



[By Email]

The Rt Hon Kemi Badenoch MP
Secretary of State for Business and Trade

24 November 2023

Dear Secretary of State,

In March 2023 the Joint Committee on Human Rights published a legislative scrutiny report on the Strikes (Minimum Service Levels) Bill.¹ We raised a number of serious concerns about the compatibility of that Bill with the UK's obligations under international law, including in particular the right to free assembly and association guaranteed by Article 11 of the European Convention on Human Rights (ECHR). As you will be aware, the ECHR has been made a part of domestic law through the Human Rights Act 1998. While Article 11 does not expressly refer to the "right to strike", it has been interpreted as covering the taking of strike action.²

The response to our report from the Parliamentary Under Secretary of State for Business and Trade accepted one of our recommendations, concerning the grounds upon which employers may decide which of their employees must work during a strike, but rejected the others.³ The Bill received Royal Assent and came into force on 20 July 2023.

Minimum Service Level Regulations

The Government have recently laid in both Houses three sets of Regulations under the provisions brought in by the Strikes (Minimum Service Levels) Act, for approval under the draft affirmative procedure. These Regulations set down minimum service levels to apply in respect of strikes in border security services, passenger railway services and NHS ambulance services and the NHS patient transport service.⁴ As discussed in our report on the Bill, the consequence of employees failing to work as required by employers imposing minimum service levels through "work notices", and of trade unions not taking reasonable steps to ensure their members comply, would

¹ [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill 2022-2023](#), Tenth Report of Session 2022-23, HC 1088, HL Paper 157, 6 March 2023

² See, for example, *Ognevenko v. Russia*, App. No. 44873/09, 2018, § 61

³ [Sixth Special Report of Session 2022-23](#)

⁴ [Strikes \(Minimum Service Levels: Border Security\) Regulations 2023](#); [Strikes \(Minimum Service Levels: Passenger Railway Services\) Regulations 2023](#); [Strikes \(Minimum Service Levels: NHS Ambulance Services and the NHS Patient Transport Service\) Regulations 2023](#)



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include a loss of automatic protection against dismissal for participating in the strike. We expressed our concerns that such severe consequences may amount to a disproportionate interference with Article 11 rights.⁵

In our report, we concluded that allowing trade unions to take an active part in the process by which minimum service levels are met and resolving any disputes through independent arbitration would be more consistent with International Labour Organisation standards and more likely to be compatible with Article 11 ECHR.⁶ We do not consider that the consultation process that preceded these Regulations being laid was sufficient to meet these concerns.

Neither have our concerns about the impact minimum service levels may have on the ability of workers to exercise their Article 11 rights effectively been allayed by the recently laid Regulations.

- The Regulations concerning border security would, for example, permit the employer to serve a work notice requiring border services to be no less effective on a strike day than if the strike were not taking place. While the JCHR recognises the crucial service carried out by border service staff, this proposed minimum service level raises a question not only over the ability of many individual employees to participate in a strike but over the extent which a strike would serve any purpose. Particular concerns arise in respect of small ports and airports, where “no less effective” services could result in staff teams being effectively prevented from striking at all.
- The Regulations concerning passenger trains would allow for an employer to require 40% of timetabled services to be provided. This would allow some employees to participate in strikes. However, infrastructure services (such as signalling) would have to be provided between 6am and 10pm on a substantial number of ‘priority routes’ – giving rise to a risk that employees working in infrastructure on those lines would be effectively prevented from striking.
- The Government recently published its response to the consultation that preceded the introduction of the Regulations concerning ambulance services.⁷ This response emphasised that there is “widespread support [amongst consultees] for the ambulance service continuing to respond to the most serious calls during strike action”, noted that “in the vast majority of cases ambulance unions had ensured that these cases were responded to during the strikes that took place last winter” and ultimately recognised that employers “may be able to secure the [necessary] level of coverage through

⁵ Para 83

⁶ Para 70

⁷ [Government response to minimum service levels in event of strike action: ambulance services in England, Scotland and Wales](#), 6 November 2023



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voluntary derogations, and they can continue to agree and rely on these instead, as long as they are confident that the MSL will be met.” In light of these conclusions, we are surprised that the Regulations laid do not make any mention of voluntary agreements as a primary tool for ensuring safe levels of service, or indeed at all. They would leave the decision whether to impose them through a binding work notice entirely in the hands of the employer.⁸

In our report on the Strikes Bill we recognised that Article 11 rights are not absolute and may be interfered with where necessary and proportionate in the public interest. We also emphasised, however, that measures that restrict Convention rights, including rights under Article 11, are unlikely to be proportionate if alternative, less restrictive measures could be taken that are likely to achieve the same aims.⁹ A failure to pursue voluntary arrangements where they are recognised to be sufficient is unlikely to meet this requirement of proportionality.

Code of practice

In our report on the Strikes Bill, we also raised concerns about the requirement for trade unions to take “reasonable steps” to ensure their members comply with a work notice imposing minimum service levels. These included a concern that this requirement did not provide sufficient clarity to ensure that trade unions and employees know when it has been met and when it has not.

Your department has consulted on a draft code of practice setting out what a trade union should do to ensure that it complies with the requirement to take “reasonable steps”.¹⁰ While this is not legally binding, it will be taken into account by the courts when assessing whether the requirement has been met. We welcome the introduction of a code of practice to the extent that it provides greater clarity and foreseeability, as required by Article 11 ECHR. However, it does nothing to reduce the impact of minimum service levels imposed through Regulations on trade unions, requiring them to actively encourage their own members to break their own strike. Once again, as we concluded in our report, placing greater emphasis on establishing agreed minimum service levels through negotiation could avoid placing trade unions

⁸ We note that your department has, on 16 November, published draft guidance for employers, trade unions and workers on the issuing of work notices (Guidance, [Minimum Service Levels: issuing work notices, a guide for employers, trade unions and workers](#), 16 November 2023). We welcome the fact that this guidance encourages employers to consider, before issuing a work notice, whether minimum service levels can be met by existing voluntary agreements. However, as non-statutory guidance it has no legal force, meaning that there is no clear imperative for an employer to comply.

⁹ Para 64

¹⁰ [CODE OF PRACTICE; Issued by the Secretary of State under section 203 of the Trade Union and Labour Relations \(Consolidation\) Act 1992; On Reasonable Steps to be taken by a Trade Union \(Minimum Service Levels\)](#)



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in such a position and be more likely to amount to a proportionate interference with Article 11 rights.

Can you please advise the Committee on the following points:

1. Is the Government satisfied that border security workers, particularly those at small ports and airports, will be able to exercise their Article 11 rights if the minimum service levels contained in the Strikes (Minimum Service Levels: Border Security) Regulations 2023 are imposed?
2. What assessment has the Government made of the extent to which effective strike action is still possible in cases where services must be “no less effective” than if no strike were taking place? On what basis does the Government conclude that restricting strike action in this way amounts to a proportionate interference with Article 11, both generally and specifically for those individuals identified in a work notice?
3. What assessment has the Government made of the extent to which the Article 11 rights of those working on passenger rail infrastructure on priority routes will be protected in cases where services must be provided between 6am and 10pm on strike days?
4. What consideration did the Government give to restricting the ability of employers to impose minimum service levels on ambulance services, at least where voluntary arrangements have previously proved successful, given that the consultation process appears to have established that voluntary arrangements have largely been effective? Can you ensure that there will not be an unnecessary and/or disproportionate interference with Article 11 if the employer is left with a broad discretion?

We would be grateful for a prompt response to this letter, bearing in mind the Government’s stated intent to bring these minimum service levels into force before Christmas.

Yours sincerely,

Joanna Cherry KC MP

On behalf of Harriet Harman MP, Chair, Joint Committee on Human Rights