for British citizens, EEA entrants and those with permanent permission to reside in the United Kingdom. For those who have limited leave to remain in the United Kingdom or who are subject to temporary admission, the document checks will need to be repeated at the later of (i) one year after the last check was made, or (ii) the date on which their period of leave, or the document which evidences their right to remain or rent in the United Kingdom expires. The specific requirements regarding the documentary checks will be specified in secondary legislation. There is a right of objection to the penalty to the Secretary of State and thereafter a right of appeal to the county court or sheriff.
91. Where a landlord makes specific arrangements for an agent who acts in the course of a business to undertake the checks on his behalf, then the agent will be responsible for the occupation of the premises and liable for any penalty which arises unless the agent can show that the prescribed requirements of checking and copying certain documents have been complied with, that reporting obligations have been met, or that the landlord was notified that the occupant was a disqualified person and the landlord granted the agreement despite the notification.
92. Schedule 3 sets out a number of arrangements which will fall outside the prohibition. These include grants made by social landlords where the landlord or local authority is already under a requirement to consider an occupant's immigration status before making a grant, arrangements made by local authorities in fulfilment of any statutory obligation,

this is broad enough to cover situations such as where arrangements are made for children and families under the Children Act 1989, for individuals provided with accommodation under the National Assistance Act 1948 and the Mental Health Act 1983. Accommodation provided by hostels for vulnerable individuals will not be subject to the prohibition. Accommodation provided as a result of another relationship between the landlord and tenant, such as where the premises are accommodation tied to a particular offer of employment, or accommodation provided to a student at a university, will not be subject to the restriction.

*Article 3 – Prohibition of torture, inhuman or degrading treatment*

93. Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. This threshold may be crossed if an individual with no means and no alternative sources of support, unable to support himself, is by the deliberate action of the state, denied shelter, food or the most basic necessities of life (per Lord Bingham in *R (Limbuella) v SSHD [2005] UKHL 66*).
94. The restriction on access to the private rental sector in order to secure an only or main residence will not have such an effect. Those persons who are disqualified from taking up residence as their only or main home in the private rented sector are those present in the United Kingdom in breach of the immigration laws, and in respect of whom it is considered there is no legitimate barrier which prevents them from leaving the United Kingdom. It is therefore open to them to make arrangements to leave the United Kingdom in order to access accommodation. Where it is accepted that there is a legitimate barrier which prevents an individual leaving the United Kingdom, the Secretary of State will have the discretion to grant them permission to rent under the scheme. Further, the exceptions provided for in Schedule 3 mean that the prohibition will not apply to all kinds of accommodation, and the vulnerable and those in need of additional support who are unable to support themselves will be able to access appropriate services.
95. The Department is therefore satisfied that the provisions are compatible with Article 3.

*Article 8 – Right to respect for private and family life and Article 14- Prohibition of discrimination*

96. The prohibition on the renting of property for occupation by a disqualified person and associated civil penalty scheme potentially engages Article 8 of the ECHR. While there is no right under Article 8 ECHR to be provided with housing (*Chapman v UK [2001] 33 EHRR 18*), the prohibition will prevent individuals from accessing the private rented sector in order to rent their only or main residence, and will further prevent individuals living together at privately rented premises as their only or main residence where one of them is disqualified from occupation by reason of their immigration status. It therefore

has the potential to impact on an individual's right to respect for his home, private and family life.

97. In relation to respect for an individual's home there will be no obligation on a landlord to evict an individual once in occupation. While an individual who is disqualified will not be able to establish a home in the private rented sector, if he has taken up residence at a time when he was lawfully present in the United Kingdom, the restriction will not result in the loss of a home once established.
98. The restriction on establishing a residence in the private rented sector as one's only or main residence prevents the individual living his own personal life as he chooses and potentially prevents him from living with members of his family and in that respect engages his right to respect for private and family life. However, the restriction can be justified on the basis that it is both necessary and proportionate in pursuit of the legitimate aim of immigration control. The restriction applies to those individuals who are present in the United Kingdom in breach of immigration laws. The restriction acts to support the effective operation of immigration controls by restricting the ability of persons subject to immigration control to obtain settled accommodation. An individual subject to the restriction has the option to seek to regularise their immigration status in the United Kingdom, which if successful will mean they are no longer subject to the restriction, or to leave the United Kingdom. Where an individual is present in circumstances where it is accepted there is a legitimate and/or practical barrier which prevents them from leaving the United Kingdom, the Secretary of State has the discretion to grant them permission to occupy premises under a residential tenancy agreement despite their immigration status. This will help ensure that the restriction is proportionate to the aim pursued and where the application of the restriction would produce a disproportionate impact, the effects can be ameliorated.
99. The restriction will also impact on the right to respect for family life enjoyed by both the individual themselves, and also British citizens, EEA Nationals, and those with an unlimited right to reside in the United Kingdom who will be prevented from arranging accommodation for themselves and any adult family member who is disqualified from occupation. This engages Articles 8 and arguably Article 14. In relation to Article 8, the restriction can be said to be justified and proportionate for the reasons stated above. In relation to Article 14, the margin of appreciation is relatively wide given the differential treatment is based on immigration status, which involves an element of choice, and the socio-economic nature of the subject matter (see *Bah v UK* [2012] 54 EHRR 21 paragraph 47). The restrictions here are therefore justified for the reasons set out above.
100. The Department is therefore satisfied that these provisions are compatible with Articles 8 and 14.

*Article 6 –Right to a fair trial*

101. In light of the case of *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (which concerned the compatibility with Article 6 of the carriers' liability scheme under the Immigration and Asylum Act 1999, the Court of Appeal held that the civil penalty scheme was criminal for the purposes of Article 6), it is likely that that the civil penalty scheme provided for in the Bill will be regarded as a criminal penalty for the purposes of the ECHR and that Article 6 is engaged. This view is taken on the basis that the scheme is designed to deter dishonest and careless conduct on the part of landlords and their agents. The essential nature of the liability involves a degree of blameworthiness as a result of which the penalty includes a punitive element, which points towards a criminal character.
102. Notwithstanding that classification, the scheme is compatible with Article 6. The features of the scheme which should safeguard against incompatibility with Article 6 are:
- The level of penalty is not fixed; it is subject to a statutory maximum.
  - There is to be a code of practice concerning the matters to be taken into account when determining the level of the penalty in any given case.
  - There is a right of appeal to the county court or sheriff. This is also a full reconsideration of the Secretary of State's initial decision and the decision on an objection. The court is able to consider evidence which was not before the Secretary of State and will have regard to the code of practice.
  - The statutory excuse is relatively easy for landlords and agents to demonstrate. It involves checking and copying specified documents or making a specific report, as opposed to disproving knowledge or demonstrating that reasonable care has been taken.
  - The excuse continues to be simple, even as regards occupants in relation to whom landlords will have to repeat the checks at specified intervals. There is no requirement on landlords to keep a continuous watch on the immigration status of their occupants.
  - The reverse burden is fair and proportionate.
103. One of the purposes of the code of practice is to ensure that the Home Office is consistent and fair in the manner in which it assesses the appropriate level of penalties. The factors which will be covered by the code in this regard are:
- The number of times when a warning or penalty has been issued to the landlord or agent in the past.
  - The level of penalty which is likely to be appropriate depending on the type of landlord or agent involved and the nature of the residential tenancy agreement.
104. A civil penalty scheme involves, by its very nature, a reverse burden. Civil penalties are imposed unilaterally by the Secretary of State, not as a consequence of a trial. It is for a

landlord or agent to demonstrate that he has complied with the prescribed requirements or that he is not liable to the penalty. Reverse burdens infringe the presumption of innocence. To be justified, they must be imposed in the pursuit of a legitimate aim and must be proportionate to that aim. Ensuring compliance with immigration legislation is a legitimate aim. The burden placed on landlords and agents who voluntarily assume responsibility is not onerous. Whether or not a landlord or agent has complied with the specified requirements is particularly within his knowledge. It will be almost impossible for the Secretary of State to prove a negative, i.e. that the document checks have not been done. Further, the introduction of clearer immigration documentation, the Home Office landlords' helpline and the landlord checking service will all assist landlords and agents.

105. Clause 28 requires the Secretary of State to issue a code of practice to landlords and agents specifying how to avoid contravening the Equality Act 2010 or the Race Relations (Northern Ireland) Order 1996 when complying with the provisions in this Bill.
106. It is proposed that the code of practice issued under clause 28 will be make similar provision to that issued to employers under section 23 of the Immigration, Asylum and Nationality Act 2006. That code clearly provides (at paragraph 7.3) that “The best way to ensure that you do not discriminate is to treat all applicants in the same way at each stage of the recruitment process”. Clause 28 requires that the Commission for Equality and Human Rights and the Equality Commission for Northern Ireland are consulted on the draft code of practice. In addition, the importance of avoiding unlawful discrimination will continue to be emphasised in the comprehensive guidance for landlords and agents, with specific reference to the code of practice on the avoidance of race discrimination and emphasis on the importance of treating all prospective occupants in the same way.
107. The Department is therefore satisfied that these provisions are compatible with Article 6.

*Article 1 of the First Protocol – Protection of property*

108. Article 1 of the First Protocol may be engaged where a landlord is prevented from peaceful enjoyment of their possession because they are unable to let their property to a certain category of persons. Such interference is in the public interest to ensure compliance with immigration legislation and is proportionate as the requirement is to ensure prescribed measures are complied with in order to ascertain the status of the person wishing to lease premises to prevent a breach of immigration legislation.

## National Health Service

109. This part of the memo examines the human rights implications of the Bill provisions concerning access to free NHS care by those subject to immigration control. A person subject to immigration control who applies for entry clearance or for limited leave to enter or remain in the United Kingdom other than as a visitor may be required to pay an immigration charge. This is to ensure the law reflects the policy that different immigration statuses entitle the individual to have greater or lesser access to benefits and entitlements in the United Kingdom, including access to NHS care for free, and to ensure that free NHS access does not act as an incentive for temporary migration. Clause 33 provides the power for the Secretary of State to make an order to effect this policy. Entry clearance or leave will only be granted if the person pays the charge. The charge amount will be set by secondary legislation, taking into account the range of health services that will be available free of charge to persons given entry clearance or leave, amongst other matters. The payment will be non-refundable even if the person returns to their home country early, or does not actually use the NHS.
110. There is the power under clause 33(3) to provide for exemptions from the charge and to provide for a waiver, reduction or refund of the charge.
111. Clause 34 places a gloss on the references to “persons not ordinarily resident” in section 175 of the NHS Act 2006, section 98 of the NHS (Scotland) Act 1978, section 124 of the NHS (Wales) Act 2006, and Article 42 of the Health and Personal Social Services (Northern Ireland) Order 1972 (1972/1265). These provisions essentially contain the powers to charge those who are not ordinarily resident in the United Kingdom for NHS access.<sup>4</sup> Clause 34 provides that a person who needs leave to enter or remain in the United Kingdom, but does not have it, and a person who has limited leave to enter or remain in the United Kingdom, is not “ordinarily resident” for the purposes of the charging regulations i.e. can be subject to charges for NHS access.
112. The effect of this is to make clear that those who need leave but who do not have it, and those who have limited leave, can be subject to charges for NHS access commensurate with their immigration status (under the existing powers to make secondary legislation made by the Department for Health and devolved administrations for health purposes).
113. This means those who have leave in a visitor category, are on temporary admission or who are in the United Kingdom unlawfully, will continue to be subject to the charging regime under secondary legislation made under section 175 of the NHS Act 2006 and

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<sup>4</sup> “Ordinarily resident” under the current law bears its ordinary meaning of a person “habitually and normally resident... apart from temporary or occasional absences of long or short duration.” *Shah v Barnet LBC [1983] 1 All ER 21*. The residency must be voluntary, lawful (i.e. not in breach of the immigration laws), and entail a degree of settled purpose as part of the regular order of a person’s life. Settled purpose can be achieved on the first day of arrival in the UK.

devolved equivalents.<sup>5</sup> The existing secondary legislation currently contains exceptions for health purposes – so that no charges are currently imposed for access to A&E, nor for treatment of serious communicable diseases, for instance. The secondary legislation also excepts certain categories of migrant from charges including asylum-seekers or refugees.

114. Those who have limited leave to enter or remain will, following the changes to be made to Clause 34, will be able to be subject to charges for NHS access under the powers listed in Clause 34(2).

115. It should be noted that no-one is denied access to NHS treatment under the existing system and this is not expected to change. Those who are liable to pay NHS charges are charged for the treatment received, but treatment is not held up for payment where the treatment is urgent or immediately necessary.<sup>6</sup>

#### *Article 2 and 3 ECHR*

116. It is not considered that these proposals engage Article 2 or 3 ECHR. Under the existing law, migrants who are not ordinarily resident, and who are chargeable for NHS care, are able to access emergency treatment for free.<sup>7</sup> Other exemptions from charging are set out in the existing secondary legislation on public health grounds, for example, for specified communicable diseases. Even where a person is liable to pay charges under the existing secondary legislation, the treatment they need is not held up for payment where the treatment is urgent or immediately necessary. This existing system of charging and exemptions is compatible with Article 2 and 3 ECHR.

117. While the exercise of the powers to charge for health purposes listed in Clause 34(2) are for the Department of Health and the devolved administrations to determine in their respective areas, there is no suggestion that those who will become liable for charging under the Bill provisions (by the gloss on the definition of “ordinary residence” in clause 34(1)) would not benefit from the same health-related exemptions from charging. The Department considers the provisions are compatible with Article 2 and 3 ECHR, just as the existing system is.

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<sup>5</sup> In England, the relevant regulations are the NHS (Charges to Overseas Visitors) Regulations 2011<sup>5</sup>. In Scotland – the NHS (Charges to Overseas Visitors) (Scotland) Regulations 1989 (S.I. 1989/364). For Northern Ireland the Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005 (SR 2005 No 551) as amended by SR 2008 No 377 and SR 2009 No 186. For Wales the National Health Service (Charges to Overseas Visitors) Regulations 1989 (S.I. 1989/306).

<sup>6</sup> There are existing immigration consequences for a person who does not pay NHS debts for charges of £1000 or more. See under paragraph 320(22) and 322(12) of the Immigration Rules which provides that a person’s application for entry clearance or leave to remain may be refused if they have unpaid NHS charges of £1000 or more.

<sup>7</sup> In England, under Reg 6 SI 2011/1556; in Scotland, under Reg 3 SI 1989/364; in Wales, under Reg 3 SI 1989/306; in NI, under Reg 4 SR 2005/551.

### *Article 8 ECHR*

118. It is not considered that the proposals are contrary to Article 8 ECHR. Under the provision the Secretary of State will have the power to waive the charge – clause 33(3)(f) and to the extent it may interfere with the right to respect for family life this power will have to be exercised with regard to the need to ensure compatibility with Convention rights.
119. Similarly, the Department does not believe that the charge amounts to an interference in the private life of other migrant groups, such as students or those coming to the United Kingdom to work, even through the grant of entry clearance or leave will be conditional on payment of the charge. Private life rights do not entitle a person subject to immigration control to come to study or work in the United Kingdom without restriction (please see opening discussion of Article 8 principles and case-law). Requiring payment of a fair contribution to public benefits in the United Kingdom which a person has the potential to access, commensurate with their more limited immigration status, does not amount to an interference in a person's private life. Alternatively, any such interference is necessary for the economic well-being of the country, and is proportionate for the same reasons.

### *Article 1 Protocol 1*

120. The Department does not consider that the charge provisions engage Article 1 of Protocol 1 to the ECHR. The charge is a payment in exchange for a clear benefit which otherwise a person with limited immigration status, with a limited connection to the United Kingdom, should not benefit from. There is a clear choice as to whether a foreign national wishes to come to the United Kingdom. Alternatively, any deprivation of possessions is justified in the public interest and is proportionate. The legislation reflects the policy that different immigration statuses convey different levels of benefit and entitlement to the person – including access to NHS care for free. Those with temporary immigration status – who do not have the same commitment to and connection with the United Kingdom as those with the status of indefinite leave to enter or remain – should not have the entitlement to access NHS care without contributing. The charge is a proportionate means of ensuring that those with this lesser immigration status can only access NHS care for free on making this contribution to the operation of the health service. The amount of charge payable will only be set by secondary legislation at a proportionate level, taking into account the range of health services that will be available free of charge to persons given entry clearance or leave.

### *Article 14 ECHR*

121. It is not considered the charge amounts to a discriminatory interference in Article 8 rights or Article 1 of the First Protocol, contrary to Article 14 – on the grounds that a temporary migrant may be liable to pay the charge while they are in the United

Kingdom but a permanent migrant or British citizen is not liable to pay such a charge, even if the British citizen is not working or contributing to the United Kingdom through taxes.

122. The Immigration Acts provide for different citizenship and immigration statuses with a greater or lesser nexus to the United Kingdom – on a spectrum from a British citizen to an illegal migrant. The degree of a person’s connection with, and past and ongoing commitment to, the United Kingdom is an integral part of the different immigration statuses. Those with citizenship or immigration status with a closer connection to the United Kingdom rightly have a greater entitlement to public benefits – including free NHS access. As such, temporary migrants are arguably not in a comparable position to permanent migrants or British citizens in this respect. Alternatively, the proposals are objectively justified for the same reasons in light of the wide margin of appreciation that is given to differential treatment based on immigration status, which involves an element of choice, and the socio-economic nature of the subject matter (see *Bah v UK* [2012] 54 EHRR 21 paragraph 47). The restrictions here are therefore justified for the reasons set out above.

### **Bank Accounts**

123. Clauses 35 to 38 provide for a prohibition on banks and building societies opening current accounts for persons who are disqualified as a result of their immigration status and an associated penalty framework to be put in place, to be administered by the Financial Conduct Authority. A person is disqualified from opening an account where they are present in the United Kingdom in breach of immigration laws and the Secretary of State has indicated that they should not be permitted to open a current account. This indication will be made by providing information about the individual to a specified anti-fraud organisation.
124. The bank or building society will not contravene this prohibition where they can demonstrate compliance with a prescribed checking regime:, where the bank or building society can demonstrate that it checked the account applicant’s details with the specified anti-fraud organisation prior to opening the account and, that check did not indicate the individual was disqualified, or where it was not possible to carry out such a check for reasons outwith the bank or building society’s control, it will not have contravened the prohibition.
125. Clause 36 makes provision for HM Treasury to make regulations which will enable the Financial Conduct Authority to make arrangements to monitor and enforce compliance with the prohibition. It is anticipated that a bespoke enforcement and sanctions regime will be put in place, as has been done in other instances - see for example the Money Laundering Regulations 2007, which will not raise any issues under the ECHR.

*Article 3 – Prohibition of torture, inhuman or degrading treatment*

126. Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. This threshold may be crossed if an individual with no means and no alternative sources of support, unable to support himself, is by the deliberate action of the state, denied shelter, food or the most basic necessities of life (per Lord Bingham in *R (Limbuella) v SSHD [2005] UKHL 66*). The restriction on access to current accounts will not have such an effect. Those persons who are disqualified from opening a current account are those present in the United Kingdom in breach of the immigration laws, and in respect of whom it is considered there is no legitimate barrier which prevents them from leaving the United Kingdom. It is therefore open to them to make arrangements to leave the United Kingdom in order to access such an account. A disqualified person will not be prevented from making cash payments to support himself.
127. Where an individual is present in circumstances where it is accepted there is a legitimate barrier which prevents them from leaving the United Kingdom, and they require access to open a current account, (for instance it is possible that a person who would otherwise be refused an account on the basis of their immigration status could be responsible for administering the financial affairs of a person who is not subject to immigration control, but who is unable to manage their own affairs) the Secretary of State has the discretion to allow them to open an account, by not referring their details to the specified anti-fraud organisation. This will help ensure that the restriction is proportionate to the aim pursued and where the application of the restriction would produce a disproportionate impact, the effects can be ameliorated.
128. The Department is therefore satisfied that these provisions are compatible with Article 3.

*Article 8 – Right to respect for private and family life and Article 14- Prohibition of discrimination*

129. The restriction on access to current accounts potentially engages the right to respect for one's private life provided by Article 8 ECHR. There is no watertight division which separates the sphere of social and economic rights from the field covered by the ECHR and where a restriction impacts on an individual's ability to develop relationships with the outside world to a significant degree and creates serious difficulties in terms of earning a living with repercussions for the enjoyment of private life, it will engage Article 8 (see *Sidabaras v Lithuania [2006] 42 EHRR 6*). The restriction on disqualified individuals will prevent them accessing a particular type of account, a current account. It will not itself impact on the right to earn a living, as the group affected will not have the right to work in the United Kingdom, nor will it prevent them from participating in any economic activity that does not require the operation of a current account. On this basis it is considered the restriction will not impact on an individual's ability to develop

relationships with third parties to any significant degree and so does not engage Article 8.

130. In the event that the restriction was found to engage Article 8, it could in any event be justified on the basis that it is both necessary and proportionate in pursuit of the legitimate aim of immigration control. The restriction applies to those individuals who are present in the United Kingdom in breach of immigration laws. The restriction acts to encourage such individuals to leave the United Kingdom, and so supports the effective operation of immigration controls. The individuals subject to the restriction have the choice to leave the United Kingdom, following which the restriction will no longer apply to them. Where an individual is present in circumstances where it is accepted there is a legitimate barrier which prevents them from leaving the United Kingdom, the Secretary of State has the discretion to enable them to open an account despite their immigration status. This will help ensure that the restriction is proportionate to the aim pursued and where the application of the restriction would produce a disproportionate impact, the effects can be ameliorated.

131. The Department is therefore satisfied that these provisions are compatible with Article 8.

132. If the restriction were found to be within the ambit of Article 8, Article 14 could arguably be engaged on the basis that a disqualified person is unable to interact and form relationships with the wider community in the same manner that a person who is not subject to immigration control would be free to. In relation to Article 14, the margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status, which involves an element of choice, and the issue is a socio-economic one (*Bah v United Kingdom [2012] 54 EHRR 21, paragraph 47*). The restriction can be said to be justified on an objective and rational basis: it is intended to encourage individuals who are present in breach of the immigration laws to leave the United Kingdom and so support the effective operation of immigration controls. The effect of the measure will also be proportionate to that aim, as the restriction will not be applied on a blanket basis, but targeted against those individuals who may be expected to make arrangements to leave the country. Should the impact of the restriction be disproportionate in a particular case, the Secretary of State retains the discretion to allow a person to open a current account notwithstanding their immigration status.

133. For these reasons, the Department is satisfied that these provisions are compatible with Article 14.

### **Driving Licences**

134. Clauses 41 and 42 make provision to ensure that persons, who require leave to enter and remain in the United Kingdom but do not have it, are not entitled to full or provisional United Kingdom driving licences.

135. In particular clause 41 provides that persons, who would otherwise qualify for a United Kingdom driving licence, but are not lawfully resident in the United Kingdom fail to meet the relevant residence requirement, thereby removing the statutory obligation on the Secretary of State to grant them a licence<sup>8</sup>. There is, however, nothing to prohibit the Secretary of State from exercising discretion in favour of granting such persons a driving licence and, even where a refusal decision has been made, there is no limitation on the number of subsequent driving licence applications that such individuals can submit. Once a person, who otherwise qualifies for a United Kingdom driving licence, has obtained the leave that they require to enter and remain they would therefore be automatically eligible. Although there is no statutory appeal mechanism, refusal decisions are already subject to the ordinary principles of judicial review.
136. Clause 42 provides the Secretary of State with a power to revoke the driving licences of persons who are not lawfully resident in the United Kingdom. The statutory right of appeal to a magistrates' (or sheriff, in Scotland) court, which already exists in relation to the revocation of driving licences on certain other grounds<sup>9</sup>, will apply in respect of such decisions, albeit that any question as to whether or not the appellant should be or should have been granted leave to enter or remain in the United Kingdom is not to be entertained. The questions that will fall to be determined by a magistrates' or sheriff's court in such cases is whether or not the appellant – as a matter of fact – required leave to enter and remain in the United Kingdom and if so, whether or not the appellant had that leave. On any such appeal, the court may make such order as it thinks fit and that order shall be binding on the Secretary of State.
137. These provisions arguably might engage Articles 6, 8, 14 and Article 1 of Protocol 1 of the ECHR.
138. The Department recognises that a refusal to grant, or the revocation of, a driving licence might be seen as an interference with the right to respect for private life, especially in cases where that person has been on temporary admission in the United Kingdom for a significant period of time awaiting a decision as regards their immigration status<sup>10</sup>.
139. The ECtHR has remarked that the issuing of a driving licence is “*undoubtedly an administrative procedure and is aimed at ensuring that a driver is fit and qualified to drive on the public highway*”<sup>11</sup>. The Court has also remarked that once a driving licence has been granted, its revocation might have the *de facto* effect of engaging Article 6 and Article 1 of Protocol 1, insofar as it could be seen as the bringing a criminal charge<sup>12</sup>,

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<sup>8</sup> Section 97(1) of the Road Traffic Act 1988 and Article 13(1) of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154)

<sup>9</sup> Section 100 of the Road Traffic Act 1988 and Article 16 of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154)

<sup>10</sup> *Dawit Teckle v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin) at paragraph 36 in which an individual's ability to develop social relations with others in the context of employment and to develop an ordinary life was found to be an aspect of private life.

<sup>11</sup> *Escoubet v Belgium* (Application no. 26780/95), paragraph 34 of the judgment

<sup>12</sup> *Ibid.* paragraph 35 of the judgment

the determination of a civil right<sup>13</sup> and the deprivation of a person's possessions. In cases of revocation persons who require leave to enter or remain in the United Kingdom are also being treated differently from those who do not and it might be suggested that this engages Article 14 of the Convention.

140. In concurrence with some of these remarks, the Joint Committee on Human Rights has stated that:

*“In our view, the decision to suspend a licence or passport would clearly involve the determination of a civil right or obligation, in so far as it would remove an otherwise lawfully obtained licence or travel document and would interfere with an individual's right to respect for private life and could interfere with his or her ability to work or conduct a business.”*<sup>14</sup>

141. The Department does not consider that the revocation power in fact amounts to the *de facto* bringing of a criminal charge within the meaning of Article 6 of the Convention. Its exercise does not presuppose any investigation or finding of guilt and is totally independent of any criminal proceedings which may subsequently be brought in relation to the person. Moreover, and despite the fact that it is partially intended to have a deterrent effect on those who are unlawfully resident in the United Kingdom, the measure also builds upon the concept of a “normal residence requirement”, which is one of the minimum EU standards laid down in respect of the granting of driving licences<sup>15</sup>, designed to prevent driving licence tourism and fraud and to ensure that persons resident in the EU hold only one driving licence.

142. For the reasons expressed in the introduction above, the Department considers that there are arguments that the revocation power does not engage Article 14 of the Convention either; persons who require leave to enter or remain in the United Kingdom are not in a comparable position to those who do not in these circumstances. However, if it does, the margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status, which involves an element of choice, and the issue is a socio-economic one (*Bah v United Kingdom* [2012] 54 EHRR 21, paragraph 47). The restriction can be said to be justified on an objective and rational basis: it is intended to encourage individuals who are present in breach of the immigration laws to leave the United Kingdom and so support the effective operation of immigration controls.

143. The Department considers that any interference with the other Convention rights is nevertheless in pursuance of a legitimate aim, namely ensuring effective immigration controls and preventing crime and disorder. The measures are also considered to be proportionate on the basis that persons, who would - but for their unlawful residence - have been entitled to a United Kingdom driving licence, will be automatically eligible

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<sup>13</sup> *Pudas v Sweden* (Application no. 10426/83), paragraphs 42 to 45 of the judgment

<sup>14</sup> See the fourteenth report for the 2008/09 session, in relation to the Welfare Reform Bill, paragraph 1.76

<sup>15</sup> Council Directive 2006/126/EC

for a licence once their immigration status has been regularised. The applicable guidance will also ensure that the powers are exercised in a proportionate way. Not only will illegal migrants be warned about becoming ineligible for a driving licence and the possibility of having an existing licence revoked when they are sent their immigration refusal decision but also, in cases of revocation, the Home Office will tell them 28 days in advance of their intention to request that the DVLA revoke their driving licence, thereby providing the individual with an opportunity to make representations against revocation. Moreover, if a decision to revoke is ultimately taken, it will only take effect five days from the date contained on the revocation notification letter, minimising the risk that a person will inadvertently commit the criminal offence of driving otherwise than in accordance with a licence.

144. Specifically in relation to the possible engagement with Article 6 of the Convention on the basis that the revocation of a driving licence might constitute the determination of a civil right, the avenue for redress in the magistrates' or sheriff's court, which are ECHR compatible tribunals in respect of certain other revocation decisions, is considered to be adequate to further satisfy the obligations under Article 6.

#### **PART 4: MARRIAGE AND CIVIL PARTNERSHIPS**

145. Part 4 of the Bill makes provision about investigations into whether a proposed marriage or civil partnership is a sham. The Secretary of State may not decide to investigate unless two conditions set out in clause 43 are met. These are (a) that only one of the parties to the marriage/civil partnership is an exempt person or that neither of them is, and (b) that the Secretary of State has reasonable grounds for suspecting that the proposed marriage/civil partnership is a sham.

146. A person is exempt if (a) they are a British citizen, EEA national or Swiss national, (b) they have settled status in the United Kingdom, are exempt from immigration control or have a right of permanent residence under EU law, or (c) they hold a relevant visa in respect of the proposed marriage or civil partnership. New definitions of sham marriage and civil partnership are substituted in sections 24 and 24A of the Immigration and Asylum Act 1999 by clause 49. The proposed new definition of sham marriage is as follows –

“A marriage (whether or not it is void) is a “sham marriage” if –

- (a) either, or both, of the parties to the marriage do not meet the nationality requirement,
- (b) there is no genuine relationship between the parties to the marriage, and
- (c) either, or both, of the parties to the marriage enter into the marriage for one or more of these purposes –
  - (i) avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules;

- (ii) enabling a party to the marriage to obtain a right conferred by that law to reside in the United Kingdom.”

There is a similar definition of “sham civil partnership”.

- 147. Where a couple give notice of marriage, superintendent registrars of births, deaths and marriages will be required to decide whether each of the parties to the proposed marriage is an exempt person. If the decision is that either or both is not an exempt person, the superintendent registrar must refer the proposed marriage to the Secretary of State. This duty to refer will apply also where a party to the proposed marriage is not an exempt person on the basis of their nationality and where they do not produce the prescribed evidence to establish that they are exempt on the basis of their immigration status. Equivalent provisions will apply to civil partnership. There are also existing provisions in section 24 of the Immigration and Asylum Act 1999 whereby a superintendent registrar to whom notice of marriage is given who has reasonable grounds for suspecting that the marriage is a sham must report his suspicions to the Secretary of State. The equivalent provisions for civil partnership are in section 24A.
- 148. Where a marriage or civil partnership is referred to the Secretary of State under the provisions in the Bill, the Home Office will run the referral against immigration records and agreed intelligence-based risk profiles and factors, together with the section 24 and section 24A reports of suspected shams and other relevant information, to identify suspect proposed marriages/civil partnerships. Where following these checks the Secretary of State is satisfied that there are reasonable grounds to suspect the marriage/civil partnership is a sham, a decision may be made to investigate. In that case the notice period for the marriage/civil partnership will be extended to 70 days to allow time for the investigation to take place; this may include an interview, home visit, examining further documentary evidence, etc. At the end of the 70 day period, provided the couple have complied with the investigation, the superintendent registrar will issue their certificates and the couple will be free to marry. Equivalent provisions will be made in relation to civil partnership. This will be the case irrespective of whether evidence obtained during the investigation supports a view that the marriage/civil partnership is a sham.
- 149. Where the conclusion of the investigating officer is that a marriage/civil partnership is a sham, consideration will be given to taking enforcement action against the non-EEA national involved under existing powers. This may include curtailment of leave or removal. In addition, any subsequent application based on the marriage/civil partnership is likely to be refused, though a fresh assessment of genuineness, taking into account any up-to-date information, would be made when an application was submitted. If a couple have not complied with the investigation, certificates will not be issued by the superintendent registrar and therefore the couple will not be able to marry. Again, similar provisions will apply in relation to civil partnership. The couple will need to give notice again if they still wish to marry or enter into a civil partnership.

150. Amendments are being made generally to provisions about marriage preliminaries in order to make the referral and investigation scheme effective. The notice period for marriage is being extended from 15 to 28 days; this is to allow time for the checks mentioned above to be carried out, in order to determine whether a proposed marriage that is referred needs to be investigated. There will be scope for the couple to apply to the Registrar General (or to the Secretary of State if they are in-scope of the referral scheme) to have the notice period reduced in exceptional circumstances, e.g. where one party is a member of HM Forces departing for active service. In addition deathbed marriages under the Marriage (Registrar General's Licence) Act 1970 are outside the scope of the scheme. Similar provisions will apply in relation to civil partnership.
151. The information and evidence requirements when giving notice of marriage or civil partnership will also be extended, so as to allow registration officials to identify whether the parties are exempt persons. The Bill amends provisions about ecclesiastical preliminaries in the Marriage Act 1949 so that only couples where both parties are British citizens, EEA nationals or Swiss nationals (or where the provisions for Anglican preliminaries at sea apply) will be able to get married on the basis of banns of marriage or by common licence. Except where the provisions for the Archbishop of Canterbury's Special Licence apply, other couples wanting an Anglican marriage will first need to give notice to a superintendent registrar at a designated register office (unless one or both parties is exempt from immigration control, in which case they must give notice to a superintendent registrar at their local register office); the rationale for this is that such a person will be in a better position to establish from the information and evidence provided whether the proposed marriage needs to be referred to the Secretary of State under the scheme. Once the couple have completed the civil preliminaries, they will be able to marry in church in the usual way.
152. Article 12 ECHR (right to marry) is engaged by these provisions. Case law has established that it is compatible with Article 12 for States to impose reasonable conditions on the right to marry in order to ascertain whether the proposed marriage is a sham. Case law on permissible state action as regards marriage preliminaries is usefully summarised in the judgment of the ECtHR in *O'Donoghue v the United Kingdom* (Application no. 34848/07).
153. *O'Donoghue* concerned a challenge to the United Kingdom's Certificate of Approval scheme which required persons subject to immigration control to either have express entry clearance for the purpose of enabling them to get married in the United Kingdom or a Certificate of Approval. To obtain a Certificate of Approval a person subject to immigration control had to submit an application to the Secretary of State for the Home Department together with a fee; a requirement for the Certificate was that the person had to have been granted leave for more than six months and have at least three months remaining at the time of the application ("first version"). The scheme was subsequently revised following an adverse decision from the High Court in the case of *R (on the*

*applications of Baiai and Others) v Secretary of State for the Home Department [2006] EWHC 823 QB (Admin)*, where the Court held that the scheme interfered with Articles 12 and 14 ECHR. The High Court held that the measures designed to meet the legislative objective were disproportionate as they were not rationally connected to it. The High Court cited a number of defects in the scheme such as the exemption for marriages in the Anglican Church and held that the scheme was not proportionate and constituted a substantial interference with Article 12 rights. Furthermore, the High Court also held that the scheme was discriminatory on the grounds of Article 14 with regards to religion and nationality. The Court of Appeal and House of Lords agreed with the legal findings of the High Court.

154. The scheme was amended (“second version”) after the High Court judgment so that applicants who had insufficient leave to enter or remain at the time of applying for a Certificate of Approval could be asked to submit further information on the genuineness of the marriage or civil partnership. A “third version” of the scheme was promulgated after the Court of Appeal decision so that applicants without valid leave to enter or remain were treated in line with those who had insufficient leave to qualify for a Certificate.

155. The European Court of Human Rights stated at paragraph 87 -

*“87. It is clear from the Court's case-law and from earlier Commission decisions that a Contracting State may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it. Consequently, a Contracting State will not necessarily be acting in violation of Article 12 of the Convention if they subject marriages involving foreign nationals to scrutiny in order to establish whether or not they are marriages of convenience (see Klip and Krüger v. the Netherlands, Sanders v. France, both cited above, and Frasik v. Poland, cited above, § 89). Such scrutiny may be exercised by requiring foreign nationals to notify the authorities of an intended marriage and, if necessary, asking them to submit information relevant to their immigration status and to the genuineness of the marriage (Klip and Krüger v. the Netherlands). Moreover, a requirement that a non-national planning to marry in a Contracting State should first obtain a certificate of capacity will not necessarily violate Article 12 of the Convention (Sanders v. France).*

156. One of the concerns of the ECtHR was that regardless of which version of the scheme an applicant applied under, if that applicant had “sufficient” leave to remain for a Certificate of Approval, the applicant was not required to submit any information concerning the genuineness of the proposed marriage. “Sufficient leave” was leave of six months or more, provided that at least three months was remaining. The referral and investigation scheme differs in a significant respect from the Certificate of Approval scheme in that the scheme applies to all couples, at least one of whom may stand to gain an immigration advantage from the proposed marriage or civil partnership. To be

exempt from the scheme a person has to produce evidence of British/EEA/Swiss nationality, that they have settled status or an EU law right of permanent residence in the United Kingdom, that they are exempt from immigration control or that they hold a visa for the purpose of entering into the marriage or civil partnership. There is no qualification in the Bill allowing an applicant to bypass the genuineness consideration (i.e. condition B in clause 43) simply by virtue of having a required amount of extant leave.

157. The referral and investigation scheme provided for by the Bill will require prospective couples, in respect of whom there is a reasonable suspicion of sham, and where the Secretary of State decides to investigate the genuineness of the couple's relationship, to wait 70 days (instead of 28 days) before marrying or entering into a civil partnership and to comply with the Secretary of State's investigation. It is considered that these requirements are reasonable and proportionate in terms of ECHR case law, given that they will be applied only to couples in respect of whom the Secretary of State has reasonable grounds for suspecting sham. The approach adopted – whereby even compelling evidence of sham will not prevent a couple marrying or entering into a civil partnership, but will form the basis for enforcement action (or of consideration of any subsequent immigration application based on the marriage or civil partnership) so that the non-EEA national party or parties do not obtain an immigration advantage - is a targeted and proportionate approach, and one that is appropriate, given the Home Secretary's immigration responsibilities.
158. The Department has considered the application of Article 14, read with Article 12, to these provisions. As stated in paragraph 10 above, a wide margin is usually allowed to States when it comes to general measures of social policy because of their direct knowledge, unless it is “manifestly without reasonable justification” (*Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006). This wide margin of appreciation is important to the provisions of the Bill since in *Bah v. The United Kingdom* 56328/07 [2011] ECHR 1448 (paragraph 46) the ECtHR confirmed that immigration status can be “another status” under Article 14. Immigration status is a relevant consideration under condition A of clause 43 but it is not the only consideration.
159. Consideration under Article 14 read with Article 12 needs to be given both to (a) the referral of cases to the Secretary of State and (b) the decision whether to investigate. As regards (a), a couple who are referred under the scheme are subject to additional checks, though they are not required to produce any additional information by virtue of the referral. As indicated above, the basis for determining who falls within the scheme is whether either of the couple may stand to gain an immigration advantage from the proposed marriage or civil partnership. It is considered that, given the purpose of the scheme, it is legitimate and proportionate to select couples for referral on this basis.

160. As regards (b), the conditions for a prospective couple to be investigated under the scheme relate not only to immigration status but also to the existence of a reasonable suspicion on the part of the Secretary of State that the proposed marriage or civil partnership will be a sham (i.e. condition B). Condition B is directed at the intentions of the parties, but an important part of the objective consideration regarding reasonable suspicion will be derived from Home Office checks against its immigration records and intelligence-based risk profiles and factors, together with reports from registration officials under section 24/24A of the Immigration and Asylum Act 1999 and other relevant information. Many of the risk profiles and factors which (together with other information) will be taken into account by the Secretary of State when deciding whether to investigate will be based on personal characteristics (such as nationality or ethnic origins). To this extent the scheme may be said to be treating people differently on the basis of their status. The checks aim to ensure that the Home Office takes a proportionate and objective approach to its decision whether to investigate whether a proposed marriage or civil partnership is a sham. As mentioned above, the requirement to submit to investigation will only be applied to couples in respect of whom the Secretary of State has reasonable grounds for suspecting a sham. In addition, the proposals do not prevent the couple from marrying or entering into a civil partnership, if they comply with the investigation. The evidence obtained during the investigation could instead form the basis of enforcement action, or of the decision on a subsequent immigration application, to prevent the non-EEA national obtaining an immigration advantage from the sham. In the circumstances it is considered that the scheme has an objective and reasonable justification in that it pursues a legitimate aim and is proportionate.
161. The Department has also considered the application of Article 14 (taken with Article 12) arising from the fact that couples wanting an Anglican marriage will only be able to marry following bans of marriage in circumstances where both parties are British citizens, EEA nationals or Swiss nationals (or where the provisions for Anglican preliminaries at sea apply). As described above, other couples will generally need to give notice to a superintendent registrar. The rationale for this, as set out above, is that a superintendent registrar - in a designated register office, unless one or both parties is exempt from immigration control - will be in a better position to establish from the information and evidence provided whether the proposed marriage needs to be referred to the Secretary of State under the scheme. Although different marriage preliminaries will be required according to the nationality of the prospective couple, there will not be a significant difference in the length of time the preliminaries will take, unless the notice period is extended to 70 days in respect of a couple referred to the Secretary of State under the scheme. In the circumstances the Department considers the difference in treatment can be justified as being in pursuit of a legitimate aim and proportionate to that aim.

## **PART 5: OVERSIGHT**

### **Office of the Immigration Services Commissioner**

162. Clause 57 and Schedule 6 of the Bill amends the statutory regime governing the work of the Immigration Services Commissioner (to be found in Part V of the Immigration and Asylum Act 1999). The Commissioner is responsible for regulating the work of immigration advisers who work outside the aegis of the legal profession.
163. The majority of these changes will have no impact on Convention rights. The Bill adds a new power of entry to the existing powers of the Commissioner, which means Article 8 could be engaged. This power will enable the Commissioner or her staff to enter premises (including private residences where they are used as a place of business), to inspect documents, and to take copies of documents, where necessary to carry out her functions. The Commissioner already has the power to enter premises to investigate criminal offences under the regulatory scheme for immigration advisers (with a warrant) and to investigate complaints relating to immigration advisers.
164. The new, wider, power of entry will only be exercisable where a warrant has been issued by a Justice of the Peace (or Sherriff in Scotland); warrants will only be issued if entry will be prevented otherwise, or any delay in gaining entry to premises will interfere with the Commissioner's work. Given that the power of entry can only be used subject to these conditions and will be subject to prior judicial oversight exercised in accordance with the ECHR, the Department considers that this new power of entry is compatible with Article 8; any interference with Article 8 will be proportionate and can be justified in view of the clear public interest in protecting both migrants and the immigration system from abuse.

## **PART 6: MISCELLANEOUS**

### **Embarkation Checks**

#### **Embarkation checks by authorised persons**

165. Clause 58 and Schedule 7 gives the Secretary of State the power if she chooses to authorise individuals other than immigration officers to exercise the power of examination in relation to departing passengers. The individuals will be called designated persons. No particular Convention rights are engaged by this.
166. If authorised by the Secretary of State this power of examination will be exercised to establish the nationality, identity, whether the departing passenger's entry to the United Kingdom was lawful, whether they have complied with any conditions of leave to enter or remain in the United Kingdom and whether their return is prohibited or restricted. The designated persons will also have the power to request service information about

the passenger's onward journey to enable an immigration officer to identify them subsequently should they need to further examine them about their immigration status.

167. In order to support the operation of these powers, designated persons will also be able to require the passenger to produce their passport or another document satisfactorily establishing identity and nationality or citizenship and any other documents relevant to the purpose of the examination. They will also be able to retain a passport or other document produced to allow subsequent inspection as soon as reasonably practicable by an immigration officer where there is doubt about its validity or whether it is the rightful property of the passenger.
168. In addition, a designated person will be able to take a person's biometric information in order to verify that the passenger is the person who appears on the travel document.
169. The powers to retain a passport or other documents and to take someone's biometric information in order to verify identity potentially engage Article 8 (right to respect for private and family life). However, in the Department's view any such interference can be justified under Article 8(2).
170. The powers to retain a passport in these circumstances and to take someone's biometric information pursue the legitimate aims of supporting an effective system of immigration control and are proportionate. It is intended that a designated person should retain the document for a short period only, pending the arrival of an immigration officer to establish whether the document is a counterfeit or whether the passenger is the rightful owner of the document. In relation to the power to take biometric information, the intention is to use this information only for the specific and limited purpose of verification of identity prior to the passenger undertaking their onward journey. The powers will be exercised by someone certified as a fit and proper person who has received proper training.
171. It is also relevant to note that immigration officers also already have similar powers at paragraphs 3 and 4 of Schedule 2 to the Immigration Act 1971.

**Direction to require arrangements to be put in place for embarkation checks to be undertaken**

172. Clauses 58 and Schedule 7 also make provision for the Secretary of State to direct that carriers operating ships, trains and aircraft, and port operators should put in place arrangements for designated persons to exercise the power of examination in respect of specified groups of passengers. This will have the effect of requiring carriers and port operators to ensure that they have sufficient members of their staff who have received the relevant training and been designated to exercise the powers under Schedule 2 available to be deployed to undertake examinations if required to do so.

173. Paragraph 7 of Schedule 7 provides that the failure of a carrier or port operator to comply with a direction given by the Secretary of State constitutes an offence under section 27 of the Immigration Act 1971. This engages Article 6 of the ECHR. Liability for a penalty will be determined by a court following a criminal trial and the carrier or port operator will have a defence to a penalty where they can demonstrate they had a reasonable excuse for failing to comply with the direction.
174. The Department is therefore satisfied that these provisions are compatible with Article 6.
175. It is arguable that Article 1 of the First Protocol could be engaged on the basis that a carrier or port operator who is given a direction would be required to ensure that sufficient members of staff are trained, designated and available for deployment to undertake examinations at specified locations, thus interfering with its peaceful enjoyment of their possessions, specifically staff time and the associated economic interest in the use of that time. If this argument was accepted, and Article 1 Protocol 1 found to be engaged, the interference could be justified on the basis that examinations on embarkation are in the public interest to ensure compliance with immigration legislation and allow the assessment of persons leaving the UK to determine whether their return should be prohibited or restricted. Carriers and port operators have been identified as appropriate bodies as it is anticipated that the examinations could be integrated with their existing operating procedures and so the impact on their interests would be minimised. Any such measure should not impose an excessive burden on carriers or port operators and will be proportionate to the aims pursued.
176. The Department is therefore satisfied that these provisions are compatible with Article 1 Protocol 1.

## **Fees**

177. Clauses 59 and 60 provide the Secretary of State with the power to charge a fee in respect of the exercise of functions in connection with immigration and nationality. The factors to which she is permitted to have regard in setting the fee are set out in clause 59(8). The functions in respect of which a fee can be charged will be specified in a fees order, which will also set out an upper limit for the fee to be charged in respect of each function. The fee itself will then be set by way of regulation.
178. The primary power remains discretionary: that is, the Secretary of State is able to charge a fee, but can choose not to do so. For this reason it is not considered that ECHR issues arise in relation to the current clauses. However, the breadth of the primary powers means that such issues may arise in respect of the secondary legislation.
179. Firstly, the clauses provide that the Secretary of State may specify, in secondary legislation, the consequences of failure to pay a fee. It is likely that, as now, the

secondary legislation will provide (subject to specified exemptions) that failure to pay a fee will render an application ‘not validly made’.

180. The requirement to pay a fee may give rise to breach of ECHR rights in certain circumstances. Issues arise (under Article 3 ECHR) in respect of any requirement for payment of a fee in relation to an application for refugee status (or secondary humanitarian protection). For this reason, these applications are not presently charged (and it is not anticipated that they will be charged).
181. Case-law has established that the requirement to pay a fee may also constitute breach of an applicant’s rights under Article 8 ECHR. In particular, the case of *R(QB) v SSHD [2010] EWHC 483 (Admin)* confirms that where an applicant (or his sponsors in the United Kingdom) are unable to pay the fee for an entry clearance application, such that the applicant cannot enter the United Kingdom in order to enjoy family life with relatives here, the requirement to pay the fee may in certain circumstances constitute a breach of his rights (and those of his family) under Article 8 ECHR.
182. The case of *Omar [2012] EWHC 3448* establishes complementary principles in relation to in-United Kingdom applications. In this case, the applicant was in the United Kingdom but was unable to regularise his status because he lacked the funds to file the relevant application. The court found that in the circumstances of his case the requirement for a fee constituted a breach of his right to a private life under Article 8 ECHR. IT went on to state that any requirement in secondary legislation that a fee must be paid must be read in light of section 3 of the Human Rights Act 1998 such that it is ‘*subject to a qualification that the specified fee is not due where to require it to be paid would be incompatible with a person’s Convention rights*’.
183. It is anticipated that these rulings will remain relevant under the new fees framework. As now, specific exceptions will be set out in the secondary legislation in respect of certain categories of applicant in order to ensure due regard for Convention rights. Mechanisms will also be established (or, where already in place, will continue) to ensure that consideration is given (on request) as to whether the requirement to pay a fee constitutes a breach of an individual’s ECHR rights.

**Home Office**  
**October 2013**