

NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 - Immigration Procedure

Applications

Section 118: Leave pending decision on variation application

285. **Section 118** replaces section 3C of the 1971 Act, which ensures that persons who make an application for leave "in time", that is before their current leave expires, are protected from becoming overstayers while their application is outstanding and while an appeal against a full refusal can be made in time or is pending. The earlier provision made no allowance for leave extended by this section to expire when an application was withdrawn or the applicant left the United Kingdom without formally withdrawing the application. These situations are now covered in subsection (2)(a) and (3) of the substituted section 3C.

Section 119: Deemed leave on cancellation of notice

286. **Section 119** amends paragraph 6(3) of Schedule 2 to the Immigration Act 1971. When a notice refusing leave to enter is cancelled the Immigration Officer may, instead of granting the person either indefinite or limited leave to enter, require him to submit to further examination. Therefore, when notifying cancellation of a notice of refusal of leave to enter the Immigration Officer is not obliged to make a further decision immediately, in order to avoid deemed leave being granted, but can instead notify the person that, for example, they will be interviewed or be given the opportunity to provide further written evidence before a decision is made to grant or refuse leave to enter.

Section 120: Requirement to state additional grounds for application

287. **Section 120** replaces and extends the application of the one-stop notice in section 75 of the 1999 Act. There is now no limitation on the category of applicant on whom the requirement to state grounds for application and the "one-stop warning" can be served and IND has the operational freedom to serve it at any appropriate point in the process.

288. Subsection (1) applies the section to people who have made an application to enter or remain in the United Kingdom and to people in respect of whom a relevant decision has been or may be taken without an application being made: for example where it is proposed to remove someone as an illegal entrant.

289. Subsection (2) states that when served with a "notice in writing" the person is required to state all his reasons for wishing to enter or remain in the UK, and any grounds on which IND should be obliged to let him enter or remain here, and any grounds on which he should not be removed. If he does not do so, any attempt to raise such grounds later

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on may lead to certification under section 96 with the effect that there can be no appeal against the decision, or that those grounds cannot be raised in connection with a further appeal.

290. Subsection (3) indicates that a statement made in response to a requirement and one-stop warning does not have to repeat what the applicant has already said in his application.

Section 121: Compliance with procedure

291. **Section 121** amends section 31A of the 1971 Act (as inserted by the 1999 Act). This clarifies the consequences if an application to enter or remain in the UK is not made on a prescribed form or in a prescribed manner. Regulations may provide for the consequences of failure to comply with specified requirements, including that it invalidates an application, does not invalidate an application or invalidates an application in certain circumstances.

Work permits

Section 122: Fee for work permit, &c

292. **Section 122** gives the Secretary of State the power to charge for the consideration of applications for immigration employment documents, including work permits and letters of permission issued in-country, which give authority to work and which underpin employment-related leave to enter or remain.
293. Subsection (3) establishes that the details of charging are to be set out in regulations. These regulations may make different provision in relation to different types or classes of applications. Such variation would allow, for example, different charges (including exemptions) to be introduced according to the type of application or the nature of the employer. Subsection (4) allows such regulations to specify that particular payment arrangements may apply in relation to certain applications.

Section 123: Advice about work permit, &c

294. **Section 123** inserts a new paragraph into subsection (1) and a new subsection (3) in section 82 of the 1999 Act. The effect is that applications for an immigration employment document will become a “relevant matter” for the purposes of the regulatory scheme established by Part V of the 1999 Act. This means that anyone who provides advice and/or services regarding work permit applications or any other document relating to the employment of a foreign national in the course of a business will be subject to the regulatory scheme established by Part V of the 1999 Act and administered by the Immigration Services Commissioner.

Authority-to-carry scheme

Section 124: Authority to carry

295. **Section 124** makes provision for the Authority – to-carry (ATC) scheme. This will enable the Secretary of State to operate a scheme, which requires carriers to seek authority for bringing passengers to the United Kingdom. It is envisaged that a scheme or schemes will require them to do so by checking the details of passengers travelling to the United Kingdom against information held on a Home Office database to confirm that they pose no known immigration or security risk and to confirm that their documents are in order. This will take place before the passenger embarks for the United Kingdom.
296. Subsection (1) allows the Secretary of State to make regulations requiring a carrier who brings a person to the United Kingdom to pay a penalty if they do not seek authority to carry a person, or if they carry a person even though authority has been refused, when required to do so.

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297. Subsection (3) provides that ATC may be applied to any class of carrier or passenger and subsection (4) allows the Secretary of State to operate different ATC schemes for different purposes.
298. Subsections (6) and (7) provide that the regulations made under this section may mirror or amend carrier's liability legislation, which concerns people arriving in the United Kingdom without valid travel documents or visas.
299. Subsection (8) provides that a decision as to whether to grant authority under the scheme does not indicate whether the person is entitled or permitted to enter the United Kingdom.

Evasion of Procedure

Section 125 and Schedule 8: Carriers' liability

300. The section provides that Schedule 8 shall have effect. Paragraph 2 of Schedule 8 amends section 32 of the 1999 Act, which relates to the penalty payable for carriage of a clandestine entrant into the United Kingdom.
301. Sub-paragraph (2) introduces provisions into the 1999 Act which are currently contained in the Regulations that extend the penalty regime to rail freight wagons ([S.I. 2001/280](#) as amended). Thus a clandestine entrant, as defined by section 32(1) of the 1999 Act, includes someone who arrives in the United Kingdom concealed in a vehicle, ship, aircraft or rail freight wagon and who claims, or indicates that he intends to seek, asylum in the United Kingdom, or who evades, or attempts to evade immigration control.
302. Sub-paragraph (3) amends section 32 so that it provides that a person responsible for a clandestine entrant may be held individually liable to pay a penalty in respect of the clandestine entrant and any person concealed with that clandestine entrant. The Secretary of State may impose, in respect of each clandestine entrant, an individual penalty of no more than a prescribed maximum on each responsible person whilst limiting the total combined amount to a prescribed maximum in respect of each clandestine entrant. Rather than being held jointly and severally liable, as currently provided for in the 1999 Act, each responsible person will be liable for his own penalty.
303. However, further to the amendments made by sub-paragraph (4), where a penalty is imposed on a driver who is the employee of the vehicle's owner or hirer, the driver's employer, as well as the driver, will be liable for payment of that penalty.
304. The amendments made by sub-paragraph (6) mean that where the clandestine entrant is concealed in a freight train, the responsible person is the train operator who was responsible for certifying the relevant train as fit to travel to the United Kingdom or (in the case of a freight shuttle wagon) the operator of the shuttle train of which the wagon forms part.
305. Pursuant to amendments made by sub-paragraph (8), where a person is responsible in more than one capacity, for example, as both the owner and driver of a vehicle, a separate penalty may be imposed on him in respect of each capacity.
306. [Paragraph 3](#) creates a new section 32A of the 1999 Act introducing a new code in relation to setting the level of the penalty.
307. Subsection (1) of the new section requires the Secretary of State to issue a code of practice specifying the matters to be considered in determining the amount of a penalty. Under subsection (2) the Secretary of State must have regard to the code and any other relevant matters when imposing a penalty and when considering a notice of objection against a penalty.

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308. By subsections (3) to (6), the Secretary of State is required to lay a draft of the code before Parliament before issuing it and then may bring the code into operation by order. The Secretary of State may subsequently revise and reissue the code.
309. [Paragraph 6](#) amends section 34 of the 1999 Act in relation to the defences to the imposition of a penalty under section 32 of that Act.
310. Sub-paragraph (4) inserts a new subsection (3A) which creates a defence for rail freight operators in circumstances where the operator knew, or suspected that a clandestine entrant was, or might be, concealed in the rail freight wagon, having boarded the train or shuttle train after it had begun its journey to the United Kingdom, and the operator could not stop the train or shuttle train without endangering safety.
311. [Paragraph 7](#) amends section 35 of the 1999 Act by clarifying the procedure for the issuing of the penalty notice and objecting to the issue of a penalty notice.
312. Amendments made by sub-paragraph (3) mean that a responsible person may give notice of objection to the Secretary of State in the required form and within the prescribed period if he objects on the grounds that he is not liable to the imposition of a penalty or that the amount of the penalty is too high. The Secretary of State may then affirm, vary or cancel the penalty and inform the objector of his decision within a prescribed or agreed period. If the penalty is increased, a new penalty notice must be issued.
313. [Paragraph 8](#) of the Schedule introduces a new statutory right of appeal against the imposition of a penalty in a new section 35A of the 1999 Act. A person may contest both liability to a penalty and the level of the penalty in the county court (or equivalent court in Scotland). The court may cancel or reduce the penalty, or dismiss the appeal. The appeal will be a re-hearing of the Secretary of State's decision to impose a penalty and the court hearing the appeal must have regard to any code of practice relating to the level of penalty in effect at the time of the appeal, the code of practice relating to prevention of clandestine entrants in effect when the penalty was issued and any other relevant matters (which may include matters of which the Secretary of State was unaware). An appeal may be brought whether or not a notice of objection has been given or the penalty has been increased or reduced under the objection procedure.
314. [Paragraph 9](#) amends section 36 of the 1999 Act which relates to the detention of vehicles.
315. Sub-paragraph (3) provides the power to detain a transporter for up to 24 hours pending a decision on whether to issue a penalty notice, pending the issuing of a penalty notice, or pending a decision whether to detain a transporter under section 36(1). This is to take account of the time it may take in some instances to complete the necessary enquiries to establish the identity of those who are potentially liable to pay a penalty, to determine the level of any penalty to be imposed, and to consider whether there is a significant risk that the penalty will not be paid if the transporter is not detained under section 36(1).
316. [Paragraph 10](#) inserts a new section 36A into the 1999 Act which provides the power to detain a transporter where a person to whom a penalty notice has been issued fails to pay the penalty before the specified date. Under this power any transporter used, in connection with his business, by the person to whom the penalty notice has been issued (provided that this is the owner or hirer of the transporter, or their employee at the time the penalty notice was issued) may be detained. Detention cannot take place if an appeal against the penalty is pending or can be brought. A detained transporter will be released if the penalty and any connected expenses are paid.
317. [Paragraph 11](#) amends section 37 of the 1999 Act which enables a person to apply to a court to have their transporter released.
318. The amendment made by sub-paragraph (4) removes the requirement for a person, when applying to the court for the release of a transporter that has been detained in accordance

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with section 36(1), to show a compelling need for its release. A transporter may be released if the court considers that a satisfactory security has been tendered, that there is no significant risk that the penalty and any connected expenses will not be paid, or that there is a significant doubt as to whether the penalty is payable.

319. Sub-paragraph (5) inserts new subsections (3A) and (3B) which provide that a court may also release a transporter detained under new sections 36A and 36(1) if a penalty notice was not issued to the owner or an employee of his or if the court considers it right to release the transporter. A transporter may also be released under new section 36A if the court considers that the detention was unlawful.
320. The amendment made by sub-paragraph (6) means that the power of sale under section 37(4) may only be exercised when no appeal against the penalty is pending or can be brought or with the consent of the owner.
321. [Paragraph 13](#) substitutes a new section 40 of the 1999 Act. This provides for the charge imposed on carriers in respect of passengers arriving in the United Kingdom without proper documents. The owners of ships and aircraft will continue to be liable to a charge of £2,000 in respect of an individual who arrives in the United Kingdom and fails to produce the required documents. The owners and operators of road passenger vehicles will no longer be liable to a charge but there is a power for the Secretary of State to apply the section by order to passengers arriving by train.
322. A new section 40A sets out the procedures for notification of and objection to the penalty. The charge notice and notice of objections must contain certain information and follow a prescribed form. The Secretary of State will determine whether or not to cancel the charge within a prescribed or agreed period.
323. A new section 40B also provides a statutory right of appeal by which a carrier may contest his liability to a charge in the county court (or equivalent court in Scotland). The appeal will be a rehearing of the Secretary of State's decision to impose a charge and may be determined having regard to matters of which the Secretary of State was unaware. The court may cancel the charge or dismiss the appeal. An appeal may be brought whether or not a notice of objection has been given under the objection procedure.
324. [Paragraph 14](#) removes the power to detain vehicles under section 40.
325. Amendments to Schedule 1 (sale of transporter) made by paragraph 16 mean that where the owner of a transporter is a party to an application for leave to sell it, in determining whether to give leave the court will consider the extent of any hardship likely to be caused by sale, the extent to which the owner is responsible under the penalty notice and any other relevant matters.

Provision of information by traveller

Section 126 : Physical data: compulsory provision

326. This section supplements the current power to fingerprint and gather data from persons subject to immigration control, which is contained in sections 141 to 146 of the 1999 Act. Subsections (1) and (2) enable the Secretary of State to provide by regulations that a person who makes an application for a visa or entry clearance, or for leave to enter or remain (including variation of such leave) will be required to provide data specified in the regulations when making such an application, or to provide on demand such information to an "authorised person", who is enabled by the regulations to collect such data (for example, an entry clearance officer or immigration officer). The data that may be required extends to external physical characteristics, including features of the iris and any other part of the eye. By virtue of subsection (3), the power does not extend to those persons to whom section 141 of the 1999 Act contemporaneously applies. These persons continue to be covered by sections 141 to 146 of that Act.

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327. Subsections (4) to (8) make further provision about the content of the regulations. In particular, regulations may specify the form in which “data” should be provided and the means by which data may be obtained. They may also require persons authorised by the regulations to require the provision of data to have regard to any specified code of practice, or provisions thereof, that is in force under specified Police and Criminal Evidence legislation. The regulations may make provision for the use and retention of information provided, which may permit the use of information for specified non-immigration purposes. The regulations may also specify the consequences of an applicant failing to provide the requisite data, which may include the application in question being treated as invalid or refused. Additionally the requirements of the regulations can be specified to apply to certain cases or circumstances or to apply to all applications generally. There is no power to arrest persons who refuse to provide the data or to use reasonable force as remains the case for those covered by sections 141 to 146 of the 1999 Act. Regulations must provide for the destruction of data some 10 years from the date of recording of that data (unless another date is specified in the regulations for this purpose) and ensure that proper safeguards are in place when collecting data from those under the age of 16.

Section 127: Physical data: voluntary provision

328. Under this section the Secretary of State may operate a scheme that enables people voluntarily to provide data of the type covered by section 126 with a view to assisting and accelerating their entry into the United Kingdom. By virtue of subsection (2), regulations made under this clause may impose or permit imposition of a charge on participants and may provide for safeguards regarding the use and retention of data.

Section 128: Data collection under Immigration and Asylum Act 1999

329. This section amends section 144 of the 1999 Act to clarify that features of the iris or any other part of the eye come within the scope of external physical characteristics. This confirms that iris scans may be prescribed under section 144 of the 1999 Act and ensures that section 144 of that Act is interpreted in line with section 126. This section also ensures that those exercising powers taken under section 144 of the 1999 Act may be obliged to have regard to any specified code of practice, or (possibly modified) provisions thereof, that is in force under specified Police and Criminal Evidence legislation. Those collecting data under section 126 may also be required to have regard to such codes or provisions thereof.

Disclosure of information by public authority

Section 129: Local authority

330. This section provides that where the Secretary of State reasonably suspects that a person has committed a specified offence under the 1971 Act and is, or has been resident in a local authority area, the Secretary of State may require that local authority to provide information for the purpose of locating that person. It further provides that local authorities must comply with such a requirement.

Section 130: Inland Revenue

331. This section provides that the Commissioners of Inland Revenue may supply the Secretary of State with information for the purpose of establishing a person’s whereabouts if the Secretary of State reasonably suspects that person does not have leave to be in the United Kingdom ; does not have permission to work; that he has worked in breach of conditions of leave or temporary admission. The Inland Revenue may also provide information to the Secretary of State for the purpose of determining whether an applicant for naturalisation under the British Nationality Act 1981 is of good character and for verifying whether a sponsored entry clearance applicant meets the maintenance and accommodation requirements of the Immigration Rules.

Section 131: Police, &c

332. Section 20 of the 1999 Act provides for information to be supplied to the Secretary of State by a number of bodies for immigration or other specified purposes. This section enables those bodies (including chief officers of police, the National Criminal Intelligence Service and HM Customs & Excise) to supply information to assist the Secretary of State in determining whether a person who has applied for naturalisation as a British citizen satisfies the "good character" requirements of the BNA 1981. Such information may include evidence of convictions.

Section 132: Supply of document, &c. to Secretary of State

333. Section 132 extends the scope of section 20 of the Immigration and Asylum Act 1999 to allow a person to whom the section applies who comes across physical objects, such as documents or replica immigration stamps, to pass them to the Secretary of State for immigration purposes.
334. Subsection (4) allows the Secretary of State to retain or dispose of documents or articles which are passed to him under this section.

Section 133: Medical inspectors

335. This section authorises port medical inspectors and staff working under their direction to disclose information to health service bodies for specific medical purposes. The information that can be disclosed is set out at subsection (2). The permitted purposes of such disclosure are specified at subsection (3). "Health service body" is defined at subsection (4).

Disclosure of information by private person

Section 134: Employer

336. This section provides for the Secretary of State, where he has reasonable suspicion that a person has committed a specified immigration offence, including an offence in relation to earnings under the national asylum support arrangements, to require that person's employer to disclose information about that person's whereabouts, earnings or employment history. The provision applies to employers and to employment agencies hiring out the services of staff, whether those staff are self-employed, employed by the employment agency, or employed by a third party employer.

Section 135: Financial institution

337. This section provides for the Secretary of State to require a financial institution, such as a bank or building society, to supply information about a person whom the Secretary of State reasonably suspects of making a dishonest representation so as to commit a specified offence in relation to the national asylum support arrangements. To require information the Secretary of State must also reasonably suspect that the institution has the information and that it is relevant to the offence.

Section 136: Notice

338. This section sets out the form in which a requirement under sections 134 or 135 must be made, and what is required of an employer or financial institution in response to such a request. The request must be made in writing and must specify the information required, the manner in which it is to be provided and the time limit for replying, which must be at least 10 working days from receipt of the request. Within that time limit, the person on whom the notice is served must provide the information.

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Section 137: Disclosure of information: offences

339. A person who without reasonable excuse does not comply with a request made under section 136(3) (which would include a person who falsely denies having the information requested) commits an offence punishable with a maximum penalty of a fine or three months imprisonment or both.

Section 138: Offence by body

340. The offence at section 137 may be committed by a natural or legal person, including a body corporate, such as a company. This section provides that where an offence under section 137 is committed by a body corporate, an officer of that body (which may include a manager, director, secretary or member) will have committed an offence if it is proved that the offence was committed with his consent or connivance, or was due to his neglect. The section also provides for liability of partners in a firm, making special provision for limited partnerships.

Section 139: Privilege against self-incrimination

341. This section provides that information provided by a person under sections 134 and 135 cannot be used in evidence in criminal proceedings against that person, except in proceedings for an offence under section 137.

Immigration Services

Section 140: Immigration Services Commissioner

342. Subsection (1) inserts a sub-paragraph in paragraph 7 of Schedule 5 to the 1999 Act to clarify that the Immigration Services Commissioner (“the Commissioner”) may exercise his existing powers of entry when investigating a matter on his own initiative. These powers may be exercised to the same extent and in relation to the same matters as would be the case if the Commissioner was investigating a complaint made to him by a third party.
343. Subsection (2) inserts a new paragraph in Schedule 6 to the 1999 Act which enables the Commissioner to vary an adviser’s registration during the period of an extant registration at any time without charge. Subsection (3) enables any decision made by the Immigration Services Commissioner in this way to be appealed to the Immigration Services Tribunal.

Section 141: EEA ports: juxtaposed controls

344. This section provides for a power that would allow the UK to operate immigration and other frontier controls at an EEA ferry port (such as Calais), for the purposes of giving effect to an international agreement. In addition, it would allow the Secretary of State to make any necessary legislative arrangements to accommodate French immigration control in UK ports (such as Dover).
345. Subsections (1) and (2) contain a power for the Secretary of State to make an order for the purpose of giving effect to an international agreement which concerns immigration control at an EEA port (which may also cover other frontier controls such as police and customs). The order may include any provision likely to facilitate implementation of that agreement.
346. Subsection (3) lists particular matters which may be included in a future order. For example an order may specify that particular laws of England and Wales have effect (with or without modification) in that part of the EEA where immigration and other frontier controls are being carried out by UK officials. An order may also modify or even disapply UK legislation in order to allow officers from other countries to perform their functions on UK territory

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347. Subsection (3)(f) provides that an order may make provision conferring a function, which may be discretionary and may be on a government officer of a State other than the UK.
348. Subsection (3)(g) states that an order may create or extend the application of an offence and subsections (3)(h) and (i) provide that an order may impose penalties or require payments of a fee, (for example a fee for processing a particular type of immigration application).
349. Subsection (3)(j) states that an order may contain provision about enforcement, including conferring powers of arrest, detention or removal from or to a place.
350. Subsection (3)(k) allows an order to confer jurisdiction on a court.
351. Subsections (3)(l) and (m) provide for an order to confer immunity or provide for indemnity or compensation.
352. Subsection (3)(n) allows an order to make provision requiring , inter alia, UK port authorities to co-operate with or provide facilities for French officers to carry out their functions. It includes the power to require such facilities at no charge.
353. Finally, subsection 3(o) allows an order to make provision about the disclosure of information.
354. Subsection (5) states that the Secretary of State must consult with such persons as he considers appropriate before making an order under this section. Further, an order must be made by statutory instrument, which must be laid before and approved by both Houses of Parliament.

Section 142: Advisory panel on country information

355. The Act makes provision for the establishment of an advisory panel on country information.
356. Country information means information about the countries of origin of asylum seekers. The Immigration and Nationality Directorate compiles information regarding the political situation as well as human rights issues on the 35 countries that produce the highest numbers of asylum seekers to the UK. Their purpose is to document what is known about the countries in a way that might be relevant to making a decision on an asylum application.
357. The advisory panel will provide scrutiny and oversight of the quality and content of the country reports and review the methodology used in their compilation.