

UK BORDERS ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Deportation of criminals

Section 32: Automatic deportation

102. This section provides that the Secretary of State must make a deportation order in respect of a “foreign criminal” unless certain exceptions apply.
103. *Subsection (1)* defines “foreign criminal” for the purposes of the new automatic deportation process. A “foreign criminal” in this context means a non-British Citizen who has been convicted in the United Kingdom of an offence and to whom Condition 1 or 2 applies. Condition 1 is that he is sentenced to a period of imprisonment of at least 12 months (*subsection (2)*). Condition 2 is that he is sentenced to a period of imprisonment for an offence specified in an order made under section 72(4) of the Nationality, Asylum and Immigration Act 2002 (*subsection (3)*).
104. *Subsection (4)* provides that the deportation of a foreign criminal is conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971.
105. *Subsection (6)* prohibits the Secretary of State from revoking a deportation order made under the automatic procedure unless he thinks that an exception applies (see section 33 below), the application for revocation is made while the foreign criminal is outside the United Kingdom or section 34(4) applies.
106. *Subsection (7)* confirms that the requirement on the Secretary of State to make an “automatic” deportation order under *subsection (5)* does not create a private right of action in respect of the consequences of non-compliance.
107. This section gives effect to the commitment given in the Home Secretary’s statement of 23 May 2006 to create a direct link between deportation and the commission of a crime of the appropriate level of severity; and reduces the scope for challenging “automatic” deportation decisions through the appeals system. The existing legal framework (see Annex A) will continue to be available to deal with those who are exempt from the automatic procedure, those convicted of criminal offences who fall below the threshold for automatic deportation and other residual categories of case where it may be appropriate to exercise the “conducive to the public good” power to deport, for example national security cases and war criminals.
108. The section creates a new statutory framework for the “automatic” deportation of certain non-British citizens convicted in the United Kingdom of a qualifying offence. Under the provision, the Secretary of State will be required to make a deportation order unless he thinks that removal would breach a person’s rights under the European Convention on Human Rights or the United Kingdom’s obligations under the Refugee Convention or one of the other exceptions in section 33 applies.

Section 33: Exceptions

109. This section creates a number of exceptions to the automatic deportation procedure and preserves the existing exemptions from deportation in sections 7 and 8 of the 1971 Act. *Subsections (2) to (6)* set out the five exceptions:
- Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach a person's Convention rights, or the United Kingdom's obligations under the Refugee Convention (*subsection (2)*).
 - Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction (*subsection (3)*).
 - Exception 3 is where the removal of the foreign criminal would breach his rights under the Community treaties (*subsection (4)*).
 - Exception 4 is where the Secretary of State has received a valid extradition request in respect of the foreign criminal (*subsection (5)*).
 - Exception 5 is where certain provisions of the Mental Health Act 1983 or corresponding legislation in Scotland or Northern Ireland apply (the foreign criminal is a "mentally disordered offender")(*subsection (6)*).
110. *Subsection (7)* makes clear that those who are exempt from the automatic deportation procedure may continue to be deported under existing legislation and the application of an exception will not result in it being assumed either that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good. However, section 32(4) will continue to apply to persons falling within exceptions 1 and 4.

Section 34: Timing

111. *Subsection (1)* allows the Secretary of State to choose when the deportation order should be made under section 32 subject to *subsection (2)* which provides that no order may be made while an appeal against a relevant conviction or sentence is pending (*subsection (2)(a)*), or could be brought (*subsection (2)(b)*). For the purpose of *subsection (2)(b)* the possibility of an appeal out of time must be disregarded and a person who has informed the Secretary of State in writing that he does not intend to appeal is treated as being no longer able to appeal (see *subsection (3)*).
112. *Subsection (4)* allows the Secretary of State to revoke a deportation order made in accordance with section 32(5) for the purpose of taking of action under the Immigration Acts or immigration rules and subsequently taking a new decision that section 32(5) applies and making an automatic deportation order. This includes the certification of clearly unfounded asylum and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002. Once such action is complete a new deportation order may be made.

Section 35: Appeal

113. This section modifies the usual appeals regime for cases subject to the automatic deportation process.
114. *Subsection (2)* disapplies the prohibition on making a deportation order while an appeal to the Tribunal against a decision to make an automatic deportation order is pending or could be brought. If a deportation order is made it invalidates any leave to enter or remain that the person has or is subsequently given while the order is in force (section 5(1) of the Immigration Act 1971). However, new *subsection (4)* of section 79 of the Nationality, Immigration and Asylum Act 2002, inserted by *subsection (2)*, provides that a deportation order made under section 32 will not

invalidate the deportee's leave to enter or remain while an in-country appeal against an immigration decision is pending.

115. *Subsection (3)* amends section 82 of the Nationality, Immigration and Asylum Act 2002 to provide that the definition of "immigration decision" includes a decision that section 32(5) applies. The effect of this is that an appeal can be brought against the decision to the Asylum and Immigration Tribunal under section 82(1) of that Act. The section distinguishes between a decision to make a deportation order under section 5(1) of the Immigration Act 1971 and a decision that section 32(5) applies. Appeals against the former may be brought in the United Kingdom in reliance on section 92(2) of the Nationality, Immigration and Asylum Act 2002 while the latter may not. It will still be possible to bring an appeal in the United Kingdom against a decision that section 32(5) applies in reliance on section 92(4) of the Nationality, Immigration and Asylum Act 2002. However, an appeal may not be brought in reliance on section 92(4) if the asylum or human rights claim is certified as clearly unfounded under section 94 of the 2002 Act.

Section 36: Detention

116. This section creates a new power for the Secretary of State to detain a person while he considers whether section 32 applies, and pending the making of a deportation order under section 32 (*subsection (1)*). Where an automatic deportation order has been made, the Secretary of State must exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 unless in the circumstances he thinks it inappropriate. A court determining on appeal against conviction or sentence may direct release from detention under subsection (1) or (2) (*subsection (3)*). Paragraph 2(3) provides a power of detention in respect of a person if a deportation order is in force against that person.
117. *Subsections (4) and (5)* apply the existing provisions on bail, arrest and restriction orders to automatic deportation cases.

Section 37: Family

118. This section provides that a deportation order may not be made against a family member of a foreign criminal if more than eight weeks have elapsed since either the expiry of the time limit for appeal (if no appeal against an automatic deportation order is brought) (*subsection 3*) or such an appeal ceased to be pending (*subsection (4)*).

Section 38: Interpretation

119. *Subsections (1) and (2)* further define a "period of imprisonment" so as to:
- exclude suspended sentences unless a court subsequently orders that the suspended sentence is to take effect;
 - exclude (for the purpose of Condition 1 in section 32) any sentence which amounts to at least 12 months only by virtue of being comprised of consecutive sentences which amount in aggregate to more than 12 months; and
 - include indeterminate sentences and sentences served in institutions other than a prison.
120. *Subsection (3)* clarifies that a person subject to an order under section 5 of the Criminal Procedure Insanity Act 1964 has not been convicted of an offence for the purposes of section 32.
121. *Subsection (4)* defines the following terms for the purposes of the automatic deportation process:
- British citizen;
 - Convention Rights;

*These notes refer to the UK Borders Act 2007 (c.30)
which received Royal Assent on 30th October 2007*

- Deportation order; and
- Refugee convention.

Section 39: Consequential amendments

122. This section makes several consequential amendments to section 72(11)(b) of the Nationality, Immigration and Asylum Act 2002 in respect of suspended sentences and consecutive sentences.