

THE SEAFARERS' WAGES BILL

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED INTO THE HOUSE OF LORDS

1. This Memorandum has been prepared by the Department for Transport (“the Department”) and addresses issues arising under the European Convention on Human Rights (“ECHR”/“the Convention”) in relation to the Seafarers’ Wages Bill (“the Bill”).
2. The Rt. Hon. Grant Shapps MP, the Secretary of State for Transport, proposes to make a statement under section 19(1) of the Human Rights Act 1998 that in his view the provisions in the Bill are compatible with the Convention rights.
3. The Bill contains a limited number of provisions which engage Convention rights, in particular Article 6 (right to a fair and public hearing), and Article 1 of Protocol 1 to the Convention (right to property). Certain provisions in the Bill confer functions on Harbour Authorities (“HAs”), which as hybrid public authorities are required under section 6(1) of the Human Rights Act 1998 to act in ways which are compatible with Convention rights, when carrying out public functions.
4. This Memorandum deals only with those parts of the Bill which raise significant ECHR issues. The remaining provisions of the Bill are considered not to engage Convention rights, or, if they do, it is clear that there is no breach of those rights.

Summary of the Bill

5. The Bill makes provision to ensure that non-qualifying seafarers working on international services that operate to or from UK ports are paid no less than the national minimum wage equivalent (“NMWe”). A “non-qualifying seafarer” is a seafarer who fails to qualify for the national minimum wage because they do not work, or do not ordinarily work, in the UK for the purposes of the National Minimum Wage Act 1998. NMWe is the rate set out in regulations that is broadly equivalent, having regard to all the circumstances, to the remuneration a seafarer would have received had they qualified for the national minimum wage.
6. The main provisions of the Bill are as follows:
 - a. A harbour authority (“HA”) may request the operator of an international service to provide evidence that they are paying non-qualifying seafarers at least the NMWe.
 - b. Where an operator fails to provide such evidence, the Bill empowers harbour authorities to charge a surcharge.
 - c. Where the surcharge is due, but not paid, the harbour authority may deny vessels operated by the operator access to the port.

- d. The Bill also empowers the Secretary of State to direct harbour authorities as to how to exercise the above-mentioned powers and provides the Secretary of State with enforcement powers.

The Bill and Convention Rights

Article 6: Right to a fair trial

7. Article 6 of the ECHR gives the basic entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The concept of civil rights and obligations has been held to extend to proceedings between a private party and a public body, the result of which is decisive for private rights and obligations.
8. Clause 7 of the Bill empowers HAs to require the operator of the relevant service to pay a surcharge in respect of the use of its harbour by any ship providing the service, in the circumstances where the authority has requested the operator provide an NMWe declaration and the operator has either not done so; or has provided a declaration that is false or misleading; or it has become such. An operator who neither provides a declaration nor pays a surcharge in the prescribed circumstances may be denied access to the harbour.
9. The surcharge element is included in the Bill so that operators who have not provided a NMWe declaration, or have provided a declaration that is false or misleading, or it has become such, have an alternative means of gaining access to the port where necessary to provide vital transport services. The amount of the surcharge is to be determined by HAs in accordance with regulations. Clause 11 empowers the Secretary of State to give guidance and directions to HAs as to how to exercise their powers under the Bill, including in particular directions to impose or not to impose a surcharge in any case or circumstances.
10. By virtue of clause 8 of the Bill, an operator would be able to object to the surcharge being imposed. That objection would be determined by the Secretary of State. Both the decision of the HA (in carrying out its statutory functions) and any decision of the Secretary of State would be amenable to judicial review.
11. The SHAs to which the Bill applies will fall into three categories: (i) private, (ii) trust and (iii) local authority owned ports. Although private and trust ports are independent private bodies¹, it is considered that such a body may be considered to be carrying out functions of a public nature for the purposes of the Human Rights Act 1998 in exercising its powers under the Bill. The

¹ [1] Although the larger trust ports are, for technical reasons, treated as public corporations in national accounts, they are commercially independent and compete on level terms with private company ports.

imposition of a surcharge and the denial of access to a harbour may therefore engage Article 6 of the Convention as set out below.

12. For Article 6 to be engaged, the proceedings must be decisive of the applicant's rights (*Ringeisen v Austria (No. 1)* (1971) 1 E.H.R.R. 1 (at [94])). Here, if the operator chooses not to provide an NMWe declaration, it must either pay a surcharge or it will be refused access to the harbour. The requirement to pay a surcharge is therefore decisive of the operator's right to carry out a business.
13. While the Bill does include the power for HAs to charge a surcharge, it is not considered that this is a criminal penalty for the purpose of Article 6, as the power is not governed by criminal law, nor is it designed to be punitive. Instead it is intended to ensure that it is not more economical for an operator to pay the surcharge rather than paying its seafarers the NMWe. It is therefore the civil limb of Article 6 that would be engaged.
14. "Civil rights and obligations" can include property rights and the right to carry out a business. The powers for HAs to charge a surcharge or refuse access to ports in the event that international operators fail to provide evidence that they pay NMWe arguably involve the determination of a "civil right or obligation", as they affect the rights of operators to carry out a business. Additionally, the Bill empowers the Secretary of State to give directions to HAs as to the exercise of their powers, which may further determine such rights.
15. While it is therefore accepted that the civil limb of Article 6 may be engaged by the Bill, it is the Department's position that there are sufficient safeguards to ensure that the new powers do not breach operators' Article 6 rights.
16. In the event that a HA charges a surcharge, operators may raise an objection to the Secretary of State by virtue of clause 8, which provides an important procedural safeguard. Any decision of the Secretary of State following such objections will be amenable to judicial review.
17. Additionally, a decision by the Secretary of State to issue directions under clause 11 will also be amenable to judicial review, as will relevant decisions of HAs where they are considered to be carrying out public functions.
18. In both considering objections to the surcharges and in making directions, the Secretary of State would be applying broad policy considerations to a set of facts, and as such it is considered that this will provide "sufficiency of review" for the purposes of Article 6(1) (*Bryan v United Kingdom; Tsfayo v United Kingdom*). Likewise, in carrying out any public functions conferred the Bill, HAs will be determining how to apply a set policy to a set of facts. There are unlikely to be disputes of fact on which a court would have to opine; either an operator pays NMWe or it does not. All that is likely to be in dispute is the

manner in which the decision maker applies the policy, and therefore it is the Department's position that judicial review provides a sufficient level of review for the purpose of Article 6.

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

19. Article 1 of Protocol 1 entitles everyone to the peaceful enjoyment of their possessions. No one is to be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
20. The power for HAs to request evidence that operators pay NMWe, or in the alternative charge a surcharge or refuse access to port, may engage the protections conferred by Article 1 of Protocol 1 in that such powers may interfere with operators' existing contractual or commercial rights. Additionally, the requirement to pay a surcharge may deprive operators of their property (funds).
21. Any interference can be justified as being (i) provided for by law, (ii) in the public or general interest, and (iii) proportionate.
22. The measures will be based on a clear and predictable legal basis as set out on the face of the Bill and in secondary legislation and have been structured in a way that ensures that they are compatible with the UK's international obligations.
23. The purpose of the Bill is to ensure that non-qualifying seafarers working on ships that regularly use UK ports are paid no less than NMWe. It is in the public/general interest to provide a fair wage to those working at sea, and to deter mass dismissals where existing seafarers are replaced by those willing to accept lower wages. Balancing this public interest and the rights of individuals against the commercial rights of operators, the measures are proportionate and the provisions are compatible with Article 1 Protocol 1.