

# IMMIGRATION AND ASYLUM ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part VII: Power to arrest, search and fingerprint**

360. Part VII of the Act sets out provisions relating to powers to arrest and search and to take fingerprints from certain persons.
361. The White Paper explained that immigration officers currently have to rely on the police to perform certain tasks relating to the enforcement of immigration law and announced that, in order to reduce this dependency and ensure a more effective use of resources the Government intended to extend the existing powers of arrest of immigration officers and to provide immigration officers with powers of search, entry and seizure in respect of immigration offences equivalent to those the police already have. Part VII gives effect to this but imposes certain limitations on the exercise of these powers. The new powers – and associated safeguards – have been modelled on those contained in the Police and Criminal Evidence Act 1984 (PACE). In exercising these and other powers, immigration officers will be allowed to use reasonable force if necessary.

#### ***Section 128: Arrest without warrant***

362. This section inserts a new section (section 28A) into the 1971 Act. Subsections (1), (2) and (3) reproduce the existing powers of arrest without warrant which are currently contained in sections 24(2) and 25(3) of the 1971 Act. Subsections (1) and (2) allow a constable or immigration officer to arrest someone who has committed or has attempted to commit various immigration offences contained in Part III of that Act or where there are reasonable grounds for suspecting that they have committed or attempted to commit such an offence. The offences in question include entering the country illegally; overstaying; failing to observe a condition of leave; and the new extended offence of deception created by section 28.
363. Subsections (4) and (5) allow an immigration officer to arrest without warrant someone who commits or attempts to commit certain other offences contained in part III of the 1971 Act. The offences in question include: harbouring an illegal entrant or an overstayer or someone who fails to observe a condition of their leave, and obstructing an immigration officer in the execution of his duty. Subsection (6) limits the power of arrest for obstructing an immigration officer to cases where the option of serving a summons appears impracticable or where the immigration officer has reasonable grounds for believing the arrest is necessary to prevent the suspect either causing physical injury to himself or another person or suffering physical injury or causing loss of, or damage, to property. (Constables in England, Wales and Northern Ireland already have powers to arrest for the offences referred to in subsection (3), (4) and (5) under PACE and its equivalent in Northern Ireland. Constables in Scotland have no such statutory power, so the powers of arrest in subsection (3), (4) and (5) extend to them.)
364. The existing power of arrest does not apply to offences under section 24(1)(d) of the 1971 Act (failure to comply with a requirement to report to a medical officer of health or to be examined by such an officer) and this exception is retained.

**Sections 129, 137, 138 and 140: search and arrest by warrant, search warrant safeguards, execution of warrants and detention of persons liable to examination or removal**

365. **Section 129** inserts a new section 28B into the 1971 Act which will enable a justice of the peace who is satisfied that there are reasonable grounds for suspecting a person who is liable to be arrested for a relevant offence is to be found on any premises to grant a warrant authorising any constable or immigration officer to enter those premises, by force if necessary, for the purposes of searching for and arresting the suspect. In Scotland, warrants for this purpose will be granted by either the sheriff or a justice of the peace who has jurisdiction in a place where the premises are situated (subsections (3) and (4) of new section 28B).
366. **Section 137** inserts a new section 28J into the 1971 Act which sets out the requirements to be satisfied when an immigration officer applies for a search warrant. These are very similar to those which apply to the police under PACE. They include a requirement to state the ground of the application, the premises to be searched and, as far as possible, the persons or articles to be sought. An application for a warrant must be supported by information in writing and the officer making the application must answer on oath any questions that the person considering the application asks him. A warrant is limited to authorising entry on one occasion only.
367. **Section 138** inserts a new section 28K into the 1971 Act which sets certain conditions which have to be complied with when executing warrants which again reflect conditions which apply to the police under PACE. For example, an entry and search must be within one month of the date of issue of the warrant and at a reasonable hour (unless it appears to the officer executing it that the purpose of the search might be frustrated if the latter condition is observed). If the occupier of the premises is present at the time, the immigration officer must identify himself to the occupier, produce identification showing he is an immigration officer, show the occupier the warrant and supply him with a copy of it. If the occupier is not present, but someone else who appears to be in charge of the premises is there, the same requirements apply in respect of that person. If it appears that nobody present is in charge of the premises, a copy of the warrant must be left in a prominent place on the premises.
368. A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued. An officer executing a warrant must endorse it, stating whether the persons or articles sought were found and whether any articles other than the articles which were sought were seized.
369. Subsection (2) of section 140 amends Schedule 2 to the 1971 Act to provide for the issuing to immigration officers, as well as constables, of warrants to enter premises in order to search for and arrest someone who is liable to detention.

***Section 130: Search and arrest without warrant***

370. This section adds a new section, section 28C, into the 1971 Act which will allow an immigration officer to enter and search any premises without a warrant for the purpose of arresting a person for an offence under section 25(1) of that Act. (Police officers already have a corresponding power by virtue of the provisions of PACE.)
371. Subsection (2) restricts the exercise of this power to the extent that it is reasonably required for that purpose and to cases where the immigration officer has reasonable grounds for believing that the person whom he is seeking is on the premises. Before exercising this power of entry, the immigration officer must produce identification showing that he is an immigration officer.

***Section 131: Entry and search of premises***

372. This section specifies the conditions under which a justice of the peace (in Scotland the sheriff or a justice of the peace) may issue a warrant to an immigration officer authorising him to enter specified premises and to search for, seize and retain material which is of substantial value to the investigation of a specific offence under sections 24(1)(a)-(f), 24A or 25 of the 1971 Act and which is likely to be relevant evidence. Items subject to legal privilege, excluded material and special procedure material (as defined under the Police and Criminal Evidence Act 1984 and the police and Criminal Evidence (Northern Ireland) Order 1989) are excluded.

***Section 132: Entry and search of premises following arrest***

373. This section inserts a new section 28E into the 1971 Act. It provides that where someone has been arrested for an offence under Part III of the 1971 Act, and the arrest was made somewhere other than at a police station, an immigration officer may enter and search the premises in which the person was when arrested – or any premises in which he was immediately before he was arrested – for evidence relating to the offence for which the arrest was made. This power of entry and search may only be exercised if the immigration officer has reasonable grounds for believing that there is relevant evidence on the premises and only to the extent that it is reasonably required for the purposes of discovering such evidence (subsection (3)).
374. Subsection (5) allows an officer searching premises under this section to seize and retain anything he finds which he has reasonable grounds for believing is relevant evidence. However, he may not seize such items where there are reasonable grounds for believing that they are subject to legal privilege (subsection (6)).
375. The section also amends Schedule 2 to the 1971 Act by adding a new paragraph 25A which provides a corresponding power of entry and search where someone is arrested under that Schedule or is detained under that Schedule by an immigration officer having been arrested by a constable. Thus, an immigration officer will have the power, with the written consent of a senior immigration officer (except where obtaining such consent would impede the effectiveness of the search), to enter any premises occupied or controlled by the arrested person or in which that person was when he was arrested or immediately before he was arrested in order to search for “relevant documents”. The officer may seize and retain any documents which he has reasonable grounds for believing are such documents, subject again to his not being able to do this where there are reasonable grounds for believing the documents in question are items subject to legal privilege. (“Relevant documents” for the purposes of this paragraph are any documents which might establish the identity, nationality or citizenship of the arrested person or indicate the place from which he has travelled to the United Kingdom or to which he is proposing to go.) Any documents seized may not be retained for longer than is necessary in view of the purpose for which the person was arrested.

***Section 133: Entry and search of premises following an arrest under section 25(1) of the 1971 Act***

376. This section inserts a new section 28F into the 1971 Act, giving an immigration officer the power, with the written consent of a senior immigration officer (except where obtaining such consent would impede the effectiveness of the investigation), to enter and search any premises occupied or controlled by a person arrested for the offence in section 25(1) of the 1971 Act. As with other similar powers, this power may be exercised only if the officer has reasonable grounds for suspecting that there is relevant evidence on the premises and only to the extent that it is reasonably required for the purpose of discovering such evidence.

***Section 134: Searching arrested persons***

377. This section adds a new section 28G to Part III of the 1971 Act and a new paragraph 25B to Schedule 2 to that Act. Where someone has been arrested, other than at a police station, for an offence under Part III of that Act or has been arrested under Schedule 2 of the 1971 Act, an immigration officer will be allowed to search them if the immigration officer has reasonable grounds for believing that the arrested person may present a danger to himself or others. In addition, the arrested person may be searched for anything which might be used to assist his escape from lawful custody or anything which might be evidence relating to the offence under Part III of the 1971 Act or, in the case of Schedule 2, which might establish his identity, nationality or citizenship or indicate the place from which he has travelled to the United Kingdom or to which he is proposing to go. The power may be used only if the officer has reasonable grounds for believing that the arrested person may have these things concealed on him and only to the extent that it is reasonably required for the purpose of discovering that thing. Items which may be searched for under these powers may be seized and retained apart from items subject to legal privilege. Items which might be used to inflict injury or assist in an escape which were seized under Schedule 2 powers must be returned once the person is either no longer in custody or in the custody of a court but released on bail.

***Section 135: Searching persons in police custody***

378. This section will allow an immigration officer to search somebody who has been arrested for an offence under either Part III or Schedule 2 of the 1971 Act and is in custody at a police station (or, additionally, in the case of the former, in police detention at a place other than a police station). The arrested person may be searched at any time to see whether he has with him anything which he might use to cause physical injury to himself or others, to damage property, to interfere with evidence or to assist his escape. He may also be searched in Part III cases for anything the officer has reasonable grounds for believing is evidence relating to the offence or (in the case of Schedule 2) a document which might establish his identity, nationality or citizenship or indicate the place from which he has travelled to the United Kingdom or to which he is proposing to go. The intention is not to duplicate searches but to allow an immigration officer to carry out a search where he is the arresting officer.
379. This power of search may be exercised only to the extent considered necessary for the purpose of discovering such items, must be carried out by a person of the same sex as the person being searched and does not permit an “intimate search” (as defined by section 65 of PACE). If any items of the kind described are found they may be seized. The person from whom something is seized must be told why it is being taken unless he is violent, or appears likely to become violent, or is incapable of understanding what is said to him. Anything that is seized under these powers may be retained either by the police or by an immigration officer (depending on the nature of the item). However, an immigration officer may not retain anything seized under Schedule 2 powers for longer than is necessary or when the person from whom it was seized is either no longer in custody or has been released on bail.

***Section 136: Access and copying***

380. This section lays down certain conditions relating to the handling of material which has been seized by an immigration officer under the new powers. The occupier of the premises on which the material was seized – or the person who had custody or control of material immediately before it was seized – must be given a record of what was seized within a reasonable time if they ask for this to be done. The section goes on to provide that the person who had custody or control of seized material immediately before it was seized or someone acting on their behalf must also be given access (under supervision) to the seized material and, if they so request, a photograph or copy of the material unless there are reasonable grounds for believing that to do so would prejudice

any investigation being conducted under the 1971 Act or any criminal proceedings or the exercise of any functions in connection which the material was seized.

### **Section 141: Fingerprinting**

381. This section extends the current power to fingerprint those subject to immigration control contained in paragraph 18(2) of Schedule 2 and paragraph 2(4) of Schedule 3 to the 1971 Act and section 3 of the Asylum and Immigration Appeals Act 1993 (which is repealed by this Act and consolidated with the new powers).
382. Subsection (3) provides that fingerprints cannot be taken from a child under the age of sixteen unless an adult is present who fulfils one of the criteria set out in the remainder of the subsection. Subsection (3)(a) specifies that the adult can be the child's parent or guardian. Subsection (3)(b) specifies that the person can be an adult who has temporarily taken responsibility for the child, for example, a social worker. In addition, subsection (12) provides that the authority of a chief immigration officer, or another authorised person of equivalent grade in the case of prison officers, constables and officers of the Secretary of State, has to be given before the fingerprints of a child under the age of sixteen can be taken. Subsection (13) makes it clear that the safeguards relating to the fingerprinting of children do not apply where the authorised person (as defined by subsection (5)) reasonably believes that the individual whose fingerprints are being taken is over the age of 16.
383. Subsection (5) sets out those categories of person who are authorised to take fingerprints. They are:
- (a) a constable (this includes all police ranks);
  - (b) an immigration officer (which includes a chief immigration officer or an inspector);
  - (c) a prison officer (of any rank);
  - (d) an officer of the Secretary of State authorised for this purpose (IND staff at Croydon might be authorised for this purpose); or
  - (e) a person employed by a contractor in connection with the discharge of the contractor's duties under a detention centre contract. In effect, this means that the staff who are employed to manage the day-to-day running of a detention centre would be able to take the fingerprints of detainees if they were liable to be fingerprinted under this section.
384. Subsection (7)(a) provides that fingerprints can be taken from an individual (category A) who, when required on arrival to produce a valid passport or some other form of documentation (eg a national identity card) that establishes their identity and nationality or citizenship, fails to do so. But subsection (10) provides that fingerprints can only be taken under subsection (7)(a) if an immigration officer considers that the person concerned did not have a reasonable excuse for failing to produce the documentation.
385. Subsection (7)(b) provides that fingerprints can be taken from any person (category B) who has been refused leave to enter the United Kingdom but is given temporary admission pending removal from the United Kingdom where the immigration officer reasonably suspects that the individual concerned will not comply with the reporting or residence requirements of that temporary admission. Subsection (11) provides that fingerprints cannot be taken from a person in category B unless this has been approved by a chief immigration officer.
386. Subsection (7)(c)(i) provides that fingerprints can be taken where an immigration officer has given removal directions in respect of illegal entrants, overstayers, those who breach the conditions of their temporary admission, those who have obtained leave to remain by deception, and the dependants of any of these. Subsection (7)(c)(ii)

provides that fingerprints can be taken where the Secretary of State gives directions in respect of illegal entrants and subsection (7)(c)(iii) provides for fingerprints to be taken where removal directions have been given in respect of someone who is subject to a deportation order.

387. Subsection (7)(d) provides for fingerprints to be taken from those individuals (category D) who have been arrested under paragraph 17 of Schedule 2 to the 1971 Act.
388. Subsection (7)(e) provides for an asylum seeker's (category E) fingerprints to be taken.
389. Subsection (7)(f) provides that dependants (category F), as defined by subsection (14), of those persons in categories A to E can have their fingerprints taken. Subsection (14) defines the term "dependant" for these purposes as a spouse or child under the age of eighteen who does not have right of abode or indefinite leave to enter or remain in the United Kingdom. This means, for example, that where a person in category A-E has a spouse or child who is a British citizen, the British citizen will not have their fingerprints taken under this section.

### ***Section 142: Attendance for fingerprinting***

390. This section provides for a person who is liable to be fingerprinted to attend for fingerprinting at a specified place. It also gives certain time limits within which this must take place. In addition, it also provides a constable or immigration officer with the power to arrest without warrant anyone who fails to comply with the conditions as set out in this section.

### ***Section 143: Destruction of fingerprints***

391. This section provides for the destruction of fingerprint records within a specified period. This specified period will be such a period as the Secretary of State specifies in an Order. If no period is specified then the period within which fingerprints must be destroyed is ten years.
392. Subsection (2) provides that where a person proves that he is a British citizen or a Commonwealth citizen who has the right of abode in the United Kingdom under section 2(1)(b) of the 1971 Act then any fingerprints that have been taken must be destroyed.
393. Subsection (3) provides that where an asylum seeker is granted indefinite leave to enter or remain, his fingerprints must be destroyed. In all other cases, fingerprints must be destroyed on the grant of leave to enter or remain.
394. Subsection (5) provides that where a person has failed to comply with the conditions imposed on him under paragraph 21(2) of Schedule 2 to the 1971 Act, then subsection (4) will not apply. This means that where an individual has absconded from temporary admission his fingerprints can be retained. If he has not absconded, his fingerprints must be destroyed after his removal.
395. Subsection (6) provides that fingerprints taken after directions have been given (from persons referred to as "C" in section 141) must be destroyed if the directions cease to have effect.
396. Subsection (7) provides that if a person is fingerprinted because he has been given removal directions in respect of a deportation order, and the deportation order is later revoked, his fingerprints are to be destroyed.
397. Subsection (8) provides for the destruction of fingerprints taken from those arrested under Schedule 2 of the 1971 Act (referred to as "D" in section 141) once they are released.

***Section 144: Other methods of collecting data about physical characteristics***

398. This section provides the Secretary of State with a power to make regulations to enable data to be collected about people's external physical characteristics other than by taking fingerprints. By virtue of section 166(5), these regulations are to be made by the affirmative resolution procedure. This section has been included to take account of the new systems of identification that are currently being developed which will eventually provide an alternative means of uniquely identifying individuals to replace fingerprinting.

***Section 145: Codes of practice***

399. This section allows the Secretary of State to direct that immigration officers must have regard to relevant provisions of the existing PACE codes of practice in England Wales and Northern Ireland when exercising specified powers to arrest, question, search persons, enter and search premises, take fingerprints or seize property. The direction issued under this section must specify which powers are covered, which provisions of the existing PACE codes of practice are relevant and list any modifications necessary to ensure consistency of approach. The section will reinforce the existing commitment under section 67(9) of PACE which requires any person charged with the duty to investigate offences to have regard to the relevant PACE codes of practice. It will extend this commitment to immigration officers when they are exercising specified powers under Schedule 2 to the 1971 Act and also to any authorised person exercising the power to take fingerprints conferred by section 141 of this Act.

***Section 146: Use of force***

400. This section confers on immigration officers the power to use reasonable force, if necessary, in the exercise of the powers under the 1971 Act or the provisions of this Act. In addition, it provides for immigration officers, prison officers, constables, authorised officers of the Secretary of State and employees at detention centres to use reasonable force when exercising the power to take fingerprints under sections 141 or 142 or regulations under section 144.