

BORDER SECURITY, IMMIGRATION AND ASYLUM BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

THIRD SUPPLEMENTARY MEMORANDUM

Introduction

1. This memorandum supplements the memorandums prepared by the Home Office on 30 January 2025, 13 March 2025 and 7 May 2025 which address issues under the European Convention on Human Rights (“ECHR”) in relation to the Border Security, Asylum and Immigration Bill (“the Bill”).
2. This supplementary memorandum addresses the issues under the ECHR that arise in relation to the Government amendments tabled on 21 October 2025 for Lords Report stage. It has been prepared by the Home Office.

ECHR analysis

New clause: Online advertising of unlawful migration services

3. The Government’s objective is to disrupt the business model of organised criminal gangs by explicitly criminalising the online promotion of unlawful immigration services. Such promotion is a critical component of their operations. Criminal gangs would be held to account for the content they are posting, and this may deter others from engaging in similar activity, thereby reducing the amount of organised immigration crime related content circulating online.
4. The effect of the clauses will be to create new offences which criminalise the creation (or causing the creation) of online material whose purpose or effect is to promote unlawful immigration services, where it is known or suspected that the material will be published on internet services. The offences would be triable either way and would have a maximum penalty of up to five years imprisonment. It is a defence to show that the person’s action was for the purpose of facilitating or carrying out work as a journalist or for the publication of academic research.
5. The following provisions in the ECHR are potentially engaged by the proposed offence.

Article 8 of the ECHR

6. Arguably criminalising communications from an individual migrant may amount to an interference with Article 8 rights, particularly if the correspondence is to a limited group of individuals.

7. However, the proposed offence requires that the purpose or effect of the communication is to promote an unlawful immigration service and that it is “published”, meaning that it is made available to the public at large or any section of the public. These requirements would exclude from the scope of the offence any correspondence which merely documented a journey. It would also exclude unpublished personal communication with friends or family.
8. In the case of correspondence which had the purpose or effect of promoting or offering services that enable or facilitate breaches of immigration law, any interference would be justified on the basis of para 2 of Article 8, which provides that:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

9. The requirement that the interference be in accordance with the law will be met by including the proposed amendment in legislation. The clauses have been drafted with sufficient clarity and precision to enable a person to foresee the conduct which is prohibited and the consequences of such conduct.
10. The substantive interests that would be protected are public safety or economic wellbeing of the country and the prevention of disorder or crime.
11. In terms of public safety, much of the material that would be within the scope of the offence offers dangerous sea crossings to vulnerable and desperate individuals. In terms of economic wellbeing, the material encourages uncontrolled migration which is a heavy burden on taxpayers. Moreover, the offence criminalises the facilitation of breaches of immigration law, thereby assisting in the prevention of crime.
12. The test of necessity involves deciding whether there is a '*pressing social need*' for the interference and whether the means employed are proportionate to the legitimate aim(s) pursued by the state. In conducting such an examination, the nature, context and importance of the right asserted, and the extent of interference must be balanced against the nature, context and importance of the public interest asserted as justification.
13. Given targeted nature of the offence, the mischief being tackled and the proposed penalties, the necessity test is met in respect of Article 8.

14. Accordingly, the Government is satisfied that the clause is compatible with Article 8 the ECHR.

Article 10 of the ECHR

15. As explained above, merely documenting a journey or privately communicating with friends or family would be outside the scope of the offence. The proposed offences do however restrict freedom of expression by criminalising the publication or the creation for publication the material referred to in paragraph 4. They impose restrictions and penalties as referred to in paragraph 2 of Article 10. Therefore, it is likely that the offences amount to an interference with the right to freedom of expression protected by paragraph 1 of Article 10.
16. In the case of correspondence which had the purpose or effect of promoting or offering services that enable or facilitate breaches of immigration law, any interference would be justified on the basis of para 2 of Article 10, which provides that:
- “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
17. The requirement that the interference be in accordance with the law will be met by including the proposed amendment in legislation. The clauses have been drafted with sufficient clarity and precision to enable a person to foresee the conduct which is prohibited and the consequences of such conduct.
18. The substantive interests that would be protected are public safety, the prevention of crime and territorial integrity.
19. Interference with the right to freedom of expression is justified in relation to public safety and the prevention of crime for reasons which are identical to those set out in respect of paragraph 2 of Article 8.
20. In relation to “territorial integrity”, the restriction is intended to prevent or reduce instances of breach of immigration law, which is fundamental to maintaining protection of borders and territorial integrity.
21. In terms of scope of freedom of expression, the nature of the expression which is restrained is relevant to the strength of the justification required. For example, the ECHR has given less protection to expression which has a financial or commercial motivation. See *Markt Intern*, ((1989) 12 EHRR 161, ECtHR). It is clear from that case

that States enjoy a wider margin of appreciation in assessing the existence and extent of the necessity for an interference with commercial speech. By extension, the State has a wider margin of appreciation when restricting expression which advertises the means to commit criminal offences.

22. Accordingly, the Government is satisfied that the clause is compatible with Article 10 the ECHR.

Amendment to clause 43(2): “Conditions on limited leave to enter or remain and immigration bail

23. Clause 43(2) of the Bill amended section 3(1)(c) of the Immigration Act 1971 (“1971 Act”) to introduce a number of conditions that can be imposed on a grant of leave to enter or remain in the UK. Clause 43(2) is now amended to place limits on the circumstances in which conditions inserted by clause 43(2) may be attached to a person’s limited leave to enter or remain (which will be referred to in section 3(1)(c)(vi) to (x) of the 1971 Act).

24. The supplementary memorandum dated 13 March 2025 set out the Government’s analysis that clause 43 was compatible with the ECHR. This memorandum now considers clause 43 as amended at Lords Report Stage.

Article 5 of the ECHR

25. The clause permits the Secretary of State to impose conditions of leave that would engage Article 5 ECHR, namely electronic monitoring, curfews and inclusion/exclusion zones.
26. Compatibility with Article 5 on conditions that restrict liberty on a grant of bail is permitted pursuant to Article 5(1)(f) as P would be liable to be detained and therefore conditions that restrict liberty would be a less restrictive option to detention, as well as specifically prescribed by law under that provision. In addition, even if P were no longer liable to be detained but remained on immigration bail (to which, see section 61 of the Immigration Act 2016 (“the 2016 Act”)), action would still be being taken with a view to deportation and therefore the imposition of these conditions is expressly permitted under Article 5(1)(f). Moreover, for the applicability of conditions being imposed on a grant of immigration bail, paragraph 2(7)(b) of Schedule 10 to the 2016 Act only permits such conditions if doing so would not be ‘contrary to the person’s Convention rights’, replicating section 6 of the Human Rights Act 1998.
27. The clause makes clear that the power to impose the additional conditions set out will only exist where the Secretary of State considers that P poses a risk to national security, public safety or has committed a specified offence. Accordingly, in those circumstances any conditions imposed will be a proportionate means of achieving a legitimate aim.

28. Imposing conditions on a grant of leave will also be prescribed by law and permitted under Article 5(1)(f) for the following reasons:
- a. It will have been assessed that deportation (or removal) is conducive to the public good. Accordingly, for the purposes of section 3(5) of the 1971 Act, P will remain 'liable to deportation'.
 - b. Any condition that can be imposed on a grant of leave that infringes Article 5 will therefore only be permissible under Article 5(1)(f) to those who are liable to deportation or removal. However, it should be open to the Secretary of State to regulate and control how a person liable to deportation should remain in the UK, even if, at the time of imposition, deportation or removal cannot be achieved for ECHR reasons. Strasbourg has accepted a member state's right to control their borders and refuse migrants the same general rights to liberty enjoyed by their citizens (see *Saadi v UK* (2008) ECHR 29).
 - c. Any imposition of conditions that engage Article 5 on a grant of leave will be case specific but permissible on the basis that any of those conditions will be temporary, and the Secretary of State will still be able to demonstrate action is being taken with a view to deportation in the form of regular assessments.
29. The clause is compatible with Article 5(4) as P will have the ability to challenge any conditions imposed by way of an application for judicial review, therefore affording individuals impacted with a substantial measure of procedural justice (see *Al-Nashif v Bulgaria Application* [2002] Application no.50963/99).
30. Accordingly, the Government is satisfied that the measure is compatible with Article 5.

Article 8 of the ECHR

31. The proposed clause will permit the Secretary of State to impose conditions of leave that will be of such gravity as to likely engage Article 8.
32. The Court of Appeal in *MS (& anor) v Secretary of State for the Home Department* [2017] EWCA Civ 1190) considered whether the application of the restricted leave policy (i.e. the policy that determines the extent of restrictions to be imposed on a grant of leave under s3(1)(c) of the 1971 Act) was incompatible with Article 8. At paragraph 109 the Court of Appeal held: "*Such a degree of interference is entirely proportionate to the legitimate aims of the Secretary of State's policy. (I should spell out, to avoid any misunderstanding, that that conclusion does not preclude the possibility of challenge to individual decisions taken under the policy. Such decisions need, as the UT says, to be taken on a fact-sensitive and case-specific basis.)*"
33. While the policy in that case could only provide guidance as to the imposition of the conditions set out currently in section 3(1)(c) of the

1971 Act, the additional measures, while more likely to infringe on an individual's rights under Article 8 (and to a greater degree), can only be imposed in specific circumstances where there is evidence P poses a risk to the UK public. On that basis, any exercise of the power will be a proportionate interference with Article 8 and one expressly permitted under Article 8(2).

34. Accordingly, the Government is satisfied that the measure is compatible with Article 8.