

**EXPLANATORY MEMORANDUM TO  
THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002  
(COMMENCEMENT NO. 13) ORDER 2012**

**2012 No. 1263 (C.44)**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 To commence, to the extent they are not already in force, the civil penalty provisions of the Nationality, Immigration and Asylum Act 2002 for the purposes of clandestine entrants who pass through, or attempt to pass through immigration control.

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

3.1 None.

**4. Legislative Context**

4.1 In 1999, Parliament enacted the Immigration and Asylum Act 1999 (the “1999 Act”), Part II of which created a penalty regime for the carrying of clandestine entrants. This regime was brought into force by SI 2000/464 for the purposes of all types of clandestine entrant (as defined in section 32(1) of the 1999 Act) except those who arrive in the United Kingdom concealed in a ship or aircraft. As such, from 3rd April 2000, the regime has been in force in respect of a person who passes, or attempts to pass, through immigration control concealed in a vehicle (see section 32(1)(b) of the 1999 Act). For these purposes, “immigration control” is defined as including any United Kingdom immigration control operated in a prescribed control zone outside the United Kingdom.

4.2 Under regulation 5 of the Carriers’ Liability (Clandestine Entrants and Sale of Transporters) Regulations 2000 (SI 2000/685), that part of the territory of France situated at Coquelles which is a control zone was a “prescribed control zone” for these purposes. Those Regulations came into force on 3rd April 2000.

4.3 In 2002, the Court of Appeal held that the civil penalty regime was not compatible with article 6 and article 1, Protocol 1 of the European Convention of Human Rights. In response, Parliament enacted changes to the regime in order to remedy the finding of incompatibility. These changes were set out in Schedule 8 to the 2002 Act.

**5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom

## **6. European Convention on Human Rights**

6.1 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 changes made following the decision of the court of appeal were commenced by SI 2002/2811 but by a clear error, on their literal meaning

(a) they were only commenced for the purposes of clandestine entrants (within the meaning of section 32(1) of the 1999 Act) who arrive in the United Kingdom concealed in a vehicle or a rail freight wagon, and

(b) the SI omitted to commence the changes for the purposes of clandestine entrants who pass, or attempt to pass, through immigration control concealed in a vehicle – which would include circumstances where clandestine entrants are discovered in a prescribed control zone.

7.2 In *Inco Europe Ltd v First Choice* [2000] 1 WLR 586 (HL) the House of Lords held that in particular circumstances, the Courts will adopt an extraordinary interpretive approach in order to correct clear drafting error. The Secretary of State considers that such a clear drafting error was made in SI 2002/2811 such that the principles of *Inco Europe* can be applied to the interpretation of SI 2002/2811. The effect of such an application would be that the changes to the regime made by Schedule 8 to the 2002 Act have been in force for the purposes of clandestine entrants who pass, or attempt to pass, through immigration control concealed in a vehicle since 8 December 2002.

7.3 In the event that the Courts do not interpret SI 2002/2811 in this way, then the Order commences the relevant provisions of the 2002 Act for the purposes of clandestine entrants who pass, or attempt to pass, through immigration control concealed in a vehicle.

## **8. Consultation outcome**

8.1 There has been no public consultation regarding the order.

## **9. Guidance**

9.1 No new guidance is published regarding the order.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

**11. Regulating small business**

11.1 The legislation applies to small business.

**12. Monitoring & review**

12.1 No additional monitoring will take place regarding this order.

**13. Contact**

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