

CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 10: Special immigration status

Section 130: Designation

768. This section allows the Secretary of State to designate a “foreign criminal” who is liable to deportation but who cannot be removed from the United Kingdom because of section 6 of the Human Rights Act 1998 and a family member of such a person (*subsections (1) to (3)*). Under *subsections (4) and (5)* a person who has a right of abode in the United Kingdom may not be designated and the Secretary of State may not designate a person where the effect of designation would breach the United Kingdom’s obligations under the Refugee Convention, or the person’s rights under Community treaties.

Section 131: “Foreign criminal”

769. This section defines the term “foreign criminal” as it is used in section 130.
770. *Subsection (1)* provides that a “foreign criminal” is a person who is not a British citizen, and who satisfies one or more of the conditions set out in *subsections (2) to (4)*.
771. The condition in *subsection (2)* (Condition 1) is that section 72(2)(a) and (b) or (3)(a) to (c) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) applies to the person. This applies where a person has been convicted of an offence, either in the United Kingdom or abroad, and has been sentenced to a period of imprisonment of at least two years. If the conviction was outside the United Kingdom, there is a further requirement that the person could have been sentenced to a period of imprisonment of at least two years had his conviction been in the United Kingdom for a similar offence.
772. The condition in *subsection (3)* (Condition 2) is satisfied where section 72(4)(a) or (b) of the 2002 Act applies to a person and the person has been sentenced to a term of imprisonment of any length. Section 72(4)(a) applies where a person is convicted of an offence specified by order of the Secretary of State, and section 72(4)(b) where a person is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under section 72(4)(a).
773. *Subsection (4)* specifies that Condition 3 applies where Article 1F of the Refugee Convention applies to a person. Where Article 1F applies, the person concerned cannot be a refugee.

774. *Subsections (5) and (6)* make clear that provision for the rebuttal and non-application of the presumption that a person constitutes a danger to the community is irrelevant to the question of whether a person is a foreign criminal.

Section 132: Effect of designation

775. *Section 132* sets out the effect of designation.
776. *Subsection (1)* specifies that a designated person does not have leave to enter or remain in the United Kingdom.
777. *Subsection (2)* ensures that, for the purposes of a provision of the Immigration Acts and any other enactment concerning or referring to immigration or nationality, a designated person is a person subject to immigration control, is not to be treated as an asylum-seeker or former asylum-seeker regardless of his status, and is not in the United Kingdom in breach of the immigration laws. *Subsection (3)* provides that time spent as a designated person may not be relied on by a person for the purpose of an enactment about nationality.
778. *Subsection (4)* specifies that a designated person shall not be deemed to have been given leave in accordance with paragraph 6 of Schedule 2 to the Immigration Act 1971 and may not be granted temporary admission to the United Kingdom under paragraph 21 of that Schedule. A person is deemed to have leave under paragraph 6 in certain circumstances which include, for example, where notice giving or refusing leave is not given before the end of twenty four hours after the examination of the person by an immigration officer under paragraph 2 of Schedule 2 to the Act. This provision has been disapplied as a designated person does not have leave to enter or remain in the United Kingdom (subsection (1)).
779. *Subsection (5)* notes that sections 134 and 135 make provision about support for designated persons and their dependants.

Section 133: Conditions

780. This section allows the Secretary of State or an immigration officer to impose conditions on a designated person, it specifies the nature of the conditions, and makes failure to comply with a condition an offence.
781. *Subsection (1)* allows the Secretary of State or an immigration officer to impose conditions on a designated person. These may relate to residence, employment or occupation, or reporting to the police, the Secretary of State or an immigration officer, as set out in *subsection (2)*.
782. *Subsection (3)* provides that the powers for electronic monitoring shall apply in relation to the conditions imposed under *subsection (1)* in the same way as they do when someone is granted temporary admission under paragraph 21 of Schedule 2 to the Immigration Act 1971. This means that where a residence restriction is imposed on an adult, or where a reporting restriction could be imposed, he may be required to cooperate with electronic monitoring.
783. *Subsection (4)* permits the Secretary of State to make payments to a person in respect of travelling expenses which the person has incurred or will incur in complying with a reporting condition.
784. *Subsection (5)* creates an offence of failing to comply with a condition under this section without reasonable excuse. The maximum penalties for this offence are set out in *Subsection (6)*. Further, under *subsection (7)* the ancillary provisions in the Immigration Act 1971 which apply in relation to an offence under any provision of section 24(1) (e.g. the power of arrest) will also apply in relation to an offence committed under subsection (5).

785. *Subsection (8)* specifies that the reference in *subsection (6)(b)* to 51 weeks, being the maximum period of imprisonment for an offence under subsection (5), shall be treated as a reference to six months in the application of the section to Scotland and Northern Ireland.

Section 134: Support

786. This section sets out provisions for the support of individuals designated under section 130 and their dependants.
787. *Subsections (1) and (2)* specify that Part VI of the Immigration and Asylum Act 1999 (the 1999 Act), which makes provision for support for asylum-seekers, will apply – subject to certain modifications - to designated persons and their dependants as it applies to asylum-seekers and their dependants. This allows the Secretary of State to provide, or arrange the provision of, support for designated persons and their dependants who appear to be destitute (or to be likely to become destitute within a prescribed period).
788. *Subsection (3)* specifies the ways in which this support may be provided under section 95 of the 1999 Act. The Secretary of State may provide accommodation, essential living needs, and in other ways where necessary to reflect exceptional circumstances of a particular case.
789. *Subsection (4)* provides that, unless the Secretary of State thinks it appropriate because of exceptional circumstances, the support provided under section 95 of the 1999 Act must not be wholly or mainly in cash.
790. *Subsection (5)* provides that section 4 of the 1999 Act shall not apply to designated persons.
791. *Subsection (6)* disapplies certain alternative statutory provisions relating to the provision of assistance under the homelessness provisions which would otherwise apply to a person who has been designated.

Section 135: Support: supplemental

792. This section lays out supplementary provisions relating to the support that may be provided under section 134, and it ensures the correct operation of Part VI of the 1999 Act in relation to designated persons.
793. *Subsection (1)* ensures that any references to Part VI of the 1999 Act or to a provision of that Part in other enactments includes a reference to that Part or provision as applied by section 134. Section 96 of the 1999 Act lays out the ways in which support may be provided to asylum seekers, but section 134(3) makes equivalent provision for designated persons. References to section 96 or a provision thereof will be treated as including a reference to section 134(3) or the corresponding provision. All references to asylum seekers will be treated as including a reference to designated persons.
794. *Subsection (2)* provides that any provision of Part VI of the 1999 Act requiring or permitting the Secretary of State to have regard to the temporary nature of support for asylum-seekers shall require him instead to have regard to the nature and circumstances of support for designated persons.
795. *Subsection (3)* provides that the rules governing the procedure for bringing and hearing appeals made under section 104 of the 1999 Act apply.
796. *Subsection (4)* provides that any instrument made under Part VI of the 1999 Act may make provision in respect of that Part as it applies by virtue of section 134, otherwise than by virtue of that section, or both, and may make different provision for that Part as it applies by virtue of section 134 and otherwise than by virtue of section 134.

797. *Subsection (5)* modifies the provisions which apply to the notice to be given to a designated person required to quit accommodation provided under Part VI of the 1999 Act.
798. *Subsection (6)* allows the Secretary of State, by order (subject to the affirmative resolution procedure), to repeal, modify or disapply (to any extent) the provision that support by virtue of section 134(3) may not be provided wholly or mainly by way of cash unless the Secretary of State thinks it appropriate because of exceptional circumstances.
799. *Subsection (7)* provides that an order under section 10 of the Human Rights Act 1998 (by which a Minister of the Crown may by order make amendments to legislation which has been declared to be incompatible with a Convention right) which amends a provision mentioned in section 134(6) may amend or repeal that subsection.

Section 136: End of designation

800. This section explains when designation comes to an end and the impact this has on support.
801. *Subsection (1)* lists the events which cause designation to lapse. These include where a person: (a) is granted leave to enter or remain in the United Kingdom, (b) is notified by the Secretary of State or an immigration officer of a right of residence in the United Kingdom by virtue of the Community treaties, (c) leaves the United Kingdom or (d) is made the subject of a deportation order under section 5 of the Immigration Act 1971.
802. *Subsection (2)* makes clear that support may not be provided by virtue of section 134 after designation lapses, subject to the exceptions set out in subsections (3) and (4). *Subsection (3)* (Exception 1) allows that if designation lapses under subsection (1)(a) or (b), support may be provided in respect of a period which begins when the designation lapses and ends on a date determined in accordance with an order of the Secretary of State (subject to the negative resolution procedure). *Subsection (4)* (Exception 2) specifies that if designation lapses under subsection (1)(d), support may be provided in respect of any period during which an appeal against the deportation order may be brought, any period during which an appeal against the deportation order is pending, and after an appeal ceases to be pending, such period as the Secretary of State may specify by order (subject to the negative resolution procedure).

Section 137: Interpretation: general

803. This section defines other terms as they are used in this Part of the Act, in particular, “family” and “right of abode in the United Kingdom”. It also provides that a reference in an enactment to the Immigration Acts includes a reference to sections 130 to 136.

Section 138: Amendment to section 127 of Criminal Justice and Public Order Act 1994

804. *Section 138* reintroduces a statutory prohibition on inducing prison officers in England and Wales and Scotland to take industrial action or commit a breach of discipline. *Subsection (3)* broadens the definition of industrial action to include “any action likely to put at risk the safety of any person”. This provision came into force on Royal Assent for England, Wales and Northern Ireland as well as for private sector prisons across the UK. *Subsection (4)* which extends the prohibition to public sector prison officers in Scotland comes into force by order.

Section 139: Power to suspend the operation of section 127 of Criminal Justice and Public Order Act 1994

805. *Section 139* provides a power for the Secretary of State to suspend or later revive operation of the statutory prohibition on inducing prison officers to take industrial

action or commit breaches of discipline by order subject to the affirmative procedure. This section came into force on Royal Assent..

Section 140: Disclosure of information about convictions etc of child sex offenders to members of the public

806. Subsection (1) inserts new sections 327A and 327B into the 2003 Act.
807. New subsection 327A(1) places a duty on MAPPA authorities (which includes the police, prison and probation services) to consider, in every case, disclosure to members of the public of information in its possession relating to the convictions of any child sex offender being managed by it.
808. New subsections 327A(2) and (3) create a presumption that information will be disclosed where the responsible MAPPA authority has reasonable cause to believe that a child sex offender poses a risk of serious harm to any particular child or children or to children of any particular description, and the disclosure of information to a particular member of the public is necessary for the purpose of protecting the particular child or children, or the children of that description, from serious harm caused by that offender.
809. New subsection 327A(4) makes clear that the presumption to disclose is not dependent on a request from the public.
810. New subsection 327A(5) allows responsible authorities the discretion, when making a disclosure under this section to disclose such information about the offender's convictions as it considers appropriate. It also allows the responsible authority to impose conditions preventing the recipient of the information from disclosing it to others.
811. New subsection 327A(6) obliges responsible authorities to ensure that, having made a decision that information should be disclosed, it should disclose this information as soon as is reasonably practicable.
812. New subsection 327A(7) and (8) require that any decision to disclose information or not, and the reasons for such a decision, must be recorded by the responsible MAPPA authority. Any conditions attached to the disclosure should also be recorded.
813. New subsection 327A(9) makes it clear that a disclosure should not be made under this section which contravenes the Data Protection Act 1998.
814. New subsection 327A(10) confirms that the authorities' powers to disclose are not affected by this section. They will still need to ensure that they have the necessary vires under their common law or prerogative powers to disclose.
815. The new section 327B provides a definition of the terms used in new section 327A, notably that a child is a person under 18, a child sex offender includes a person convicted or cautioned of an offence listed in the new Schedule 34A, or an equivalent offence abroad, whether spent or not, and that "serious harm" includes serious physical or psychological harm caused by committing any offence listed in the new Schedule 34A

Section 141: Sexual offences prevention orders: relevant sexual offences

816. The section amends the criteria necessary for a sexual offences prevention order to be made.
817. Subsection (1) amends section 106 of the Sexual Offences Act 2003 with the effect that it will not be necessary to meet the conditions listed as to the age of the victim, age of the offender and/or sentence length in Schedule 3 to that Act for a sexual offences prevention order to be made. The thresholds relating to sentence length/type and the age of the offender or victim set out in Schedule 3, will continue to apply for the purposes of determining whether an offender is subject to the notification requirements ("the sex offender's register").

Section 142: Notification requirements: prescribed information

818. This section amends the Sexual Offences Act 2003 in order to allow the Secretary of State to amend, through secondary legislation (subject to the affirmative resolution procedure), the notification requirements placed on those convicted or cautioned of relevant sexual offences or otherwise subject to the sex offender notification requirements.
819. *Subsection (1)* allows the Secretary of State to add to the information that sex offenders subject to the notification requirements must notify to the police.
820. *Subsections (2) to (5)* have the effect that, if the Secretary of State does add to the information required to be notified by a sex offender and there is a change in those details, the offender must notify the authorities within three days of the change. As occurs with the current information which must be notified, *subsection (4)* allows the sex offender to notify the police of an expected change in the prescribed details before the change occurs. *Subsections (6) to (9)* allow the Secretary of State to provide in regulations that an offender who does not have a sole or main residence in the United Kingdom must notify their details to police more frequently.

Section 143: Persistent sales of tobacco to persons under 18

821. **Section 143** inserts a new section 12A into the Children and Young Persons Act 1933.
822. Section 12A enables a magistrates' court to impose restricted premises orders preventing the sale, either in person or by automatic machine, of tobacco products or cigarette papers on certain premises for up to one year.
823. Under new section 12A(7) a magistrates' court may make a restricted premises order only if, in addition to the offence on the premises for which the offender has been convicted, the offender has also committed at least two other tobacco offences on the premises within a two year period (whether or not convicted of those other offences). A restricted premises order can only be made if the person applying for the order has given notice to everyone appearing to be affected by it.
824. Under new section 12A(9) and (10), restricted premises orders may be varied or discharged if a person affected by an application was not given notice and that person has not had a later opportunity to make representations to the court.
825. **Section 143** also inserts a new section 12B into the Children and Young Persons Act 1933. New section 12B enables a magistrates' court to impose restricted sale orders. By virtue of new section 12B(3) a restricted sale order is an order which prohibits a person from making any sale of tobacco or cigarette papers (whether in person or by automatic machine) to any person. It also prohibits the person from having management functions in relation to such sales.
826. Under new section 12B(5) a magistrates' court may make a restricted sale order only if, in addition to the offence for which the offender has been convicted, the offender has also committed at least two other tobacco offences within a two year period (whether or not convicted of those other offences).
827. In addition section 143 inserts a new section 12C into the Children and Young Persons Act 1933. New section 12C contains an enforcement sanction and a defence. Under new section 12C(3), it is a defence for a person charged with breaching a restricted sale order to show that he took all reasonable precautions to avoid committing the breach. Under new section 12C(4), a person found guilty of breaching restricted premises orders or restricted sale orders is liable to a fine of up to £20,000. New section 12C(5) provides that restricted premises orders are local land charges and will therefore be registered against the property.

Section 144: Power to require data controllers to pay monetary penalty

828. **Section 144** inserts new sections 55A to 55E into the Data Protection Act 1998. These new sections create a framework for the Information Commissioner to serve a monetary penalty notice on a data controller.
829. New section 55A(1) gives the Information Commissioner a discretion to serve a monetary penalty notice on a data controller if the Commissioner is satisfied there has been both a serious contravention by the data controller of the data protection principles and that the contravention was of a kind likely to cause substantial damage or substantial distress. The Commissioner must also be satisfied that the contravention was deliberate or that the data controller knew or ought to have known that there was a risk that the contravention would occur (and that it would be of a kind likely to cause substantial harm or substantial distress) but failed to take reasonable steps to prevent it occurring (new section 5A(2) and (3)). New section 55A(5) and (9) make provision for the Secretary of State to make regulations prescribing the maximum amount of the penalty.
830. New section 55B makes provision for the procedural rights of data controllers served with a monetary penalty notice. This includes a duty on the Information Commissioner to serve a data controller with a notice of intent that he proposes to issue a monetary penalty notice. This will allow a data controller to make representations before any monetary penalty notice is imposed. It also provides a right of appeal to the Information Tribunal against a monetary penalty notice issued or the amount specified in a monetary penalty notice. By new section 55B(3) and (6), the Secretary of State may make regulations prescribing what must be contained in notices of intent.
831. New section 55C requires the Information Commissioner to prepare and issue guidance on how he proposes to exercise his functions in respect of notices of intent and monetary penalty notices. The guidance, and all alterations and replacements, must be approved by the Secretary of State, and laid before Parliament.
832. New section 55D makes provision for the enforcement of monetary penalty notices.
833. New section 55E confers a power on the Secretary of State to make an order to make further provision in connection with monetary penalty notices and notices of intent.

Section 145 and Schedule 25 : Amendments to armed forces legislation

834. **Section 145** gives effect to Schedule 25, which makes changes to armed forces legislation similar to certain provisions of the Act, subject to modification where required.
835. Part 1 of the Schedule (**Paragraphs 1 to 9**) makes a number of amendments to the Courts-Martial (Appeals) Act 1968. Paragraph 2 provides for powers to dismiss certain appeals following references by the CCRC, equivalent to the provisions of section 42. Paragraphs 3 to 9 deal with the effect of interim hospital orders, the production of evidence, appeals against procedural directions and the detention of an accused pending appeal to the Supreme Court. They make provision equivalent to those provisions made by Part 1 of Schedule 8 to the Act in relation to appeals in criminal cases.
836. Part 2 of the Schedule (**Paragraphs 10 to 31**) makes a number of amendments to the Armed Forces Act 2006. These include amendments relating to the sentencing of dangerous offenders, restrictions on imposing community punishments equivalent to the provisions of section 11, review of sentences referred by the Attorney-General equivalent to those in section 46, changes in relation to the award of compensation for miscarriages of justice equivalent to those in section 61, imposition of unpaid work requirement for breach of community order or overseas community order equivalent to those of section 38 and minor amendments regarding suspended prison sentences on further conviction or breach of requirement to reflect section 20 .

*These notes refer to the Criminal Justice and Immigration
Act 2008 (c.4) which received Royal Assent on 8 May 2008*

837. Part 3 of the Schedule ([Paragraph 34](#)) makes transitional provisions for applications for compensation for miscarriage of justice including provision for exceptional circumstances.

Section 146: Convention against human trafficking

838. [Section 146](#) inserts a new section 33(6A) into the UK Borders Act 2007. Section 32 to 39 of that Act provide for the automatic deportation of certain foreign criminals, subject to the exceptions in section 33. New section 33(6A) provides that the Secretary of State does not have to deport a person automatically where he thinks this would be contrary to the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings. This is to ensure that the UK can comply with the Convention once it has been ratified.