

**EXPLANATORY MEMORANDUM TO
THE SPECIAL IMMIGRATION APPEALS COMMISSION (PROCEDURE)
(AMENDMENT) RULES 2007**

2007 No.

1. This explanatory memorandum has been prepared by the Tribunals Service of the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 The Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007 (“the 2007 Rules”) amend the Special Immigration Appeals Commission (Procedure) Rules 2003 (“the 2003 Rules”), of which the SI number is 2003/1034. They prescribe the procedure to be followed for appeals to the Special Immigration Appeals Commission (SIAC) under sections 2 or 2B of the Special Immigration Appeals Commission Act 1997 (“the SIAC Act”). Sections 2 and 2B provide that a person may appeal to SIAC against an immigration, asylum or citizenship decision where he is unable to appeal to the Asylum and Immigration Tribunal due to the Secretary of State for the Home Department (“SSHD”) certifying that the decision was taken on national security or public interest grounds.

The amendments bring the 2003 Rules up to date in the light of recent legislative developments in counter-terrorism and giving existing practices in SIAC a legislative footing. Although there is a large number of amendments, none of them makes any substantial change to the procedure.

- 2.2 The 2007 Rules are subject to affirmative resolution, and are intended to come into force by May 2007.

3. **Matters of special interest to the Joint Committee on Statutory Instruments.**

- 3.1 None.

4. **Legislative Background**

- 4.1 The Procedure Rules for SIAC are made by the Lord Chancellor under sections 5 and 8 of the SIAC Act. Section 8 deals with applications for permission to appeal from SIAC to an appellate court. Section 5(2) to (6) sets out those matters which the Lord Chancellor must have regard to when making Rules, and those provisions which he may or must include in them.

Sections 5(9) and 8(4) prescribe the affirmative resolution procedure for instruments under the sections.

Amendments to primary legislation that require amendments to the Procedure Rules

- 4.2 Section 7 of the Immigration, Asylum and Nationality Act 2006 (“the IAN Act”) inserts section 97A into the Nationality, Immigration and Asylum Act 2002 (“the NIA Act”). This makes appeals against deportation orders made in the interests of national security non-suspensive, meaning an appeal against a decision to make a deportation order which has been certified as having been made on national security grounds can only be brought from outside the United Kingdom. Where the appellant has made a human rights claim the appeal can be brought in-country unless the SSHD certifies that removal would not breach the ECHR. There is an appeal against that certificate to SIAC.
- 4.3 Section 9 of the IAN Act amends section 104(4) of the NIA Act so that appeals will not be automatically abandoned if appellants are granted leave to enter or remain. Under new section 104(4B) appeals on race discrimination grounds will not be treated as abandoned following grants of leave to enter or remain providing appellants give notice confirming they wish to continue with the appeal. Under new section 104(4C), appeals on Refugee Convention grounds shall not be abandoned if leave to enter or remain is granted for more than 12 months and appellants give notice confirming they want to continue with the appeal.
- 4.4 Section 10 of the IAN Act revokes section 110 of the NIA Act which provided for the Secretary of State for the Home Department (the SSHD) to make grants to voluntary organisations providing representation for immigration appellants.
- 4.5 Section 36 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 provides for electronic monitoring as a condition of bail.
- 4.6 The Prevention of Terrorism Act 2005 (“the PTA”) repeals Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (“the ATCS Act”) which provided for appeals to SIAC against certificates by the SSHD that the appellant is a suspected international terrorist, and reviews of such certificates. The PTA replaced these certificates with control orders, against which there is a right of appeal to the High Court.

5. Extent

- 5.1 This instrument applies to all of the United Kingdom.

6. European Convention of Human Rights

- 6.1 As the instrument does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The policy objectives of these amendments are to formalise SIAC practice as it has evolved over the years, to bring SIAC up to date with recent counter-terrorism legislation, and to bring the Rules into line with the Civil Procedure Rules on dealing with national security cases, where appropriate.
- 7.2 There has been extensive consultation with stakeholders over a twelve-month period. This is a specialised and technical area, so this did not take the form of a formalised public consultation exercise. The DCA worked with stakeholders representing the spectrum of those involved with and interested in SIAC cases. These were:
- The Home Office
 - Special Advocates (a Special Advocate is appointed where the case involves ‘closed’ material; the disclosure of which the SSHD certifies would be contrary to the public interest)
 - The Special Advocates’ Support Office
 - The Treasury Solicitor, who acts for the respondent in SIAC appeals
 - The Foreign and Commonwealth Office
 - The Security Services
 - The Chairman of SIAC, Mr Justice Ouseley
- 7.3 There is no statutory obligation to consult the Council on Tribunals (“the CoT”) on the SIAC Procedure Rules as SIAC does not fall within the CoT’s remit.
- 7.4 The views of stakeholders have substantially affected the development of the amendments. There follows a summary of the main amendments.
- 7.5 Rule 8 formalises and reflects the existing practice of holding an early directions hearing at which the parties, their representatives and any Special Advocate may be present. This was suggested for inclusion by stakeholders heavily involved in the SIAC process.
- 7.6 Rules 9 and 10 establish procedures for the SSHD to file exculpatory material – material that supports the appellant’s case or undermines the SSHD’s own – and for both parties to file further material with SIAC, copying it to any appointed Special Advocate. In accordance with current SIAC practice, in which the obligation to file exculpatory material is an ongoing one; where the appellant files further evidence the SSHD must make a reasonable search for exculpatory material. Additionally, the appellant and Special Advocate may apply to SIAC for a direction requiring the SSHD to file further information about his case, giving reasons as to why this information is needed. SIAC must determine whether it is necessary, taking into account whether the information can be provided without disproportionate cost, time or effort. The formulation of these Rules was significantly influenced by stakeholder input.

7.7 Rule 11 clarifies the procedure for withdrawal of appeals, which was not previously defined in the Rules. Rule 11 and 26 also provide that SIAC may strike out a notice of appeal or a reply if:

- it gives no reasonable grounds for bringing or defending the appeal
- SIAC deems it an abuse of the SIAC process,
- a party or Special Advocate fails to comply with directions.

The strengthening of SIAC's powers where parties fail to comply with directions was proposed by the Special Advocates and agreed by all stakeholders.

7.8 The amended Rules make clearer the role of Special Advocates in proceedings:

- Rules 20 and 27 clarify that Special Advocates may adduce evidence and cross-examine witnesses.
- Where there is 'closed' material, SIAC gives a separate 'closed' determination in addition to the 'open' determination. This is seen only by the Special Advocate and SSHD and cannot enter the public domain. Rule 29 permits the Special Advocate to apply to SIAC for a direction that parts of the 'closed' material be within the 'open' determination, on the grounds that it would not be contrary to the public interest to disclose it. SIAC must determine the application either with or without a hearing.
- Rules 8, 9, 10, 22, 23 and 30 make it clearer where documents must be served on the Special Advocate.

7.9 Rule 30 makes clearer the circumstances in which the SSHD can apply to SIAC to amend the 'open' determination, and is consistent with Rule 29 (outlined above in 7.8) which it mirrors.

7.10 Rules 22 and 23 amend the procedures for dealing with 'closed' material. Reflecting practice that has recently evolved within SIAC, these Rules require the SSHD to serve on SIAC any closed exculpatory material served on the Special Advocate which is redacted on grounds other than legal professional privilege (LLP), together with explanations for those redactions. SIAC will then give a direction to the SSHD as to the extent of the redactions that may be made. Rule 23 makes clearer the process by which SIAC deals with objections by the SSHD to material he wishes to rely on being disclosed to the appellant.

7.11 Rule 24 sets out procedures for open material served on the appellant that the SSHD has redacted on grounds other than LLP. The SSHD must notify the appellant and SIAC that redactions have been made, and must file with SIAC an unredacted version.

Amendments to Procedure Rules arising from primary legislation

7.12 The IAN Act contains measures to improve the asylum and immigration process. This instrument reflects the changes introduced by sections 7, 9 and 10 of the Act, as set out respectively in section 4.2, 4.3 and 4.4 above.

- Rule 5 to 7 extend the remit of the Rules to cover appeals against the issue of certificates under section 97A of the NIA Act, inserted by section 7 of the IAN Act.
- Rule 12 amends the provision on abandonment of appeals in accordance with section 9 of the IAN Act.
- Rule 19 removes the reference to representation by grant-aided voluntary organisations following section 10 of the IAN Act.

7.13 Rule 17 makes a minor amendment to the 2003 Rules to provide for electronic monitoring as a condition of bail, consequential to primary legislation described above in section 4.5.

7.14 Rules 3, 4, 5, 7, 8, 14, 15, 16, 17, 28 and 35 remove references to rights of appeal under Part 4 of the ATCS Act, as outlined in section 4.6 above.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on businesses, charities or voluntary bodies.

9. Contact

9.1 Jason Latham at the Tribunals Service can be contacted with queries regarding the instrument, on 0161 234 2077 or Jason.Latham@tribunals.gsi.gov.uk.