



**Deirdre Hargey MLA**  
**Minister for Communities**

By email: [private.office@communities-ni.gov.uk](mailto:private.office@communities-ni.gov.uk)

15 April 2020

Dear Deirdre

**Re – COVID-19 and No Recourse to Public Funds**

The Coronavirus disease (COVID-19) pandemic has created extraordinary challenges for Governments across the world. Within this context, it is important that vulnerable members of our communities are effectively shielded.

The Commission welcomes the Department for Communities' swift response in developing measures during the pandemic, such as:

- amending the Discretionary Support Regulations (Northern Ireland) 2016, so as to provide a grant for short-term living expenses to assist claimants affected by COVID-19;
- direct payments for families in lieu of Free School Meals;
- match funding for the Community Foundation NI's Coronavirus Community Fund;
- a deferral of NI Housing Executive's rent increases;
- protection from eviction for social housing tenants and measures in tandem to address security of tenure for tenants in the private rented sector.

However, the Commission is concerned that many migrants living in Northern Ireland will not qualify for the various support measures. Accordingly, the Commission calls for targeted measures to support EEA and non-EEA migrants.

Early research into the first patients critically ill with COVID-19 in UK hospitals conducted by the Intensive Care National Audit and Research Centre indicates that black and Asian people are more likely to be badly affected by coronavirus.<sup>1</sup> Further, the Institute for Public Policy Research has warned that migrant households may experience particularly severe financial and health consequences. This is because migrants are more likely to be working in industries affected by the crisis, more likely to be self-employed and in temporary work, and are more likely to be in private rented and overcrowded accommodation.<sup>2</sup> The Council of Europe Commissioner for Human Rights has also warned that Roma are among the groups most vulnerable to the pandemic.<sup>3</sup>

Article 2 of the European Convention on Human Rights requires States to take reasonable steps to prevent intentional and unintentional deprivation of life within their jurisdictions<sup>4</sup> and to counter a known real and imminent risk to life.<sup>5</sup> The measures proposed below are consistent with these requirements.

### **EEA migrants**

The Habitual Residence Test applies to most means-tested benefits. EEA migrants who are not able to demonstrate a Right to Reside cannot pass the Habitual Residence Test. Those most likely to be affected include persons who are unemployed, those in precarious/casual work and persons considered as economically inactive. This latter category includes care givers subject to specifically defined exceptions meaning that women are particularly likely to be affected. Many migrants have been unable to access support due to the tightened right to reside test. The Commission believes a number of approaches should be adopted in the current crisis.

In the first instance, the Department for Communities should promptly issue guidance to implement the recent decision in *KH –v- Bury MBC and SSWP* [2020] UKUT 50 (AAC) whereby the Upper Tribunal ruled that the genuine prospects of work test does not apply to persons with retained worker status who have previously worked for a year or more. It is clear from the decision that it also applies to the self-employed and goes beyond Housing Benefit. Moreover, the requirement to register for employment should apply the approach endorsed in the decision at paragraphs 58 and 59. Implementation of this judgement will

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<sup>1</sup> Robert Booth, 'BAME groups hit harder by Covid-19 than white people, UK study suggests', *The Guardian*, 7 April 2020.

<sup>2</sup> House of Commons Library, 'Coronavirus: Calls to Ease No Recourse to Public Funds Conditions' (HoC, 2020), at 3.

<sup>3</sup> CoE Commissioner for Human Rights, 'Press Statement: Government must ensure equal protection and care for Roma and Travellers during the COVID-19 crisis', 7 April 2020.

<sup>4</sup> *Öneryildiz v Turkey* (2004) ECHR 657; *LCB v UK* (1999) 27 EHRR 212, at para 36.

<sup>5</sup> *Burke v UK*, Application No 19807/06, 11 July 2006, at para 1.

help ensure that former EEA workers and the self-employed retain an entitlement to means –tested social security. This should include EEA workers and the self-employed who have lost their jobs or self-employed livelihood due to the pandemic.

This will, of course still leave others who will still fall through the net.

The Commission recommends that the residence tests are removed to ensure that European migrants are eligible to apply for benefits including Universal Credit and Discretionary Support. Rather than apply the Habitual Residence and Right to Reside tests, the Department for Communities could instead request that applicants demonstrate presence. The EU Settlement Scheme has adopted a flexible approach to evidence and permits applicants to submit various types of paperwork as a means to document their presence. This may provide a useful model for Department for Communities to adopt.

### **Non-EEA migrants**

For non EEA migrants, the key obstacle to accessing support is the No Recourse to Public Funds condition. This restriction is imposed by immigration law on the majority of migrants with grants of limited leave to enter or remain in the UK. The effect of No Recourse to Public Funds is that migrants cannot apply for means tested benefits. This includes Universal Credit and Discretionary Support. Migrants subject to this condition may apply for contribution-based benefits such as contribution based/‘New Style’ Jobseeker’s Allowance and Statutory Sick Pay. However, eligibility is limited to employees who have paid sufficient national insurance contributions. These leaves many EEA migrants outside of social security system, for example, those who are self employed.

The Commission has written to the Secretary of State for the Home Department, Priti Patel MP, to request that the No Recourse to Public Funds condition is suspended across the UK as a matter of urgency. The details of this letter are set out in the Annex. The Commission awaits a response to this letter, but the Home Office has outlined its approach to No Recourse to Public Funds in a response to a recent Parliamentary Question. Claire Hanna MP asked whether a support package would be put into place for migrants without access to public funds during the COVID-19 outbreak. The UK Government indicated that migrants may apply to have their No Recourse to Public Funds condition lifted and that local authorities have powers to act.<sup>6</sup>

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<sup>6</sup> Hansard, ‘Immigrants: Coronavirus: Written Question 32747 in the House of Commons’, 20 March 2020.



The Commission does not consider these solutions are adequate. With regard to migrants applying to have the No Recourse to Public Funds condition lifted, this is an individual remedy, which necessitates that each migrant is able to navigate the application process and meet the evidential requirements.<sup>7</sup> This remedy is therefore unlikely to be accessible to the most vulnerable migrants. On local authorities stepping in, NI Councils do not have comparable powers to local authorities in the rest of the UK. While other provision may be available through social services our experience in the past is that accessing such support is exceedingly difficult and often requires third party intervention.

Notwithstanding the UK approach, the Commission urges the Department for Communities to adopt immediate measures to ensure that migrants have access to support. Options could include devising a scheme similar to Discretionary Support, which is not classified as a public fund, working with the Department of Health to provide support through existing community care powers or working with the Executive Office to expand the Crisis Fund.

The TEO Crisis Fund administered by the Red Cross has proven to be an effective way to support destitute migrants during the winter months. The Commission understands that the Red Cross has proposed an extension of the Crisis Fund during this time of unprecedented need. This would provide immediate humanitarian relief by harnessing existing structures and the expertise of civil society. The Commission lends its support to this option.

### **Asylum seekers**

The UN Committee on Economic, Social and Cultural Rights has urged the UK to adopt measures to address the particular vulnerability faced by asylum seekers.<sup>8</sup>

The Commission understands that there are approximately 1,200 asylum seekers living in Northern Ireland, primarily in Belfast. Almost 900 are comprised of households. Asylum seekers are eligible to receive Free School Meals and therefore will benefit from the direct payment scheme announced by the Minister for Communities. However, as noted at the Committee meeting on 6 April 2020, payments are made by bank transfers. The majority of asylum seekers do not

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<sup>7</sup> The Commission notes that the Home Office has very recently widened criteria to apply for the NRPF condition to be lifted by revising its 'change in circumstances' policy. While helpful, this revised policy does not remove the onus from individuals. Further, it does not address the issue whereby some immigrants who avail of the concession will face an additional qualifying period when applying for Indefinite Leave to Remain. See House of Commons Library, 'Briefing Paper No CBP 8888 Coronavirus: Calls to ease No Recourse to Public Funds Conditions' (HoC, 2020).

<sup>8</sup> E/C/12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 July 2016, at para 25.

have bank accounts. We understand that Department for Communities officials are working with Education Authority NI on this issue.

In addition, the Commission invites the Department for Communities to consider what additional support can be provided to asylum seekers. Asylum seekers currently receive a maximum of £37.75 per week in asylum support known as NASS. This is substantially below the amount paid through means tested benefit. Financial hardship is compounded by the current circumstances. The standard allowance of Universal Credit has been increased by £20 per week in light of increased financial pressures yet there has been no increase in asylum support rates.

The Commission notes that a food distribution project has been organised by civil society organisations supporting asylum seekers. The project lead is South Belfast Roundtable, which I know would be willing to work with the Department for Communities in devising a means to distribute financial support, were it to come available.

The Commission is available to offer any assistance required to ensure government policies and practices aimed at dealing with COVID-19 are human rights compliant and effective in protecting all, particularly the most vulnerable, in such challenging times. I look forward to hearing from you at the first possible opportunity.

I have attached the recent upper tribunal decision with this letter.

I have copied my letter to the Committee for Communities so that they are aware of the issues raised.

Yours sincerely,

Personal Data

**Les Allamby**  
**Chief Commissioner**

CC: Name Redacted Committee Clerk:  
[Committee.Communities@niassembly.gov.uk](mailto:Committee.Communities@niassembly.gov.uk)

## **Annex – Letter to Home Office**

Rt Hon Priti Patel MP  
Secretary of State for the Home Department  
Home Office  
Marsham Street  
London  
SW10 4DF

1 April 2020

Dear Minister,

### **Re: COVID-19, No Recourse to Public Funds and Immigration Detention**

The Coronavirus disease (COVID-19) pandemic has created extraordinary challenges for governments across the world. Within this context, it is important that all vulnerable members of our communities are effectively shielded. In this letter, the Commission sets out two issues that require urgent measures to be adopted to support migrants.

Article 2 of the European Convention on Human Rights requires States to take reasonable steps to prevent intentional and unintentional deprivation of life within their jurisdictions<sup>9</sup> and to counter a known real and imminent risk to life.<sup>10</sup> The measures proposed below are consistent with these requirements.

### **No Recourse to Public Funds**

As a result of COVID-19, an increased number of persons are out of work and face financial hardship.

The Commission welcomes the number of measures already announced by the UK Government to ensure that employees have access to appropriate support during these unprecedented times. However, while some migrants who lose employment will be eligible to receive the available contribution-based benefits, many will not. Many migrants with grants of limited leave to enter or remain that are subject to the No Recourse to Public Funds condition are unable to access the vital support offered by government. This significantly affects not only those individuals, but also their families, and it may force those affected to disregard the Government's COVID-19 policies in a bid for wider survival, placing them and the wider population at great health risk in the current environment.

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<sup>9</sup> *Öneriyildiz v Turkey* (2004) ECHR 657; *LCB v UK* (1999) 27 EHRR 212, at para 36.

<sup>10</sup> *Burke v UK*, Application No 19807/06, 11 July 2006, at para 1.

As one example, we welcome the Secretary of State for Housing, Communities and Local Government, Robert Jenrick MP, highlighting the urgent need to ensure that persons who are rough sleeping or living in hostel are properly accommodated. This will facilitate their ability to comply with the Government's policies on self-isolation and social distancing and will also give effect to the right to adequate housing enshrined in the International Covenant on Social, Economic and Cultural Rights (UN ICESCR), Article 11.

The power to impose conditions on leave, as conferred by section 3 of the Immigration Act 1971, is discretionary. The Commission notes that there is currently provision for the public funds condition to be lifted, albeit in limited and exceptional circumstances. To avail of this presently, persons must apply individually through a process that is not sufficiently agile to meet the circumstances we face. Thus, this existing route is unlikely to be able to provide the relief urgently required by migrants subject to this condition.

Accordingly, the Commission requests that you suspend the No Recourse to Public Funds condition as a matter of urgency. This will ensure that all employees and workers who lose employment as a result of COVID-19 can access prompt financial support. It would also ensure that all migrants have access to homelessness support through existing social security channels. We recognise that there is provision in Britain for local authorities to use powers to deal with some of these issues. In Northern Ireland local authorities have significantly reduced responsibilities including no responsibility for housing, social services or education. In the absence of suspension of 'no recourse to public funds' arrangements across the board, we think the Discretionary Support Payments scheme in Northern Ireland should not be treated as public funds for the duration of the crisis. Our preference remains a suspension across the board.

## **Immigration detention**

The UN High Commissioner for Human Rights has urged action to protect the health and safety of people in detention and other closed facilities, as part of overall efforts to contain the COVID-19 pandemic.<sup>11</sup> The Council of Europe's Commissioner for Human Rights has also called on Member States to review the situation of persons in immigration detention and to release detainees to the maximum extent possible.<sup>12</sup>

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<sup>11</sup> United Nations High Commissioner for Human Rights, 'Press Release: Urgent action needed to prevent COVID-19 "rampaging through places of detention"', 25 March 2020.

<sup>12</sup> Council of Europe Commissioner for Human Rights, 'Press Release: Commissioner calls for release of immigration detainees while COVID-19 crisis continues', 26 March 2020.



The UK Government is rightly taking action to fulfil its obligation to take steps to prevent foreseeable threats to public health. However, it should not be forgotten that this obligation extends to those in detention. The European Convention on Human Rights (Articles 2, 3, and 8) and the UN Standard Minimum Rules for the Treatment of Prisoners 1977 are clear that the State has a particular duty to ensure the well-being of those within its care, such as immigration detainees. There is no doubt that a virus such as COVID-19 poses a higher risk to populations that live in close proximity, such as places of detention.

In Northern Ireland, immigration detainees are primarily held at Larne House Short-Term Holding Facility. The Commission understands that Larne House continues to operate. Immigration detainees may also be held in police custody, prisons or immigration holding cells at Drumkeen House or ports of entry.

The Commission requests that all forms of immigration detention are immediately halted in Northern Ireland. Furthermore, any person released from immigration detention should be provided with accommodation in a community setting. This accommodation must be safe and culturally appropriate as required by UN ICESCR, Article 11.

The Commission is available to offer any assistance required to ensure government policies and practices aimed at dealing with COVID-19 are human rights compliant and effective in protecting all, particularly the most vulnerable, in such challenging times.

I look forward to hearing from you at the first possible opportunity.

Yours sincerely,

**Les Allamby**  
**Chief Commissioner**

CC

Arlene Foster, First Minister for Northern Ireland

Michelle O'Neill, Deputy First Minister for Northern Ireland

Name Redacted Regional Head of Home Office

Declan Kearney, Junior Minister for TEO

Gordon Lyons, Junior Minister for TEO



