

*These notes refer to the Nationality, Immigration and Asylum Act 2002 (c.41) which received Royal Assent on 7 November 2002*

# NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4**

#### **: Detention and Removal**

#### **Detention**

#### *Section 62*

#### *: Detention by Secretary of State*

174. Under paragraph 16 of Schedule 2 to the 1971 Act, an immigration officer has the power to detain an arriving passenger, an illegal entrant or a passenger liable to removal under the powers contained in section 10 of the 1999 Act. As an alternative to detaining them, the immigration officer also has the power (under paragraph 21 of Schedule 2 to the 1971 Act) to temporarily admit them to the United Kingdom. The Secretary of State has the power (under Schedule 3 to the 1971 Act) to detain or release someone against whom deportation action is being taken. The Secretary of State also has the power to grant temporary admission to someone who has made a claim for asylum immediately on arrival at a port, but unlike an immigration officer, has no power to detain such a person.
175. This section will give the Secretary of State the same power to detain as immigration officers, in the following circumstances - (1) pending a decision by the Secretary of State whether to set removal directions under paragraph 10, 10A or 14 of Schedule 2 to the 1971 Act and pending removal; and (2) where the Secretary of State has power to examine a person or grant or refuse them leave to enter under section 3A of the 1971 Act, pending the examination, his decision to give or refuse leave to enter, his decision to set removal directions or removal of such a person.
176. Subsections (3)(a) and (3)(c) are intended to ensure that a person detained under this section has the same rights as persons detained under Schedule 2 to the 1971 Act to apply for bail. Subsection (3)(b) allows the Secretary of State, where he has power to detain under this section, as an alternative, to grant temporary admission or release from detention under paragraph 21 of Schedule 2 to the 1971 Act in the same way that an immigration officer currently can.
177. This will mean that the decision whether or not to detain can be taken by the person who determines a person's asylum claim or immigration status and that this can be done at the same time.
178. Subsection (

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) allows restrictions under paragraph 21 of Schedule 2 to the 1971 Act set by the Secretary of State to be varied by an immigration officer and vice versa. The present offence of failing to comply with a condition of temporary admission or release without reasonable excuse is extended by subsection (9) to include failing to comply with a condition set by the Secretary of State.

179. Subsections (

10

) to (

16

) are consequential amendments to ensure that relevant provisions in other legislation to persons detained under the 1971 Act include references to persons detained under this section.

### **Section 63**

#### ***: Control of entry to United Kingdom, &c: use of force***

180. This section ensures consistency of language between the powers of escorts and immigration officers to use force. It makes no substantive change to the powers of the latter.

### **Section 64**

#### ***: Escorts***

181. **Section 54**

amends paragraph 17 of Schedule 2 to the 1971 Act so as to confer a power on detainee custody officers, acting in accordance with escort arrangements, to enter premises in order to search a person who has been detained prior to escorting him to a place of detention. The power is confined to those circumstances where an immigration or police officer has executed a warrant issued under paragraph 17(2) of Schedule 2 to the 1971 Act and has detained a person on the premises.

182. The existing powers of detainee custody officers acting in accordance with escort arrangements are contained in paragraph 2 of Schedule 13 to the 1999 Act. In particular, a detainee custody officer has the power to search a detained person for whose delivery or custody he is responsible. The new power would permit such a search to take place on private premises where entry is not by consent.

### **Section 65**

#### ***: Detention centres: custodial functions***

183. **Section 65**

amends section 154(5) of the 1999 Act so as to clarify the basis on which prison officers or prisoner custody officers may perform the functions of detainee custody officers in detention centres. The amendment will mean that the functions of detainee custody officers may be conferred on prison officers or prisoner custody officers without the Secretary of State having, as at present, to consider it necessary to do so. The section also makes consequential amendments to Schedules 11 and 12 to the 1999 Act, which relate to the powers and duties of detainee custody officers and to discipline within detention centres, so as to apply the provisions of these Schedules to prison officers or prisoner custody officers performing the functions of detainee custody officers in detention centres.

### **Section 66**

#### ***: Detention centres: change of name***

184. **Section 66**

amends section 147 of the 1999 Act so that detention centres will be known formally as removal centres. This reflects the part played by detention in the removal of failed

asylum-seekers and others. There are a number of minor and consequential amendments to other provisions in the 1999 Act and provisions in other legislation that refer to “detention centres”. There are no substantive changes to the existing provisions relating to the purpose and operation of detention centres.

### **Section 67**

#### **: Construction of reference to a person liable to detention**

185. A person who is liable to be detained, or who is actually detained, under the powers contained in the Immigration Acts, may instead be granted temporary admission or temporary release. This status may be subject to restrictions such as requiring the person concerned to live at a particular address and/or to report to the police or an immigration officer.
186. The powers to detain in immigration legislation do not specify a maximum period beyond which a person cannot be detained. However, for the detention to be lawful, it has to be for the purpose stated, and the person may only be detained for a period that is reasonable in all the circumstances of the particular case. Thus, for example, where a person is detained under paragraph 16(2) of Schedule 2 to the 1971 Act pending a decision whether or not to give directions for their removal or, where such directions have been given, pending their removal, they can only be detained for as long as the event can reasonably be described as “pending”. Once that point has been passed, the detention is no longer lawful.
187. Where this occurs, the practice has been to grant temporary release, generally subject to the conditions described above.
188. A judgment by the High Court in July 2002 (in the case of *Hwez and Khadir*) held that this practice was unlawful. The judge in that case held that the phrase “liable to detention” in paragraph 21 of Schedule 2 to the 1971 Act did not relate to the categories of person subject to immigration control who could, at some point, be detained, but rather was limited to those cases where the individual concerned could lawfully be detained at that precise moment. Thus, once the point was reached where the power to detain no longer existed, the alternative of temporary release subject to conditions was no longer available either. Similar considerations would apply to deportation cases, where the power to detain or release subject to restrictions is contained in Schedule 3 to the 1971 Act, rather than Schedule 2.
189. The purpose of this section is to avoid a situation where people subject to immigration control, who do not have leave to be here, but who cannot lawfully be detained, are left at large without there being any way of keeping track of them. The power to impose reporting and residence conditions on asylum seekers and others while their claims to remain in the United Kingdom are being considered is for contact management purposes, and this power is dependant on there being a power to grant temporary admission or release.
190. As subsection (1)(a) makes clear, this section does not affect the scope of the current powers to detain. It only applies to provisions which do not actually confer a power to detain. What it does is define what a reference in immigration legislation to being “liable to detention” means, making it clear that the term includes cases where the only reason the person cannot be detained at that precise moment is one of those specified in subsection (2).
191. The effect of this is that the people concerned can be given temporary admission or release (under Schedule 2 to the 1971 Act) or released on conditions (under Schedule 3) even where they may not lawfully be detained under the detention powers in, respectively, Schedule 2 and Schedule 3 to the 1971 Act.
192. Subsection (  
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) gives the section retrospective effect, thus avoiding the need to reassess the cases of persons on temporary admission on an individual basis. Because the provision will always have applied, it has the effect of validating the authorisation of temporary admission and restrictions imposed.

## **Temporary release**

### ***Section 68 : Bail***

193. **Section 68**  
provides a power for the Secretary of State, or an official acting on his behalf, to grant bail to a person detained under paragraph 16 of Schedule 2 to the 1971 Act in the same circumstances as a chief immigration officer may currently. The power takes effect after the expiry of the eighth day after detention begins, prior to which the power to grant bail will continue to be exercised by an immigration officer not below the rank of chief immigration officer.
194. **Section 68**  
also repeals Part III of the 1999 Act, with the exceptions of sections 53 (except subsection (5)) and 54. Part III of the 1999 Act contained provisions for a system of routine bail hearings for those in detention and has not been implemented. The rights to apply for bail under existing legislation will remain in place.

### ***Section 69 : Reporting restriction: travel expenses***

195. **Section 50**  
provides a power for the Secretary of State to link the provision of support with a requirement to report to the police or an immigration officer. Section 69 enables the Secretary of State to meet the reasonable travel costs of supported asylum-seekers who are required to travel to enable them to report as directed.

### ***Section 70 : Induction***

196. **Section 70**  
provides that an asylum-seeker and any dependants may be required to reside at a location for a period of up to 14 days which is at or near a place where a programme of induction will take place. The intention is that all asylum-seekers will be given an induction at the outset of their claim. The purpose of this induction is to inform the asylum-seeker about how the asylum process will work, up to and beyond the initial decision on their claim; to explain what responsibilities they have to comply with requirements placed upon them as part of that process; and to consider any requests for support. The residence restriction can be imposed regardless of circumstances, for example, whether or not the asylum-seeker has alternative accommodation available to them.

### ***Section 71 : Asylum-seeker: residence, &c. restriction***

197. **Section 71**  
is concerned with asylum-seekers who have existing leave to enter or remain at the time they make a claim for asylum (at present, only a small percentage of asylum-seekers fall into this category). The section provides that such asylum-seekers and their dependants may have restrictions imposed on them which can be imposed on other asylum-seekers (that is, those without existing leave to enter or remain) under paragraph 21 of Schedule 2 to the 1971 Act. The powers under that paragraph include the power to impose reporting and residence requirements. The purpose of this provision is to ensure

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that all asylum-seekers, whatever their circumstances prior to making a claim, can be subject to the same basic process including, for example, the requirement to keep in touch through regular reporting. The section further provides that where an asylum-seeker with existing leave fails to comply with a restriction placed upon him they will then become liable to detention under paragraph 16 of Schedule 2 to the 1971 Act. Restrictions imposed under this section cease to have effect once a person ceases to be an asylum-seeker.

## **Removal**

### **Section 72**

#### **: *Serious criminal***

198. Article 33(1) of the Refugee Convention. prevents a refugee being returned to a place where their life or freedom is threatened. Article 33(1) does not apply where the refugee has been convicted of a particularly serious crime and is a danger to the community, by virtue of Article 33(2). The section provides that where a person is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years, or of an offence specified by order made by the Secretary of State, he will be presumed to have been convicted of a particularly serious crime and to be a danger to the community. Provision is made for convictions for offences outside the United Kingdom. A person may rebut the presumption that they have committed a particularly serious crime and are a danger to the community.
199. Subsection (   
8  
 ) provides that the dangers a person may face if removed are not relevant to a consideration of whether the Article 33(2) presumption established by this section applies. Subsection (10) provides that where the Secretary of State has issued a certificate that the presumption applies an adjudicator, the Tribunal or the Special Immigration Appeals Commission must begin its substantive consideration of an appeal by looking at the certificate. If the appellate body agrees that the presumptions apply, having given opportunity for rebuttal, it must dismiss that part of the appeal which relates to removal being contrary to the Refugee Convention.

### **Section 73**

#### **: *Family***

200. Under paragraphs 8 to 10 of Schedule 2 to the 1971 Act, directions may be given for the removal of persons refused leave to enter the United Kingdom and illegal entrants. Subsection (1) allows removal directions to be given for the children of such people where those children were born in the United Kingdom.
201. An equivalent power already exists under section 10(1)(c) of the 1999 Act in respect of children born in the United Kingdom whose parents have remained beyond their leave, breached the conditions of their leave or obtained leave to remain by deception.
202. Subsections (   
2  
 ) to (   
4  
 ) make minor amendments in relation to the existing provisions of section 10 of the 1999 Act.

### **Section 74**

#### **: *Deception***

203. Under section 10(1)(b) of the 1999 Act, there is a power to remove immigration offenders who have obtained leave to remain by deception. Section 74 creates a power to remove people whose deception is discovered before leave is granted. (People who

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seek to obtain leave to remain by deception and people who succeed in doing so both commit an offence under section 24A(1)(a) of the 1971 Act.)

### **Section 75**

#### **: Exemption from deportation**

204. Under section 7(1)(a) of the 1971 Act Commonwealth citizens or citizens of the Republic of Ireland cannot be deported on grounds of the public good if they: (a) were Commonwealth or Republic of Ireland citizens on 1<sup>st</sup> January 1973 (the date of the coming into force of the 1971 Act); (b) were ordinarily resident in the United Kingdom at that time; and (c) have been ordinarily resident in the United Kingdom ever since.
205. Under section 7(1)(b) of 1971 Act Commonwealth citizens and citizens of the Republic of Ireland cannot be deported if they were ordinarily resident here on 1 January 1973 and have been ordinarily resident here for the 5 years prior to a decision to make a deportation order. Clearly, someone who has been ordinarily resident here at all times since 1 January 1973 has also been resident here for 5 years before the decision to deport. Subsection (2) therefore repeals section 7(1)(a) of the 1971 Act which is redundant.
206. Subsection (  
3  
) replaces section 7(1)(b) of the 1971 Act.

### **Section 76**

#### **: Revocation of leave to enter or remain**

207. **Section 76**  
gives the Secretary of State power to revoke a person's indefinite leave to enter or remain in certain specified circumstances.
208. Subsection (  
1  
) allows the Secretary of State to revoke indefinite leave where the person is liable to deportation but the person cannot be deported for legal reasons. An example of how this power might be used would be where a person has committed a serious criminal offence such that their deportation would be conducive to the public good but where they cannot be deported to their country of origin because removal would be contrary to Article 3 of the European Convention on Human Rights.
209. Subsection (  
2  
) allows the Secretary of State to revoke the indefinite leave of persons who are liable to removal on the grounds that they obtained the leave by deception, but who cannot be removed for legal or practical reasons. Practical obstacles such as difficulty in establishing nationality or the lack of a safe route of return can prevent removal.
210. Subsection (  
3  
) allows the Secretary of State to revoke the indefinite leave of a person and that person's dependants in certain cases where a person is no longer a refugee – for example, by accepting the protection of the country of their nationality or establishing themselves in that country.. As those concerned will no longer require the protection of the United Kingdom, subsection (7) allows for administrative removal by amending section 10(1) of the 1999 Act.
211. Subsections (  
5  
) and (  
6

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) provide that leave granted before the power comes into force may be revoked. In relation to subsections (1) and (2) but not (3) leave may also be revoked where the action which triggers revocation occurs before the power comes into force.

### **Section 77**

#### ***: No removal while claim for asylum pending***

212. **Section 77**

replaces section 15 of the 1999 Act which provides that an asylum claimant may not be removed from or required to leave the United Kingdom before notice of the Secretary of State's decision on the claim is given. The new section only prohibits removals in accordance with a provision in the Immigration Acts, and subsection (4) allows removal directions or a deportation order to be given and other interim or preparatory action to be taken before notice of a decision on the claim has been given.

### **Section 78**

#### ***: No removal while appeal pending***

213. **Section 78**

makes provision equivalent to that in Schedule 4 of the 1999 Act, which states that a person may not be removed from or required to leave the United Kingdom while he is in the country and his appeal is pending, as defined in section 104. Again, this only applies to removal or a requirement to leave under the Immigration Acts, and removal directions may be given or, subject to section 79, a deportation order may be made while the appeal is pending. Subsection (3) also allows other interim or preparatory action to be taken.

### **Section 79**

#### ***: Deportation order: appeal***

214. **Section 79**

makes provision equivalent to section 63(2) of the 1999 Act and paragraph 18 of Schedule 4 to that Act which prevent a deportation order being made during the period allowed for appealing against the decision to make it or while such an appeal is pending. "Pending" is defined in section 104.

### **Section 80**

#### ***: Removal of asylum-seeker to third country***

215. This provision replaces section 11 of the 1999 Act. The definition of standing arrangements is amended to ensure that any bilateral agreements on asylum returns with Member States outside of the Dublin Convention to which section 11 already applied, also will fall within this provision.