

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (NOTICES) (AMENDMENT) (No.2) REGULATIONS 2008
2008 No. 1819

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 The purpose of the Immigration (Notices) (Amendment) (No.2) Regulations 2008 (the “2008 Regulations”) is to facilitate the implementation of the automatic deportation provisions (sections 32-39) of the UK Borders Act 2007 (the “2007 Act”). These Regulations will come into force on the same date (1st August 2008) as Sections 32-39 of the 2007 Act (see The UK Borders Act 2007 (Commencement No3 and Transitional Provisions) Order 2008) and the Statement of Changes in Immigration Rules.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

4. **Legislative Background**

4.1 Sections 32-39 of the 2007 Act concerns the automatic deportation of foreign criminals. A foreign criminal is defined as someone who has either received an immediate custodial sentence of at least 12 months (Condition 1) or someone who has received a custodial sentence for an offence specified by order under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (Condition 2). The UK Borders Act 2007 (Commencement No3 and Transitional Provisions) Order 2008 only commences the automatic deportation provisions in respect of a person to whom Condition 1 (that the person is sentenced to a period of imprisonment of at least 12 months) applies.

4.2 Section 32(5) obliges the Secretary of State to make a deportation order in respect of a foreign criminal. For the purpose of section 3(5)(a) of the Immigration Act 1971 the deportation of a foreign criminal is regarded as conducive to the public good.

4.3 Section 33 sets out the exemptions to the obligation in Section 32. These exemptions are:

1. where removal would breach a person’s Convention Rights or the UK’s obligations under the Refugee Convention;
2. where the Secretary of State believes that the foreign criminal was under the age of 18 on the date of conviction;
3. where removal would breach the person’s rights under the Community Treaties;

4. where the foreign criminal is subject to extradition proceedings;
5. where the foreign criminal is subject to certain mental health legislation; and
6. where the making of an automatic deportation order would breach the United Kingdom's obligations under the Council or Europe Convention on Action against Trafficking in Human Beings.

A person who is exempt from the automatic deportation provisions can be considered for deportation under the Immigration Act 1971, and there is no presumption either way as to whether deportation is conducive to the public good.

- 4.4 Section 34 provides that a deportation order cannot be made whilst an appeal against conviction or sentence has been or could be brought. The Secretary of State may disregard the possibility of an appeal out of time with permission, and she may treat a person who has informed her in writing that he does not intend to appeal as being no longer able to appeal. The Secretary of State may withdraw or revoke a decision that a person is a foreign criminal in order to take action under section 3 of the immigration Act 1971 and subsequently make a fresh decision that the person is a foreign criminal and make a deportation order. This is necessary in order to allow the Secretary of State, where appropriate, to certify as unfounded an asylum claim which is submitted after a deportation order has been made.
- 4.5 Section 35 provides that any appeal against a decision that a person is a foreign criminal is from outside the UK unless there are asylum or human rights grounds. This section also amends section 79 of the 2002 Act so that whilst a deportation order can be made whilst an appeal is pending, leave is not cancelled until and unless the appeal is determined in the Secretary of State's favour. It also amends section 82(4) of the 2002 Act in order to confirm that a decision that a person is a foreign criminal is an immigration decision (within the meaning of section 82(2)) and that references to an appeal in the 2002 Act are to be read as references to a decision that a person is a foreign criminal (i.e. that section 32(5) of the 2007 Act applies).
- 4.6 Section 36 creates a power for the Secretary of State to detain a person while she considers whether he is a foreign criminal and pending the making of a deportation order in circumstances where she considers that he is a foreign criminal. The detention provisions in Schedule 3 of the 1971 Act apply to a deportation order made under the 2007 Act as they would to a deportation order made under the Immigration Act 1971.
- 4.7 Section 37 provides that where a family member of a foreign criminal is to be deported (under section 3(5)(b) of the immigration Act 1971), a deportation order must be made against that family member within 8 weeks of either i) the time limit for appealing having expired or ii) the appeal no longer being pending.
- 4.8 Section 38 states that in respect of Condition 1, references to a period of imprisonment of at least 12 months do not include a) suspended sentences unless a court subsequently orders that any part of that sentence is to take effect or b) consecutive sentences which aggregate to at least 12 months. It also states that imprisonment includes a) detention in an institution other than a prison, such as a hospital or institute for young offenders and b) an indeterminate sentence (providing that it may last for at least 12 months). It further states that a person

subject to an order under the Criminal Procedure (Insanity) Act 1964 has not been convicted of an offence. This section also provides definitions of the terms “British citizen”, “Convention rights”, “deportation order” and “Refugee Convention”.

- 4.9 The Statement of Changes in Immigration Rules comes into force on 1st August 2008. Paragraph 1 of the Statement of Changes sets out that Rule 364 does not apply where the Secretary of State is obliged to make a deportation order in respect of a foreign criminal under section 32(5) of the 2007 Act.
- 4.10 Paragraph 2 sets out that the prohibition in Rule 378 on making a deportation order while an appeal is pending does not apply where the Secretary of State is obliged to make a deportation order in respect of a foreign criminal under section 32(5) of the 2007 Act.
- 4.11 The Statement of Changes in Immigration Rules has been incorporated into a consolidated version of the Immigration Rules, which can be found under the 'Laws & Policy' page at: www.ukba.homeoffice.gov.uk, where there are also copies of all the Statements of Changes in Immigration Rules issued since May 2003.
- 4.12 The 2008 Regulations add a decision that a person is a foreign criminal to the list of immigration decisions which require a notice of appeal rights to be served on the individual concerned.

5. Territorial Extent and Application

- 5.1 The 2008 Regulations apply to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The 2008 Regulations facilitate the implementation of the automatic deportation provisions in the 2007 Act. The provisions mean that, subject to a limited number of exceptions, a person coming within the definition of a “foreign criminal” in section 32 of the 2007 Act will be deported from the United Kingdom and can only appeal from abroad unless asylum or human rights grounds are raised. The definition of a foreign criminal in section 32 is a statement of the level of criminality which (the Government considers) merits deportation. The provisions will create a more streamlined deportation process as there will no longer be any need for the caseworker to consider whether the level of criminality warrants deportation, only whether one of the exceptions applies. The provisions are being implemented in two phases. At this stage only Condition 1 is being implemented. Condition 2 will be implemented when assumptions on the impact of implementing Condition 1 have been tested.

- 7.2 Exceptions 1 and 3 recognise our international obligations and Exceptions 2, 5 and 6 recognise that automatic provisions are not appropriate for certain categories of vulnerable person. Exception 4 recognises the need to ensure that deportation is not undertaken in a way which will undermine extradition proceedings.
- 7.3 The automatic deportations provisions will run alongside the existing deportation regime in the Immigration Act 1971, which will be used to consider cases which do not meet the automatic threshold or fall into one of the exception categories. Such cases will continue to attract an in-country right of appeal.

8. Impact

- 8.1 An Impact Assessment was prepared for the UK Borders Act 2007. The document may be found at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/ukbordersact/regulatoryimpactassessment/ukbordersbillria.pdf?view=Binary>

9. Contact

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