

Medical Training (Prioritisation) Bill: ECHR memorandum

Introduction and overall ECHR analysis

1. This memorandum has been prepared by the Department of Health and Social Care (DHSC) and addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Medical Training (Prioritisation) Bill ('the bill').
2. On introduction of the bill the Secretary of State for Health and Social Care made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the bill are compatible with the Convention rights.
3. The purpose of the bill is to make provision for prioritisation of certain graduates for medical training places. For foundation training, it will require graduates of UK medical schools (UK graduates) and those within the "priority group" (which includes graduates of medical schools in the Republic of Ireland, Switzerland and EEA EFTA states) to be allocated places before other eligible applicants. For specialty training, it will require prioritisation of UK graduates, those in the priority group, those who have completed or are undertaking a relevant qualifying UK programme, and for 2026, those with a certain immigration status. For 2027 onwards the Secretary of State will have the power to set out other applicants who should be prioritised for speciality training in regulations.
4. The Government considers within this memorandum Article 8 (right to respect for private and family life) and Article 2 of Protocol 1 (right to education). However, the Government's view is that neither of these rights, nor any other ECHR right, are engaged by the bill, either on a

standalone basis or in conjunction with Article 14 (prohibition of discrimination). We nevertheless do go on to consider the question of justification for completeness.

Summary of the Bill

5. Clause 1 of the bill imposes a duty on those with a function of deciding offers of places on a UK Foundation Programme, to prioritise UK medical graduates or persons in the priority group (as defined at clause 4), before other eligible applicants.

6. Clause 2 of the bill imposes a duty on those with a function of deciding offers of places on UK speciality training programme for 2026 to offer places to:

- I. UK medical graduates
- II. persons in the priority group,
- III. persons who have completed the relevant previous UK programme, or
- IV. persons who have the immigration statuses listed within 2(2),

before offering a place to other eligible applicants.

7. The immigration statuses at clause 2(2) are:

- I. a British citizen,
- II. a Commonwealth citizen who has the right of abode in the United Kingdom under section 2 of the Immigration Act 1971,
- III. an Irish citizen who does not require leave to enter or remain in the United Kingdom under that Act,
- IV. a person with indefinite leave to enter or remain in the United Kingdom, or a person who has leave to enter or remain in the United Kingdom which was granted by virtue of residence scheme immigration rules within the meaning given by section 17 of the European Union (Withdrawal Agreement) Act 2020.

8. Clause 3 of the bill imposes a duty on those with a function of deciding which applicants to interview for a place on a UK specialty training programme for 2027, and those with a function of deciding offers of places, to prioritise:

- I. UK medical graduates
- II. persons in the priority group,

III. persons who have completed the relevant previous UK programme, or

IV. persons of a description set out in regulations by the appropriate authority,

before offering a place to other eligible applicants.

9. The regulation making power at clause 3(3) is limited to describing persons who in the opinion of the appropriate authority (i.e. the Secretary of State in relation to the UK, the Welsh Ministers in relation to Wales, the Scottish Ministers in relation to Scotland and the Department of Health in Northern Ireland in relation to Northern Ireland) are likely to have significant experience working in the NHS (or Health and Social Care in NI) or by reference to immigration status.
10. Clause 4 defines “UK medical graduate” and “priority group”. UK medical graduate means those with a primary UK qualification unless they mainly studied overseas. The priority group includes people with their primary medical qualification from Ireland, Norway, Iceland, Liechtenstein or Switzerland.
11. Clause 4(6) gives a power to make regulations to add to the list of countries in clause 4(4), to reflect future international agreements, which can be exercised by the Secretary of State (in relation to programmes anywhere in the UK), or the Scottish Ministers, Welsh Ministers or Department of Health in Northern Ireland (in relation to programmes in Scotland, Wales and Northern Ireland respectively).
12. Clause 5 defines the UK foundation programme and UK specialty programme for the purposes of the legislation. UK specialty programme is defined at clause 5(4) and includes a power to for the appropriate authority to describe in regulations a programme which does not amount to a UK specialty programme for the purposes of the bill.
13. Clause 6 sets out the definition of “the appropriate authority” and provides that regulations made under the bill will be made by statutory instrument, Welsh statutory instrument, Scottish statutory instrument or statutory rule in Northern Ireland, and that they may make;

- i. consequential, incidental, supplemental, transitional and saving provision;
- ii. different provision for different purposes; and
- iii. different provision for different parts of the United Kingdom.

14. Clause 7 sets out the procedure for making regulations under the legislation. All of the regulation making powers allow the Secretary of State to make regulations for the whole or any part of the UK, but for clauses 3 and 5(4)(d), the Secretary of State must obtain the consent of the Devolved Governments in Scotland, Wales and Northern Ireland, where the regulations contain provision which would be within the competence of their respective legislatures.
15. The regulation making powers in clauses 3, 4 and 5 may be exercised by either the Secretary of State or the Devolved Governments in relation to their respective nations. Regulations under clauses 3 and 5(4)(d) would be made by the negative procedure. Regulations under clause 4(6) require the affirmative procedure.
16. Clause 8 contains the provisions on extent (England and Wales, Scotland and Northern Ireland), commencement (in accordance with regulations made by the Secretary of State, who may also make transitional or saving provision), and title.

The Bill and convention rights

17. The Government's firm view is that none of the ECHR articles are engaged by the bill and therefore the bill is compatible with the ECHR.
18. However, the Government recognises that it could be argued that the Bill engages Article 8 and/or Article 2 of Protocol 1 (A2P1), either on a standalone basis or in conjunction with Article 14, and we therefore go on to consider these arguments.

Article 8

19. Article 8 of the ECHR provides:

“Everyone has the right to respect for his private and family life, his home and his correspondence. 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 well-being 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”.

20. The argument would be that the prevention of a person who has committed themselves to practising medicine, from being able to obtain a training place in the UK, sufficiently engages the aspect of Article 8, which encompasses the right to establish and develop relationships with others. If such an argument were to be made then it is likely that the argument would be that the bill’s provisions as a whole engage Article 8.

21. The Government however considers that Article 8 is not engaged by the bill and any argument to the contrary is wrong in principle. In *R (Wright) v Secretary of State for Health* [2009] 1 AC 739 at §34, Lady Hale summarised without criticism Stanley Burnton J at first instance holding, in connection with Article 8, that: *“In general, the Convention did not confer any right to engage in a chosen profession”*. The Government considers this to be the clear starting point of the Strasbourg case law.

22. The Grand Chamber went on to review the case law on Article 8 and employment in detail in *Denisov Ukraine* (App. No. 76639/11) and articulated two approaches (at §101 and 102), which may anchor an employment issue – otherwise outside the scope of Article 8 – within aspects of private life.

23. The first is where the issue in dispute concerns a reason based on a private life matter e.g. dismissal of a person based upon some aspect of their personal life. The second is where the consequences of the measure have serious negative effects on the individual’s

private life. “*In this connection the Court has taken into account negative consequences as regards (i) impact on the individual’s “inner circle”, in particular where there are serious material consequences, (ii) the individual’s opportunities “to establish and develop relationships with others”, and (iii) the impact on the individual’s reputation*”: at §107 of *Denisov*.

24. The cases on restrictions on access to public sector employment, including the case of *Naidin v Romania*, (App. No. 38162/07), have generally concerned prohibitions imposed by former Soviet Bloc countries on ex-KGB employees (or similar connections) obtaining public sector offices: *Sidabras v Lithuania* (2004) 42 EHRR 104; *Turek v Slovakia* [2006] ECHR 138.
25. A case such as *Campagnano v Italy*, (App. No. 77955/01) concerned restrictions imposed on certain offices (such as company directors and guardian of assets) on a person appearing on the bankruptcy register. In *Denisov*, the restrictions on ex-KGB employees, and those on the bankruptcy register, were given as examples of measures with a sufficiently far-reaching impact to engage Article 8 on the second, consequential, basis.
26. There are examples of cases concerning access to a profession which have engaged Article 8 on the second consequential basis, such as *Bigaeva v Greece* (App. No. 26713/05). However, the facts of that case were particularly stark because the applicant had not just undertaken all the relevant university and postgraduate studies but had also been permitted to pursue the equivalent of pupillage, despite being barred from doing so by reason of nationality. This had been a “*long personal and academic journey*” connected to her desire to integrate into Greece (§24). The Court found a breach of Article 8, but rejected a case based on Article 14 ECHR, considering that complaints about access to a profession fell outside Article 14: see §39.
27. The relatively limited domestic case law finding Article 8 to be engaged in relation to employment matters is consistent with the principles articulated in *Denisov*. The primary line of authority where

Article 8 has been held to be engaged in an employment context, concerns the inclusion of an individual's name in a statutory list of persons barred from working in particular regulated professions.

28. There are some other contexts in which Article 8 has been found to be engaged in the context of employment-related matters in domestic law. For example, in *R (Crompton) v Police and Crime Commissioner for South Yorkshire* [2017] EWHC 349 (Admin), the Divisional Court found, in passing, Article 8 to be engaged by the suspension of a chief constable in connection with the outcome of the Hillsborough Inquests, by reason of the impact on his private life through media intrusion etc. But these types of case are also consistent with the consequential limb of *Denisov* and are in the Government's view self-evidently exceptional and limited.
29. Although the cases can also concern access to regulated professions – particularly because being barred will prevent a person being able to join it – and those professions are often ones thought to be vocations, there is no true analogy in the Government's view between any of these cases and the effect of the bill.
30. The Government's view is that the bill cannot sensibly be said to have any true or material consequences for a person's private life. A person is not prohibited by virtue of the bill from seeking any other sort of medical employment or training, and it may well be that ultimately, they will not in fact be unable to obtain a place at all (as the bill implements a policy of prioritisation and not barring). Being unable to obtain a training place involves no sort of statement about one's character analogous to being statutorily barred as a risk to others.
31. The closest analogy to the policy within the bill is the line of cases in which a claimant has been subjected to some form of immigration control measure, which has prevented them from working, and claimed a breach of Article 8 ECHR. These claims have been consistently rejected as not engaging Article 8 at all, see for example: *R (Atapattu) v Secretary of State for the Home Department* [2011] EWHC 1388 (Admin), *Kulumbegov v Home Office* [2023] EWHC 337 (KB) and *Husson v Secretary of State for the*

Home Department [2020] EWCA Civ 329. In the latter, it was held that the Article 8 case law required a high threshold for engagement that “*an individual is wholly or substantially deprived of the ability to work altogether*”: at §36 *per* Simler LJ.

32. The Government therefore considers that the effects of the bill could not give rise to circumstances within the ambit of Article 8. The bill does not engage either of the categories of Strasbourg case law identified in *Denisov* and does not result in any individual being wholly or substantively deprived of their ability to work altogether. As a result, the starting point, that Article 8 does not give a right to choose or pursue a particular occupation applies. The Government’s view therefore is that Article 8 is not engaged.

Justification

33. Whilst the Government’s view is that Article 8 is not engaged, so as to require justification of interference with that right, we have nevertheless gone on to consider justification for completeness.
34. Firstly, any such interference would be ‘provided for by law’ as it would be contained in primary legislation.
35. Any interference would then in the Government’s view be justified as pursuing a number of legitimate aims.
36. Firstly, it is an important aim of the bill to secure a reliable pipeline of workforce for the future. The Government has a responsibility to secure the medical workforce needed to meet the healthcare demands of the country. A key reason for bill is to help ensure reliable workforce planning for the NHS. The bill seeks to ensure that priority is afforded to those with a more durable linkage to the UK and UK medical profession and who are more likely to progress to be consultants and work out the rest of their careers within the NHS.
37. Furthermore, whilst there are currently many doctors from overseas (both with non-British nationalities and those with an

international medical degree) keen to work in the UK, there can be no certainty of this in the long term as the medical needs of all countries globally are expected to increase due to aging populations. As developing nations grow richer, there will also be more reason for doctors from those countries to stay or to return to the countries they came from. It is accordingly desirable to reduce dependency on an unpredictable international medical labour market.

38. Another key aim of the policy is the aim of ensuring a workforce with knowledge of local clinical practice, culture, and epidemiology. There are considerable advantages associated with experience of the practice of healthcare in the UK. These include understanding the practices and protocols of the NHS, the cultural expectations around the doctor-patient relationship in the UK and the disease pattern in the UK. Each of these may be vastly different in other countries. Insofar as the Government wishes to influence NHS practice, it can do so by interventions in the programme of undergraduate education and the Foundation Programme, but such interventions are only effective (or are most effective) if the vast majority of the workforce has come through a pathway beginning with a UK undergraduate degree followed by the Foundation Programme.

39. Furthermore, it is an aim of the bill to prioritise those who already have significant NHS experience, so that those who have already built up such experience can continue to progress through training and to ensure that the health service does not lose out on the benefit of that experienced workforce. For 2026, the immigration statuses at clause 2(2) have been used as a reasonable proxy for that NHS experience. For example, someone who is eligible for specialty training and who has indefinite leave to remain is likely to already have experience of working in the NHS.

40. In sum therefore, the legitimate aims pursued by the bill include those of building a reliable pipeline of doctors with a durable linkage to the UK, the need to enable reliable workforce planning and placing value on knowledge of local clinical practice, culture and epidemiology.

41. Proportionality is then achieved by the fact that the bill does not seek to prohibit those who are not within the priority group from applying for, or ultimately being allocated, training places. The bill merely requires that priority is given to the groups that fulfil the policy aims articulated in the preceding paragraphs. Roles in specialty fields that are less popular with individuals who will be within the prioritised group such as Core Psychiatry, Internal Medicine and for GPs could well provide opportunities for those outside of the priority group, bearing in mind that multiple applicants are chasing multiple posts so not all the competition materialises.
42. It is also the case that unsuccessful applicants may seek alternative medical roles, for example, doctors who do not follow a specialty training programme can still practice as doctors and, in the NHS, might be employed as locally employed doctors (LEDs), in clinical fellow posts or in specialist or associate specialist (SAS) posts (although they would only be eligible for SAS roles after several years post-graduation).
43. The Government's view therefore is that any interference with Article 8 would therefore be justifiable and lawful. However, the Government's primary contention remains that Article 8 is simply not engaged at all.

Article 2 of Protocol 1

44. A2P1 provides:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

45. The Government's view is that A2P1 is not engaged by the bill. Whilst the Government recognises that A2P1 was found in *Belgian Linguistics* App. No. 1474/62 to extend to the recognition of the educational qualification obtained, there is a fundamental point of distinction with the purview of the bill. This is because the foundation programme, and still more so the speciality training programme, is employment. Neither foundation nor speciality training are programmes of education (although they are educative); they are on-the-job training provided for a salary. Furthermore, the bill does not alter the recognition afforded to foreign medical qualifications; those remain recognisable or not as they were before. It simply provides that access to a particular form of employment and training programme is to be organised by the priority set out in the bill. The context of the bill is therefore one of access to a profession and is not within the territory of access to education in the sense A2P1 provides for.
46. There does not appear to be any Strasbourg case law which clearly applies A2P1 to a period of employment training (whether on a free-standing basis or for Article 14 purposes). Whilst there is some consideration in the case law, e.g. in *Kök v Turkey*, App. No. 1855/02, A2P1 was not substantively addressed. There is however at least one more elderly decision of the Commission - *Glazewska v Sweden* (App No 11655/85) – which is somewhat analogous to the bill's context, in which the Commission robustly rejected the application of A2P1 to a Polish ophthalmologist who had been refused permission to practice in Sweden without undergoing further education.
47. In light of the above analysis, the Government does not consider that the bill engages A2P1. However, in the event that there was found to be an interference, the Government's view is that any such interference would be justified as a proportionate means of achieving a legitimate aim.
48. The interference would be 'provided for by law' as it would be contained in primary legislation.
49. That interference would then be justified by the same justifications as we have outlined above at paragraphs 36-40 (under consideration of Article 8) and which we do not repeat here for the sake of brevity. Proportionality is again achieved by the fact that the bill does not seek to prohibit those who are not within the priority

group from applying for, or ultimately being allocated, training places, and alternative medical roles remain available.

50. Therefore, any potential interference with A2P1 would in the Government's view be justified and lawful.

Article 14

51. Article 14 of the ECHR provides:

The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

52. It is well established that Article 14 does not provide free-standing rights but must be considered in conjunction with another substantive ECHR provision. It would therefore be necessary to demonstrate that any discriminatory effect of the bill is sufficiently linked to a core value of an ECHR right: e.g. *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, SC, at §17. The Government's view, as set out above, is that the bill does not engage any ECHR rights, including Article 8 and A2P1, and accordingly Article 14 cannot be engaged.

53. Nevertheless, the Government is of the view that, insofar as there is any differential treatment in the enjoyment of Article 8 or A2P1, that would be justified as a proportionate means of achieving legitimate aims.

54. The Government recognises that the bill gives rise to a number of differences of treatment. In particular, clause 2(2) generates differential treatment based on nationality regarding the offer of specialty training places for 2026, because British citizens (as well as certain others) are to be given priority over non-nationals. The ability to differentiate based on immigration status for places in 2027 onwards is retained at clause 3(3)(b). Other provisions draw distinctions

according to whether an applicant qualified at a UK institution (or certain other institutions) or not.

55. The differential treatment in the enjoyment of Article 8 and/or A2P1 rights that the Government would therefore be potentially seeking to justify is the differential effect on nationality and the place of qualification. The Government's view is that the aims outlined at paragraphs 36-40 above would serve to justify such differential treatment. We do not repeat those justifications here, save as to note that the aim of ensuring a workforce with knowledge of local clinical practice, culture, and epidemiology is particularly relevant to any differential treatment based on place of qualification.
56. Furthermore, we note that, in *Karus v Italy* App. No. 29043/95, the Commission found that it was compatible with Article 14 taken with A2P1 that foreign students could not obtain full exemption in respect of university tuition fees, given the higher likelihood that they would leave the country when they finished their studies so that the state would not benefit from its investment in them. In the Government's view, the bill's aim of seeking a return on investment in the education of UK medical school graduates, is plainly analogous and relevant to justifying any differential treatment generated based on place of qualification.
57. Proportionality is then in the Government's view achieved by the fact that the bill does not seek to prohibit those who are not within the priority group from applying for, or ultimately being allocated, training places, and alternative medical roles would remain available.
58. The Government therefore considers that any differential treatment in the enjoyment of article 8 or A2P1 rights is justifiable and lawful. However, our primary view remains that Article 14 is simply not engaged because the bill does not come within the ambit of article 8, A2P1 or any other ECHR right in the first place.

