

EXPLANATORY MEMORANDUM TO THE
Immigration (Assisting Unlawful Immigration) (Section 25 List of Schengen Acquis States) Order 2004

2004 No. 2877

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 This Order is made under section 25(7)(a) of the Immigration Act 1971 (“the 1971 Act”), as inserted by section 1 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and prescribes a list of States which are to be regarded as member States solely for the purposes of the offence of assisting unlawful immigration.
 - 2.2 By virtue of Article 2 of this Order, a reference to a member State includes a reference to the Kingdom of Norway and the Republic of Iceland in respect of the offence of assisting unlawful immigration.
3. **Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments.**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 Section 1 of the 2004 Act broadens the territorial scope of section 25 of the 1971 (as substituted by section 143 of the 2002 Act). The Order made under section 1 of the 2004 Act, ensures the offence of assisting unlawful immigration can be extended to Norway or Iceland, provided the action would constitute a breach of the law which controls the entitlement of a non-EU citizen to enter, transit across or reside in Norway or Iceland.
 - 4.2 The amendment made by section 1 of the 2004 Act, and subsequent commencement of this Order, ensures that the United Kingdom is able to comply with its obligations under Community Directive 2002/90/EC and the associated Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence. The 2004 Act was viewed as the only available opportunity to pass primary legislation to amend to the 1971 Act as required, to include

Norway and Iceland, thereby enabling the deadline for adoption of 5th December 2004 to be met.

- 4.3 The Commons and Lords committees cleared the Directive (and associated Framework Decision) from scrutiny on 24 February 2002 and 26 March 2002 respectively. The Select Committee on the European Union, and Standing Committee E discussed both documents during the debate on section 143 of the Nationality and Immigration Act 2002 during its passage through Parliament. Several amendments were subsequently agreed. It was believed, at the time, that the changes to section 25 of the 1971 Act, brought about by section 143 of the 2002 Act, were sufficient to allow the United Kingdom to implement the Directive. However, the omission of Norway and Iceland has necessitated this further amendment to take account of the fact that this Directive has been regarded as a Schengen building measure.
- 4.4 Section 1 inserted sections 25(7) and (8) into the 1971 Act (as amended), which allows the Secretary of State to make an Order, prescribing a list of States, each of which are to be regarded as member States for the purposes of section 25 and whose nationals are to be regarded as citizens of the European Union for that purpose. This amendment was regarded as a minor technical amendment, and was not considered contentious during the passage of the 2004 Act through the parliamentary process.
- 4.5 A transposition note is attached by way of an Annex to this document which will be communicated to the European Commission before the deadline of 5 December 2004. This expressly sets out how UK legislation fully complies with the provisions of the Directive. The UK already had in place legislation that met the majority of these provisions, and section 1 of the 2004 Act was the final measure adopted to ensure full compliance with our obligations. The transposition note will be forwarded to the Commission together with copies of the relevant legislation.

5. Extent

- 5.1 This instrument applies to all of the United Kingdom.
- 5.2 This measure will apply in Gibraltar.

6. European Convention on Human Rights

- 6.1 Not applicable.

7. Policy background

- 7.1 The changes made to the 1971 Act (as amended), by section 1 of the 2004 Act, and the implementation of this Order, are designed to give effect to our obligations under Community Directive 2002/90/EC concerning facilitation of unauthorised entry, transit and residence and the associated Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence. They support the Government's policy on immigration and asylum, particularly in the fight against illegal immigration and human trafficking as set out in the White Paper 'Safe Haven, Secure Borders'. They represent an extension to the legislative changes brought about by the Nationality, Immigration and Asylum Act 2002.
- 7.2 The European Union has identified the prevention of, and the fight against illegal immigration, as essential components of the common and comprehensive asylum and immigration policy (COM 2000 755 final; COM 2000 757 final). The need for co-operation and the determination to combat networks was highlighted in the agreement reached on the Directive defining the facilitation of unauthorised entry, movement and stay, and the accompanying Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.
- 7.3 In a broader context the UN Convention against Transnational Organised Crime in Palermo on December 2000 and its two accompanying protocols on trafficking in persons and smuggling of migrants form a basis for a global recognition of this problem and a comparable approach to tackle it. In its Communication on a Community Immigration Policy adopted in November 2000, the Commission stressed the need for a comprehensive common migration policy, and in September 2001 the Justice Home Affairs Council reached political agreement on a Framework Decision on combating trafficking in human beings. In summary, only a multidisciplinary approach covering both repression and prevention would be able to tackle the phenomenon in an efficient and coherent way. Certain common principles on these issues have been laid down in several recommendations under the regime of the Maastricht Treaty.
- 7.4 Implementation of both the Amsterdam Treaty 1999 (within the inclusion of the new Title IV in the EC Treaty (TEC)) and the conclusions of the Tampere Summit required the Union to develop common policies on asylum and immigration. The Treaty of European Union (TEU) lays down that one of the objectives entrusted to the Union is to combat trafficking in human beings by approximating, as far as necessary, rules on criminal matters in the member States. Article 63 para 3 TEC refers explicitly to measures on illegal immigration and illegal residence. Moreover since

facilitation involves in most cases, organised criminal networks operating at international level, the relevant provisions of Title VI of the TEU on police and judicial co-operation in criminal matters (Art 29, 30,31 TEU) also apply. The Commission is striving to make progress aimed at creating a co-ordinated approach by adding the European dimension, including the concept of comparable sanctions against promoters of illegal immigration. This supports the EU objective of creating an area of freedom, security and justice.

- 7.5 Currently, section 25 of the 1971 Act (as amended) allows action to be taken where an offence is committed within the European Union where the individual committing the offence is present in the United Kingdom, or any person outside the United Kingdom who engages in this activity if they are a person to whom section 25(5) of the 1971 Act applies¹. The change alters the territorial scope of the section 25 offence (as amended), so that action may now also be taken against such individuals who assist illegal immigration in breach of the relevant laws applicable in Norway or Iceland.

8. Impact

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies..

9. Contact

Maxine Manto at the Home Office Tel: 020 8760 2343 or e-mail: Maxine.Manto@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

¹ Section 25(5)(a) a British Citizen, (b) a British overseas territories Citizen, (c) a British National (Overseas), (d) a British Overseas Citizen, (e) a person who is a British Subject under the British Nationality Act 1981(c.61), and (f) a British protected person within the meaning of that Act.

TRANSPOSITION NOTE

For Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence).

| Articles | Objectives | Implementation | Responsibility |
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| <p>Introduction</p> | <p>This sets out the purpose and application of the Directive. The individual Articles (detailed below) set out the specific obligations that member States must comply with.</p> <p>The Directive aims to provide inter alia a definition of the facilitation of illegal immigration, cases of exemptions, minimum rules for penalties, liability of legal persons and jurisdiction, and consequently to render more effective the implementation of Framework Decision 2002/946/JHA.</p> <p>The Directive applies to the United Kingdom and Ireland and also constitutes a development of provisions of the Schengen acquis within the meaning of the Agreement entered into between the Council of the European Union and Iceland and Norway concerning the association of those two States with the implementation, application and development of that acquis.</p> | <p>The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the "2004 Act"), came into force on 1 October 2004. This allows the Secretary of State for the Home Department (the "SSHD") to extend the scope of existing legislation as set out within the Immigration Act 1971 (the 1971 Act") (as amended by the Nationality, Immigration and Asylum Act 2002 (the "2002 Act")) which criminalises the facilitation of illegal entry. Under the 2004 Act the SSHD may apply the provisions of the 1971 Act (as amended) to additional States which are not member States of the EU, but which are involved in the development of the Schengen acquis. Section 1 of the 2004 Act inserted section 25(7)&(8) into the 1971 Act and empowers the SSHD to prescribe a list of additional States, such as Norway and Iceland, which are to be regarded as member States for the purposes of section 25 of the 1971 Act. The list is implemented separately by way of an order. Such an Order (the "Immigration (Assisting Unlawful Immigration)</p> | <p>Secretary of State for the Home Department</p> |

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| | | (Section 25 List of Schengen Acquis States) Order 2004" (the "2004 Order")) was made on 1 November 2004. Article 2 of this Order contains a list that includes Norway and Iceland. In the future the SSHD may add or take away from this list where necessary, without the need for additional primary legislation. | |
| Article 1 1(1)(a) & 1(1)(b) | <p>This Article requires member States to adopt appropriate sanctions on</p> <p>(a) any person who intentionally assists a person who is not a national of a member State to enter, or transit across, the territory of a member State in breach of the laws of the State concerned on the entry to transit of aliens; and</p> <p>(b) any person who, for financial gain, intentionally assists a person who is not a national of a member State to reside within the territory of a member State in breach of the laws of the State concerned on the residence of aliens.</p> | <p>No action required.</p> <p>Section 25 of the 1971 Act (as substituted by section 143 of the "the 2002 Act" and amended by section 1 of the 2004 Act) states that a person commits an offence if he - (a) does an act which facilitates the commission of a breach of immigration law by a person who is not a citizen of the European Union, (b) knows or has reasonable cause to believe the act facilitates the commission of a breach of immigration law by the individual, and (c) knows or has reasonable cause to believe the individual is not a citizen of the European Union. "Immigration law" is defined as "a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to – (a) enter the State, (b) transit across the State, or (c) be in the State". A person found guilty of the offence may be liable to up to 14 years imprisonment, to a fine or to both.</p> | |
| 1(2) | <p>This is a non-binding provision which provides that member States may choose not to impose sanctions with regard to behaviour defined in paragraph (1)(a) where the aim of the behaviour is to provide humanitarian assistance of the person(s) involved.</p> | <p>No action required.</p> | |
| Article 2 | <p>This Article requires member States to take the necessary measures to ensure that the sanctions referred to in Article 1 are also applicable to any person who instigates, assists in or attempts to commit an infringement referred to in Article 1 (1)(a) or (b).</p> | <p>No action required.</p> <p>Existing law covers those who instigate offences, assist in the commission of offences or attempt to commit offences. For instance, section 1 of the Criminal Attempts Act 1981 states that if a person does an act which is more than merely preparatory to the commission of an offence (including the offence in</p> | |

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| | | section 25 of the 1971 Act) he is guilty of attempting to commit that offence. The Criminal Attempts Act 1981 applies only in England and Wales, but similar provisions exists in Scotland (section 63 of the Criminal Procedure (Scotland) Act 1975) and Northern Ireland (Article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983). | |
| Article 3 | This Article requires member States to ensure that the infringements referred to in Articles 1 and 2 are made subject to effective, proportionate and dissuasive sanctions. | No action required. Section 25(6) of the 1971 Act (as substituted) states that a person found guilty of an offence under the section shall be liable (a) on conviction on indictment, to imprisonment for a term up to 14 years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term up to six months, to a fine not exceeding the statutory maximum (presently £5,000) or to both. | |
| Article 4 4(1) & 4(2) | This Article requires member States to bring into force all necessary laws, regulations and administrative provisions to comply with the Directive before 5 December 2004. It also requires member States to communicate to the Commission the text of the relevant national provisions along with a table showing how the provisions of the Directive correspond to the national provisions adopted. | Section 1 of the 2004 Act came into force on 1 October 2004. Secondary legislation under section 25(7) of the 1971 Act (as amended by section 1 of the 2004 Act) comes into effect on 1 December 2004. Details of the relevant legislation and provisions will be communicated to the Commission via the United Kingdom Permanent Representative to the European Union before the deadline date. | Secretary of State for the Home Department |
| Article 5 | This Article repeals Article 27(1) of the 1990 Schengen Convention, effective from 5 December 2004. The Article states that where a member State implements this Directive pursuant to Article 4(1) in advance of that date, then the said provision shall cease to apply to that member State from the date of implementation. | No action required. | |
| Article 6 | This Article states that the Directive shall enter into force on the day it is published in the Official Journal of the European Communities. | No action required. | |
| Article 7 | This Article states that the Directive is addressed to member States in accordance with the Treaty establishing the European Community. | No action required. | |