

*These notes refer to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) which received Royal Assent on 22 July 2004*

# ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) ACT 2004

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## EXPLANATORY NOTES

### REMOVAL AND DETENTION

#### *Section 33 and Schedule 3: Removing asylum seekers to a safe country*

139. [Section 33](#) and Schedule 3 deal with situations where a person can be removed to a safe third country without substantive consideration of his asylum claim. They replace and extend the provisions currently contained in sections 11 and 12 of the Immigration and Asylum Act 1999.
140. In considering whether a claimant for asylum can be removed to a third country, obligations under the Refugee Convention and the Human Rights Act are potentially relevant. Under section 11 of the 1999 Act, certain countries are deemed safe for Refugee Convention purposes – that is to say they are to be regarded as:
- a) a place where a person’s life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
  - b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.
141. This prevents any claimant who is to be removed to one of these countries from challenging their removal on Refugee Convention grounds. A person can still challenge removal to those countries on the ground that it would be unlawful under Section 6 HRA as being incompatible with his Convention rights. But where the Secretary of State certifies a human rights claim as clearly unfounded, any appeal on this ground can only be pursued from abroad. Section 11 encompasses countries which have agreed to be bound by the Dublin arrangements (Council Regulation [\(EC\) No. 343/2003](#) or the Dublin Convention). Countries can also be certified as safe for Refugee Convention purposes under section 12 on a case by case basis.
142. Under the new provisions there will continue to be a deeming provision for Refugee Convention purposes in relation to those countries bound by the Dublin arrangements and a limited human rights deeming provision (preventing challenge on the basis of onward removal from the third country in breach of human rights) will be added.
143. In addition, the deeming provision for Refugee Convention purposes will be capable of extending to countries that would not be covered by section 11. Other countries can be certified as safe for a given individual as at present. In addition, in relation to certain countries, the legislation will provide for human rights claims to be certified as clearly unfounded unless the Secretary of State is satisfied that they are not clearly unfounded. The provisions therefore take a graduated approach to the “safety” of third countries for Refugee Convention and ECHR purposes.

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144. **Section 33** repeals sections 11 and 12 of the Immigration and Asylum Act 1999 and introduces Schedule 3, which contains the replacement provisions (see below). It also repeals sections 80 and 93 of the Nationality, Immigration and Asylum Act 2002 which set out an amended version of section 11 and limited the right to an “in country” appeal in relation to removals to safe third countries, respectively. The appeals provision is now dealt with in Schedule 3.
145. **Part 2** of Schedule 3 deals with countries that are deemed safe for Refugee Convention purposes and for claims that onward removal from the state would breach the ECHR. All other human rights claims against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that they are not.
146. The countries listed at paragraph 2 are those which are subject or have agreed to be bound by the Dublin arrangements which are currently the members of the enlarged European Union as from May 2004 together with Norway and Iceland. Additional countries joining the Dublin arrangements may be added by order – see Part 6 below.
147. Under paragraph 3 in considering whether a person may be removed there, they are to be treated as places:
- a) where a person’s life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
  - b) from which a person will not be sent in contravention of his rights under the Human Rights Convention, and
  - c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.
148. **Paragraph 4** disapplies section 77 of the Nationality, Immigration and Asylum Act 2002 (which prevents removal while an asylum claim is pending) where the Secretary of State certifies that a person is to be removed to a listed State and he is not a national or citizen of that State. Paragraph 5 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for Refugee Convention purposes or ECHR purposes in terms of onward removal. Paragraph 5 provides that where a human rights claim made on another basis is certified as clearly unfounded a person being removed is similarly prevented from bringing an appeal within the United Kingdom. Finally, paragraph 5 provides that any human rights claim against removal (other than the on basis of onward removal) will be certified by the Secretary of State as clearly unfounded unless he is satisfied that it is not.
149. **Paragraph 6** prevents a person bringing an appeal from outside the United Kingdom on any ground inconsistent with the provisions in paragraph 3 described above.
150. **Part 3** of Schedule 3 deals with countries (not listed under Part 2) that are deemed safe for the purposes of the Refugee Convention. All human rights claims against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that they are not. The list of countries is to be specified by order, and may be amended in accordance with Part 6 below.
151. Under paragraph 8, in considering whether a person may be removed there, they are to be treated as places:
- a) where a person’s life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
  - b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.
152. **Paragraph 9** disapplies the provision in section 77 of the 2002 Act in the same way as paragraph 4 described above. Paragraph 10 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for

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Refugee Convention purposes or on human rights grounds where the claim is certified as clearly unfounded. Paragraph 10 also provides that a human rights claim against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that it is not.

153. **Paragraph 11** prevents a person bringing an appeal from outside the United Kingdom on any ground which is inconsistent with the provisions of paragraph 8 described above.
154. **Part 4** of Schedule 3 deals with countries that are deemed safe for the purposes of the Refugee Convention only. Human rights claims against removal may be certified by the Secretary of State as clearly unfounded. The list of countries is to be specified by order and may be amended in accordance with Part 6 below.
155. **Paragraph 13** provides that the countries are to be treated as safe for Refugee Convention purposes in the same way as under paragraph 8 above.
156. **Paragraph 14** disapplies the provision in section 77 of the 2002 Act in the same way as paragraph 4 described above. Paragraph 15 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for Refugee Convention purposes or on human rights grounds where the claim is certified as clearly unfounded. Paragraph 16 has the same effect in relation to this Part as paragraph 11.
157. **Part 5** of Schedule 3 provides for the Secretary of State to certify a country (not listed under Parts 2, 3 or 4 of the Schedule) as safe for Refugee Convention purposes for a particular individual. Human rights claims against removal may be certified by the Secretary of State as clearly unfounded. Where a country is certified as safe for Refugee Convention purposes, section 77 of the 2002 Act is disapplied by virtue of paragraph 18 and the in country and out of country appeal rights are limited by paragraph 19 to the same extent as under paragraphs 15 and 16 discussed above.
158. **Part 6** of Schedule 3 provides order-making powers to amend the lists under Parts 2, 3, and 4.

***Section 34: Detention pending deportation***

159. Schedule 3 to the Immigration Act 1971 deals with deportation. Where someone has been recommended for deportation by a court under section 3(6) of the Act, paragraph 2(1) of Schedule 3 specifies that that person shall be detained pending the signing of the deportation order unless (a) he is already detained by virtue of the sentence or order of any court, or (b) he is released on bail by any court having power so to release him, or (c) the court which made the recommendation (or an appeal court) or the Secretary of State directs that he is to be released, or he is granted bail under paragraph 2(4A) of that Schedule. Similarly, where someone has been notified that the Secretary of State intends to make a deportation order against him under section 3(5) of the Act, paragraph 2(2) allows that person to be detained unless he is already detained by virtue of the sentence or order of a court or released on bail by a court having the power to release him.
160. Although it may be implicit that it is only bail granted by a court which is both aware of and involved in the deportation process which affects the power to detain under these paragraphs, on the face of it, it could mean bail granted by any court. This would mean that bail granted by a court which was unaware of the impending deportation action, or perhaps was granted before deportation came into prospect, could prevent detention pending the making of a deportation order if this was considered appropriate.
161. **Section 34** amends paragraphs 2(1) and 2(2) to remove the reference to the grant of bail by a court. A person who is detained under Schedule 3 will continue to be able to apply for bail from the Immigration Service or from the appropriate immigration appellate body by virtue of paragraph 2(4A) of the Schedule which came into force in February 2003.

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**Section 35: Deportation or removal: cooperation**

162. Under section 35 the Secretary of State may require a person to take specified action if he believes that that will enable a travel document to be obtained on the person's behalf and the travel document will facilitate the person's deportation or removal from the United Kingdom. A person who fails, without reasonable excuse, to comply with the Secretary of State's requirement commits an offence.
163. Travel document is defined in the subsection (7) and includes a passport as well as other official documents which enable or facilitate travel from the United Kingdom to another state.
164. The section sets out the types of steps the Secretary of State may require someone to take, but these are not meant to be exhaustive. They include things like obtaining documents, providing documents and providing fingerprints.
165. Many people arrive in the United Kingdom without a passport or other identification and cannot, in many cases, be removed or deported unless a travel document is obtained on their behalf. A travel document is obtained from the person's relevant embassy or high commission and before issuing such a document the embassy must be satisfied of the person's identity and nationality. This requires certain information to be obtained from and, on some occasions, attendance at interviews by, the person concerned.
166. The offence may be tried summarily on or indictment. On summary conviction the maximum penalty is six months imprisonment, a fine up to the statutory maximum or both. On conviction on indictment the maximum penalty is two years imprisonment, a fine, or both. When section 154 of the Criminal Justice Act 2003 is commenced the sentence that may be passed on summary conviction will increase to 12 months in England and Wales. It is expected that at the same time a similar amendment will be made in respect of Scotland and Northern Ireland.

**Section 36: Electronic monitoring**

167. **Section 36** makes provision for the electronic monitoring of persons subject to immigration control who are at least 18 years of age in the following circumstances:
- where a residence restriction is imposed (subsection (2));
  - where a reporting restriction could be imposed (subsection (3)); and
  - where immigration bail is granted subject to a recognizance or bail bond (subsection (4)) (except where bail is granted by a police officer) (subsection (1)(d)(ii)).
168. A person subject to electronic monitoring in accordance with these provisions is required to cooperate with arrangements for detecting and recording his location at specified times, during specified periods of time or throughout the currency of the arrangements. The electronic means employed in connection with such arrangements may include voice recognition technology, the use of a "tag" to confirm the presence of absence of the person from a specified location and in the future "tracking" technology to monitor the person's whereabouts on a continuous basis.
169. Subsection (8) provides power for the Secretary of State to make rules about the arrangements for electronic monitoring under section 36.
170. Subsection (10) prevents the imposition of a requirement to submit to electronic monitoring unless the authority imposing the requirement has been notified by the Secretary of State under subsection (8)(b) that satisfactory monitoring arrangements are available in the relevant area(s).