Delegated Powers Memorandum – Nationality and Borders Bill

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Nationality and Borders Bill ("the Bill"). It has been drafted taking into account the conclusions and recommendations set out in the DPRRC's report on The Legislative Process: The Delegation of Powers, and subsequent correspondence between the Leader of the House of Commons and the Chairs of the House of Lords Committees principally concerned with the scrutiny of legislation.

2. The Bill will be introduced in the House of Commons on 6 July 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

3. The Nationality and Borders Bill has three main objectives:
    - to increase the fairness of the system to better protect and support those in need of asylum;
    - to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger; and
    - to remove more easily those with no right to be in the UK.

Delegated Powers

4. On introduction, the Bill will contain 13 substantive clauses creating new or amending existing delegated powers across:
    a) A power to make provision in Immigration Rules for the **differential treatment of refugees.**
    b) A power to enable the category of individual to be accommodated in a certain **location or type of accommodation**, and the time limit for their stay, to be set out in regulations.
    c) A power to add by regulations a designated place to the list of **places where asylum may be claimed**.
    d) An amendment to the current order-making power to enable amendment to the number of hours of **legally-aided advice** available for individuals served with the Priority Removal Notice, and a new power to make an order to make provision as to the operation of any overall time limit.
    e) A power to make regulations specifying further criteria that a case must satisfy in order for any appeal against a decision in that case to be subject to the **accelerated detained appeals route**.
    f) Amendments to current order making powers in Schedule 3 of the Asylum and Immigration (Treatments of Claimants, etc.) Act 2004 to provide for **the removal of countries from the list of safe countries for asylum purposes**.
    g) Powers to specify in regulations the steps required to ensure that **a vehicle is adequately secure against unauthorised access by clandestine entrants** and the level of penalties that may be issued where this is not done and the circumstances (time-limits and service of documents).

h) Amendments to the power to make regulations regarding the **service of notices relating to enforced removal.**
i) Amendments to Modern Slavery Act 2015 provisions on the **reasonable grounds and conclusive grounds tests.**
j) A power to set out the **definition of a victim of slavery or human trafficking**.
k) A power to amend immigration legislation in order to make **pre-consolidation changes** to facilitate a consolidation bill.
l) A power to make **transitional and consequential** provision
m) **Commencement** powers

5. This includes three Henry VIII powers in respect of: consolidating primary immigration legislation; amending the hours of legally-aided advice available to individuals served with a Priority Removal Notice; and making transitional and consequential provision. Further details are provided in the relevant sections below, but in all three cases the power and associated procedure is considered necessary and appropriate given that the powers are tightly drafted with limited scope and based on other similar powers.

6. Beyond the measures set out above, the Bill also contains three provisions which impose a duty on the Tribunal Procedure Committee (TPC) to exercise its existing powers, under section 22 and Schedule 5 to the Tribunal Courts and Enforcement Act 2007, to make rules for the procedure to be followed in the Immigration and Asylum Chamber for: (a) accelerated detained appeals; (b) expedited judicial oversight for certain appeals following a Priority Removal Notice; and (c) cost orders. These provisions are intended to clarify the role of the TPC in setting out the Rules for these Bill measures. The making of the procedure rules by the TPC will be governed by the powers and procedure set out in the Tribunal Courts and Enforcement Act.

7. The Bill contains 6 placeholder clauses which are, by default, drafted as Regulation-making powers subject to the affirmative procedure. However, the Government does not intend to use these powers as drafted, but to replace them with substantive provisions ahead of Committee stage in the House of Commons. The substantive provisions may mean that it is appropriate to remove some delegated powers entirely or to replace them with a delegated power that is subject to a different parliamentary procedure. The Department will provide a supplementary Delegated Powers Memorandum to reflect the detail of the substantive clauses. In the interest of transparency, and to allow full examination of the Bill, all placeholder clauses are included in this document.

8. These placeholder clauses are as follows:
a) Authorisation to work in the territorial sea
b) Prisoners liable to removal from the United Kingdom
c) Age assessments
d) Processing of visa applications from nationals of certain countries.
e) Electronic Travel Authorisations (ETAs)
f) Special Immigration Appeals Commission

ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 10 (8) – Differential treatment of refugees

Power conferred on: Secretary of State

Power exercised by: Immigration Rules

Parliamentary Procedure: specific to immigration rules (see section 31(2) of the Immigration Act 1971) but similar to negative procedure

Context and Purpose

9. The clause contains a power for the Secretary of State or an immigration officer to treat a refugee differently depending on whether or not they satisfy three conditions relating to the circumstances of their claim for asylum. The three conditions are set out in subsections (2) and (3) and are aligned with the conditions in Article 31(1) of the Refugee Convention. Under Article 31(1), Contracting States are prohibited from penalising a refugee on account of his or her illegal entry or presence, where the three conditions are met. Clause 10 provides instruction on how certain of the conditions in Article 31(1) are to be construed and applied, including in the context of the use of the power under this clause. The conditions are: that the refugee has come directly to the UK from a territory where their life or freedom was threatened; that they presented themselves without delay to the authorities (and claimed asylum as soon as practicable after arrival); and that, where they are present in the UK unlawfully, they have demonstrated good cause for their unlawful presence.

10. The purpose of taking this power is to clarify the more restrictive set of rights, including in relation to the length of any period of leave to remain or enter to be granted, that may be afforded to refugees who fail to satisfy at least one of the three conditions, as compared to those who satisfy all three conditions (so-called group 2 and group 1 refugees, respectively). The clause does not limit the ways in which refugees may be treated differently as between the two groups, rather it contains a non-exhaustive list of examples of the forms differential treatment may take. These are: the length of any grant of limited leave to enter or remain given to a refugee; the requirements that the refugee must meet in order to be given indefinite leave to remain; whether a “no recourse to public funds” condition is attached to any grant of limited leave to remain given to a refugee; and whether leave to enter or remain is given to members of the refugee’s family. Subsection (6) allows differentiation of treatment for the family members of refugees, based on the group to which the refugee belongs.

11. Relying on the power in subsection (8), detailed provision will be set out in the immigration rules on the use of the differentiation power, the assessment of whether the three Article 31(1) conditions are met in the case of a particular refugee, and the more restrictive set of rights that group 2 refugees and their family members may receive.

12. The overarching policy purpose of this is to discourage asylum seekers from travelling to the UK from safe countries or overstaying their visas. It also aims to influence the choices that migrants may make when leaving their countries of origin – encouraging individuals to seek asylum in the first safe country they find after fleeing persecution, avoiding dangerous and unnecessary journeys.

Justification for taking the power

13. The Immigration Rules set out the details of the conditions attached to refugee leave. For example, paragraph 339Q(i) currently sets out the length of leave given to those granted refugee status. It would therefore be inconsistent to have conditions of leave set out in the Bill for those in group 2, whilst the conditions attached to group 1 were in the Immigration Rules. Including the details in the Immigration Rules also allows for changes to the conditions attached to a grant of temporary protection to be amended more easily in future.

14. Prior to 31 December 2020, the procedure for deciding whether to grant a person refugee status, and minimum standards of treatment to be afforded to a person granted such status, were regulated by EU law, transposed in part through immigration rules laid down in accordance with the Immigration Act 1971. Neither the relevant EU law nor the domestic rules implementing them allowed for a differentiated system. It is therefore necessary to make changes to the immigration rules, relying on the power in subsection (8), to give effect to the new policy.

Justification for the procedure

15. As the power is a power to include provision in immigration rules, the appropriate procedure is the one set out in section 3(2) of the Immigration Act 1971, which applies whenever the Secretary of State makes changes to the rules. This is therefore consistent with previous practice.

Clause 11 (8) – Accommodation for asylum-seekers etc

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

16. Part 2 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") enables the Secretary of State to provide accommodation centres as a means of support to asylum seekers and failed asylum seekers who are or may become destitute.

17. Section 25 (1) of the 2002 Act provides that individuals may be resident in an accommodation centre for a continuous period of six months. Section 25(2) of the 2002 Act allows this period to be extended to nine months by agreement with the individual or where the Secretary of State deems it appropriate because of the circumstances of the case.

18. Subsection 11(8) amends section 25(4) of the 2002 Act to allow the Secretary of State, through the use of affirmative regulations, to extend or reduce the period of time during which an individual may be accommodated in an accommodation centre. As set out in the following paragraphs, the amendment to this power will give the Secretary of State the flexibility to ensure appropriate support is provided to destitute asylum seekers for as long as it is required and, in turn, enable asylum claims to be handled

more expediently and facilitate the removal of those who do not require asylum in the UK.

Justification for taking the power

19. The amendment to the existing delegated power will enable the Secretary of State to respond swiftly to new and changing factors that affect the appropriate length of time for which certain categories of people in the asylum support system can be housed in an accommodation centre. As an example, the practical arrangements needed to facilitate the departure of those found inadmissible or refused asylum, for example resolving documentation issues, will vary according to individual circumstances.

20. Amending the existing power, rather than setting out the details on the face of the Bill, will help maintain a coherent statute book and ensure that any changes can be implemented swiftly and benefits can be realised without the need to make further primary legislation.

Justification for the procedure

21. This is an amendment to an existing power in section 25(4) of the 2002 Act, which is currently subject to the affirmative procedure. The Department considers therefore that maintaining this procedure will provide appropriate parliamentary scrutiny.

Clause 12(2)(f) – Asylum claim: meaning of "designated place"

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

22. This clause stipulates the places where asylum claims must be made for the purposes of the Immigration Rules. These places are an asylum intake unit, an immigration removal centre, a port or airport, a location where an officer authorised to accept an asylum application is present (except anywhere in the territorial seas of the United Kingdom), or a location to which the person has been directed by the Secretary of State to make an asylum claim, within the UK.

23. Clause 12(2)(f) confers a power on the Secretary of State to be able to add designated places to this list by statutory instrument.

Justification for taking the power

24. The requirement to make an asylum claim in person has been in place in guidance since 2003, with applicants expected to make their claim for asylum at the port of entry on arrival in the UK, or at an asylum intake unit for in-country applicants. However, there are circumstances where asylum claims need to be registered at other locations. These provisions clarify those circumstances and locations where a claim may be accepted.

25. It is acknowledged that migrant behaviour may evolve in future, and therefore this power will provide the flexibility to add designated places where asylum claims may be accepted in the future, where appropriate. While there is some flexibility in the provisions already – for example, a person can be directed to a place by the Secretary of State – if asylum-seekers are regularly directed to that place, there is greater operational efficiency in designating that place by way of regulations made under this power, rather than requiring primary legislation to make any future changes.

Justification for the procedure

26. The clause legislates, with only minor modification, for provisions which have been an administrative requirement since 2003. The fact that the Secretary of State has the power to specify procedure to be followed in making or pursuing an application or claim is uncontroversial and therefore the negative procedure is considered appropriate. Any concerns with regards to any specific, new designated place can be sufficiently addressed through this procedure.

Clause 22(2) – Civil legal aid: services for recipients of priority removal notices

Power conferred on: Lord Chancellor

Power exercised by: order made by statutory instrument

Parliamentary Procedure: affirmative resolution

Context and Purpose

27. The Bill expands the scope of legal aid to provide for a number of hours of legally-aided advice to individuals who are served with a Priority Removal Notice (PRN). The number of hours will be on the face of the Bill, and so the purpose of clause 22(2) is to amend the Lord Chancellor's power in section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO 2012') for this power to also allow the time limit to be changed by order at a later date. This may be an increase or decrease in the number of hours. Clause 22(2) also provides a power to allow the Lord Chancellor to make an order to show how the time limit could operate in practice, which could include the circumstances where a certain number of hours may be provided.

Justification for taking the powers

28. The justification for amending the Lord Chancellor's power under LASPO 2012 is to provide flexibility so that the Government can ensure that the measure remains operationally effective following implementation. The PRN is a new Notice created through this Bill and, as with any new operational process, adjustments are likely to be needed to address emerging issues or changes in circumstances. For example, the PRN may be served on a different range of individuals, at a different point in time or on a changing (larger or smaller) volume of individuals than currently envisaged; or changes to immigration law and rules may affect the number of hours required to be provided under the PRN to ensure the purpose is still met.

29. These powers will allow the Lord Chancellor to respond to such operational impacts in the years to come. These impacts may necessitate a change in the number of hours of legally-aided advice provided under the measure, or a change for a certain group of people in certain circumstances, to ensure the purpose of the measure continues to be fulfilled and legally-aided advice is effectively provided to all individuals in receipt of a PRN.

Justification for the procedure

30. The powers could be used to amend a single provision of primary legislation. It enables a change to the number of hours of legally-aided advice and the circumstances in which a certain number of hours can be provided. These powers will enable the Lord Chancellor to respond to future changes in the immigration or legal aid systems that necessitate a change in the number of hours of advice. Although a Henry VIII power, it is tightly drafted so that it cannot be used more widely to make other changes to the legislation governing either system.

31. Given the power to amend the time limit and the circumstances in which a certain number of hours could be claimed could be used to amend primary legislation (albeit limited to a single, specific provision) and could result in access to a number of hours of legal aid being reduced, the affirmative procedure provides appropriate Parliamentary scrutiny before the change can be made. If Parliament approves the principles of affording legal aid to recipients of a PRN, these powers enable Parliament – via prior scrutiny of an order made under it – to change the number of hours of that advice and the circumstances in which a certain number of hours can be claimed. Furthermore, it is in line with other powers that amend Part 1 of LASPO 2012, which are also affirmative (see s.41(6) and (7) LASPO).

Clause 24 – Accelerated detained appeals

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

32. This clause imposes a duty on the Tribunal Procedure Rules Committee to introduce procedural rules for determining within an accelerated timeframe immigration and asylum appeals (and any permission to appeal stages) made by a certain subset of appellants detained under immigration powers. The bill contains some cohort criteria but the purpose of this power is to enable further criteria to apply, which may be subject to amendment over time. It means that, in addition to the criteria in the bill, only cases of a prescribed description may be included in the accelerated route.

33. The regulations will specify the locations at which the accelerated detained appeals route (ADA) will operate (i.e. places of detention). This will provide certainty to appellants and ensure that they are located in places where they can be provided with the access to legal advice necessary to support the accelerated appeal timescale.

34. It will also specify that the Secretary of State will provide written reasons to an individual when their appeal has been certified for inclusion in the accelerated detained appeals route, which will include consideration of the criteria set out in the regulations, and reasons why the Secretary of State considers that the appeal would likely be disposed of expeditiously.

35. It is anticipated that the regulations will also specify that only first-time appeals brought under Section 82 of the Nationality, Immigration and Asylum Act 2002 will be appropriate for the accelerated detained appeals route. This is because the nature of a first-time appeal is more likely to be "straightforward" and, in turn, suitable for determination within the specified timescales, in comparison to repeat or further claims.

Justification for taking the power

36. The justification for taking this power is to provide flexibility so that the Government can ensure that over time the measure continues to deliver its objective of improving speed and certainty for appellants in detention while also ensuring fairness. For example, certain immigration removal centres are currently deemed most suitable for operating ADA, but this may change as the detention estate evolves over time.

37. By setting out suitability criteria in regulations, the Department will be able to respond to operational information about the types of cases which tend to be removed from the accelerated route by the Tribunal, and amend the criteria so that they are not put into the route in the first place, improving certainty and fairness.

38. The Department will be able to adapt the criteria in response to future changes in related systems and processes, such as the expedited process for claims made in detention which feeds into ADA, and which is set out in guidance rather than legislation and so is likely to evolve over time.

39. The Department will also be able to respond to emerging issues or trends, for example allowing it to further narrow the suitability criteria if asylum volumes or trends were to increase the numbers of appellants eligible for the accelerated route to an extent which risked overwhelming tribunal capacity.

Justification for the procedure

40. These regulations will further limit the exercise of the power to certify decisions that any appeal is subject to the accelerated route. As set out above, it is anticipated that the criteria applied when considering detained appeals for inclusion in the accelerated route will need regular reconsideration and amendment, so that the government's handling of cases is fit-for-purpose and responsive to the types of cases and issues that emerge or become more or less common over time.

41. It is considered that, in view of the flexibility required, and the need to change the regulations quickly, the negative procedure is more appropriate.

42. The cohort who will be eligible for inclusion in the accelerated appeals route is already limited in the primary legislation, and so it is considered proportionate that further limitation by way of these regulations is realised by way of the negative procedure.

Clause 26 and Schedule 3 – Removal of asylum seeker to safe country

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

43. This clause and Schedule amend the existing power in paragraph 20 of Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act"), which allows the Secretary of State, by Order, to add countries to the list of safe countries specified in paragraph 2 of Schedule 3. The clause amends this power so that the Secretary of State can also remove countries from the list of safe countries in paragraph 2.

44. The wider context of this provision is that Section 33 of and Schedule 3 to the 2004 Act together provide a framework for the removal of asylum seekers to safe third countries without substantive consideration of their asylum claims in the United Kingdom. A safe third country is not the country of which the asylum seeker is a national or citizen, but is one where the asylum claim should more properly be considered. The intention of section 33 and Schedule 3 is to ensure the efficient and effective removal of asylum seekers to safe third countries, ensuring this process cannot be frustrated based on claims that an asylum seeker's right to protection and non-refoulement under the Refugee Convention may be breached in circumstances where the Department has a good evidence base to support that these countries are safe. States listed as safe countries in paragraph 2 of Part 2 of Schedule 3 are places:
    - where an asylum seeker's life and liberty will not be threatened in that country by reason of race, religion, nationality, membership of a particular social group or political opinion; and
    - from which the government of that country will not send the asylum seeker to another country other than in accordance with the 1951 Convention (the concept of 'non refoulement').

45. The Bill will also amend Schedule 3 of the 2004 Act to add a provision which also relies on the list of safe countries in paragraph 2 of Schedule 3. It provides that, unless the contrary is shown by the claimant to be the case in their particular circumstances, countries listed in paragraph 2 are to be treated as a place:
    a) where a person's Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) are respected; and
    b) from which a person will not be sent to another State in contravention of their Convention rights when the question of their removal is being considered.

Justification for taking the power

46. The expansion of the existing power to amend the list of countries in paragraph 2 reflects and acknowledges the fact that the global socio-political situation is not fixed. The governance and laws in a country can change over time and these changes can have a significant impact on how those countries can be assessed in terms of their compliance with international obligations. In the same way that countries may be added to the list, this amendment acknowledges that the situation in a country can

change such that it can no longer be considered appropriate to consider it a safe country.

47. Although the general character of the countries currently included in paragraph 2 suggests overall long-term stability (indicated by issues, for example, such as membership of the European Union) it would be inappropriate not to accept that such situations can change, and change relatively quickly. Taking a power to amend this list by Order allows the Secretary of State to act quickly to update legislation if there were a rapid change in a country's situation. It ensures that paragraph 2 remains entirely relevant and up-to-date, and that it can be relied upon by the Courts. Having to amend paragraph 2 via primary legislation would likely be too slow and leave the list open to inaccuracies, thereby leaving countries not considered safe on the list for longer than is necessary.

Justification for the procedure

48. This is an amendment to an existing power in paragraph 20, Part 2 of Schedule 3 of the 2004 Act allowing the Secretary of State, by Order, to add countries to the list of safe countries in paragraph 2. The current power to add countries to the list is – and will remain – subject to the affirmative procedure. The new element to remove countries from the list will, however, be subject to the negative procedure. This is because the act of removing a country from the list means that the provisions in the 2004 Act which relate to removals to the listed countries, will no longer apply to those countries which have been removed. This in effect limits the reach of the provisions and means that the negative procedure will provide a more appropriate level of oversight from Parliament.

Clause 39 and Schedule 4 – Penalty for failure to secure good vehicle

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

49. The clause and schedule update the existing Clandestine Entrant Civil Penalty Scheme by inserting a new section 31A into Part 2 of the Immigration and Asylum Act 1999 ("the 1999 Act"), which introduces a new civil offence of a failure to adequately secure a goods vehicle, whereupon the Secretary of State may impose a civil penalty. They also expand the existing provisions in Part 2 of the 1999 Act to ensure that a civil penalty may be charged where a clandestine migrant is found onboard a vehicle and the carrier has failed to take sufficient measures to ensure the vehicle was adequately secured against unauthorised access by a clandestine entrant.

50. These changes are required as a high proportion of drivers and hauliers continue to fail to properly secure their vehicle, often running the risk of being targeted by migrants or relying upon going undetected. In a compliance sampling exercise carried out in March 2021, more than a third of vehicles were found not to have basic security measures in place. When considering how this differs between hard-sided and soft-sided vehicles, 55% of soft-sided vehicles lacked basic security measures. Moreover, as efforts and measures are increased to tackle the small boats issue, there is every

likelihood this could lead to an increase in attempts at clandestine entry in vehicles. The intention is to incentivise drivers and hauliers to comply with the regulations and security of the vehicles.

51. The clause and schedule, by inserting a new section 31A into the Act, impose a duty on the Secretary of State to specify in regulations:

    i. what is meant by a goods vehicle being adequately secured against unauthorised access by clandestine entrants;
    ii. the actions that must be taken by each person responsible for a goods vehicle in relation to securing the vehicle against unauthorised access on arrival at a place where immigration control is operated, including the juxtaposed controls;
    iii. the actions to be taken by each person responsible for a goods vehicle in relation to the reporting of any unauthorised access to the vehicle; and
    iv. the documentation that must be used to establish that the actions specified above have been taken by the person responsible for the goods vehicle.

52. The clause also amends the existing civil penalty regime at Part 2 of the 1999 Act to omit Section 33. As a result, the current *Prevention of Clandestine Entrants: Code of Practice* will be replaced by regulations in which the Secretary of State will specify what actions a carrier must take to ensure a vehicle is adequately secured against unauthorised access by clandestine entrants. Where the owner, driver or hirer fails to comply with the regulations and a clandestine entrant is found in the vehicle upon arrival in the UK or upon presentation at the juxtaposed controls in Northern Europe, the Secretary of State may impose a civil penalty on that responsible person.

53. Before exercising the new powers to make regulations set out above, under the negative procedure, the Secretary of State must consult such persons as they consider appropriate.

54. The Secretary of State will determine the level of penalty payable for both civil regimes with reference to a Level of Penalty: Codes of Practice, which will be issued by the Secretary of State and brought into operation by regulations under the negative procedure. It is open to the Secretary of State to bring into operation by regulations one code of practice for the two civil offences or a separate one for each.

55. The clause and schedule also provide the Secretary of State with a power to prescribe a time limit by which a penalty notice may be issued under both section 32 and section 31A. Further, sections 36 and 36A are amended to insert provisions providing for the service of documents outside of the UK. These include a power for the Secretary of State to provide by regulations when a document issued or served is deemed to have been received.

Justification for taking the powers

56. In order to make the new civil penalty regime workable and to provide sufficient clarity and legal certainty as to what conduct is required by vehicle operators, failing which a civil penalty may be issued, it is necessary to set out the ways in which the Department expects vehicles to be secured in regulations. It is not appropriate to set this out on the face of the Bill, as vehicle security and standards change over time, necessitating legislative changes that can be made more promptly and flexibly by regulations and following consultation with those impacted by the proposals (e.g. the road haulage industry). Furthermore, the rules and requirements relating to vehicle security do intrinsically contain significant administrative and technical detail and it

would not be appropriate or proportionate to set out the detail of these changes in new primary legislation.

57. Given the range of different vehicle types in operation, and the very technical nature of how security systems are operated, the standards under the existing scheme are currently set out in a Prevention of Clandestine Entrants: Code of Practice. However, as the clause creates a new civil offence at section 31A, the Department considers it more appropriate for the new and existing rules to sit in secondary legislation. The clause will achieve this by replacing the Prevention of Clandestine Entrants: Code of Practice with a power to make regulations for the existing regime and to take a power to make regulations in respect of the new civil penalty regime. Taking regulation-making powers therefore enables the Department to follow its policy through.

58. The new powers are, however, constrained by the requirement on the Secretary of State to conduct a public consultation with such persons as they consider appropriate before making the regulations.

59. The power to issue a Level of Penalty: Code of Practice in respect of determining the level of penalty payable under section 31A mirrors the existing powers in Part 2 of the 1999 Act in respect of a penalty issued under section 32. The Department considers this power to be appropriate in the circumstances, noting that a new Code of Practice can be laid more flexibly than primary legislation.

60. The powers to prescribe a time limit for the Secretary of State to issue a penalty and to make regulations specifying when documents are deemed received on persons outside of the UK are considered to be primarily technical and administrative matters that are more appropriately dealt with in secondary legislation.

Justification for the procedure

61. The negative procedure will apply to regulations made under powers contained in the clause. This procedure applies to the existing powers in Part 2 (carriers' liability) of the 1999 Act. The negative procedure is appropriate because the regulations will specify procedural or technical measures that are required of those operating vehicles, in order to reflect current and changing vehicle security standards and procedures.

62. Regulations made under the proposed powers set out above and prior to bringing a new Level of Penalty: Code of Practice into force can only be laid following a public consultation with the haulage industry, which provides an opportunity for the Secretary of State to seek the views of those affected by any proposed legislative changes. The remaining powers are also considered to be primarily administrative and technical in nature. Therefore, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

Clause 43 – Removals: notice requirements

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

63. This clause amends the removal power in section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") by placing in statute a single, standardised minimum notice period for migrants to access justice prior to enforced removal. It confirms in statute that a new notice period does not need to be re-issued within a specified timescale following a previous failed removal or following a judicial review regarding their removal. It also now includes the provision of written notices of intention to remove and departure details. By clarifying and moving the policy into a single piece of legislation in the 1999 Act, it makes it more straightforward for decision makers, legal representatives and migrants, and provides Parliament with the opportunity to scrutinise these measures.

64. Section 10(10) of the 1999 Act currently provides a power for the Secretary of State to make regulations about the time period during which a family member of another person may be removed from the UK and the service of a notice of the intention to remove the family member.

65. This clause amends the existing removal power by inserting a requirement to serve a person who is liable to removal with a notice of intention to remove and a notice of departure details before their removal is effected.

66. This amendment to the existing power to make regulations is extended to allow provision to be made about the service of these statutory notices.

Justification for taking the power

67. The requirements to serve notices regarding liability to removal and departure arrangements have been in place in the *Judicial Reviews and Injunctions* policy guidance; however, these are now being placed on a statutory footing. Regulations already govern the service of notices for the removal of family members to allow for flexibility regarding when and how such a notice is served. Amending the existing regulation making power, rather than setting out such details on the face of the Bill, will help maintain this flexibility without the need to make further primary legislation.

Justification for the procedure

68. The negative procedure will apply to regulations made under the power contained in the clause. This procedure already applies to the existing power in Section 10(10) of the 1999 Act. The negative procedure is appropriate because the regulations allow for specifying procedural measures that are required for the service of relevant notices.

Clause 48 – identification of potential victims of slavery or human trafficking

Power conferred on: Secretary of State

Power exercised by: guidance (in the case of changes to section 49 of the Modern Slavery Act 2015) and Regulations made by statutory instrument (in the case of changes to section 50 of the Modern Slavery Act 2015)

Parliamentary Procedure: none (in the case of changes to section 49 of the Modern Slavery Act 2015) and the affirmative procedure (in the case of changes to section 50 of the Modern Slavery Act 2015)

Context and Purpose

69. The UK is and will remain a signatory of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), which sets out our international obligations to identify and support victims of modern slavery.

70. Under ECAT assistance and protection from removal for victims of trafficking should be provided if there are "reasonable grounds to believe that a person has been a (sic) victim of trafficking." ("RG" and the RG Threshold), subject to exemptions. The main domestic framework for the provision of this support is the National Referral Mechanism (NRM), created mainly by the Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland. The Government is committed to ensuring that victims are identified through the NRM effectively and that the system is resilient to misuse.

71. The New Plan for Immigration (NPFI) Policy Statement set out the proposed legislative change to the Modern Slavery Act 2015 ("the 2015 Act") to clarify the definition of "reasonable grounds" such that assistance and support are available to someone when there are reasonable grounds to believe the individual "is" (rather than "may be") a victim of slavery or human trafficking. The NPFI also committed to further consultation on the underpinning test to be applied in practice, which will be set out in the Modern Slavery Statutory Guidance. This test is required to be included in the Guidance, under Section 49 (1)(c) of the 2015 Act.

72. Under ECAT, assistance and protection from removal for victims of trafficking should be provided if there are "reasonable grounds to believe that a person has been a (sic) victim of trafficking", subject to exemptions. The current test for a Reasonable Grounds decision is set out in the Statutory Guidance published under Section 49 of the 2015 Act. Sections 49 and 50 provide for the SSHD to make guidance and regulations respectively on victim identification (section 49 Guidance about identifying and supporting victims and section 50 Regulations about identifying and supporting victims).

73. This clause amends these provisions in section 49 and 50 of the 2015 Act, which make reference to when "there are reasonable grounds to believe that a person *may* be a victim of slavery or human trafficking" to "there are reasonable grounds to believe someone *is* a victim of slavery or human trafficking". The purpose of this change is to clarify the Reasonable Grounds definition so that it mirrors our obligations under ECAT.

74. Following the Reasonable Grounds decision, a Conclusive Grounds decision should then be made based on whether there is sufficient evidence to decide on the *balance of probabilities* that the individual is a confirmed victim of modern slavery. This clause when it comes into effect will apply to England and Wales only.

75. Regarding the Conclusive Grounds Threshold, the intention is to confirm in primary legislation that the test in guidance is to be based on the balance of probabilities. This is the current test as accepted by the Courts. The balance of

probabilities test for the Conclusive Grounds Threshold is already set out in domestic guidance.

76. To facilitate these changes, the Department is adding to the guidance making power in s49 (1) of the 2015 Act by inserting:

"(d) arrangements for determining whether a person is a victim of slavery or human trafficking."

Justification for taking the power

77. These clauses provide for minor amendments to existing powers, rather than creating new powers. The power under s49 and s50 of the 2015 Act to provide for the Reasonable Grounds and Conclusive Grounds decisions in guidance and regulations respectively already exists. This Bill makes a slight change to the wording of the power relating to Reasonable Grounds decisions to bring it into line with the requirements in ECAT. Regarding the Conclusive Grounds decision, the clauses add in the requirement that any such determination has as its test the threshold of the balance of probabilities. This clarifies the use of the power rather than extends it.

Justification for the procedure

78. The powers will retain their current procedures. This is appropriate given the relatively minor way in which the powers are being amended and that the powers are not being extended.

Clause 57(1) – Part 4: interpretation

Power conferred on: Secretary of State

Power exercised by: regulations made via statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

79. Sections 56 (1) and (2) of the Modern Slavery Act 2015 ("the 2015 Act") define a "victim", for the purposes of the 2015 Act, as an individual who has been the victim of conduct which would constitute an offence under Sections 1 or 2 of that Act. However, for the purposes of the identification process (Reasonable and Conclusive Grounds) the relevant definitions are those contained within the Modern Slavery Statutory Guidance for England and Wales and Non Statutory Guidance for Scotland and Northern Ireland, rather than in Section 56 of the 2015 Act. The Section 56 definition applies, in practice, only for the purpose of recognising an individual as a victim of a criminal offence, rather than for the identification process (that is the Reasonable or Conclusive Grounds decisions). This applies equally with regard to the Scottish and Northern Irish legislation, given that the Single Competent Authority makes Reasonable and Conclusive Grounds decisions across the whole of the UK, using the definitions as set out in guidance.

80. The modern slavery measures in this Bill rely upon the understanding of a victim as being linked to the Reasonable and Conclusive Grounds decisions, using the

definitions set out in the Modern Slavery Statutory Guidance for England and Wales and the Non Statutory Guidance for Scotland and Northern Ireland.

81. In order to create legislative clarity, the Department is therefore seeking a power to define in secondary legislation "victim of slavery" and "victim of human trafficking" in a manner that is compatible with the definitions listed at Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Article 4 of the European Convention on Human Rights to underpin these measures.

82. In order to place this definition into statute, the affirmative legislative procedure will be used and, thus, the definition will be subject to scrutiny by Parliament.

Justification for taking the power

83. The definition needs to encompass everyone caught by the definition in Article 4 of ECAT. This is an international treaty definition which is open to interpretation by the Courts. Given this, and its legal complexity, the Department needs to ensure the definition covers that cohort depending on how the Courts interpret the definition to ensure that it captures the correct group of people, and can continue to so in future.

Justification for the procedure

84. The Bill introduces certain obligations which fall to be delivered to this cohort of people. To ensure that the use of this power by the Secretary of State to define this cohort is therefore subject to appropriate Parliamentary scrutiny, it is proposed that the exercise of the power is subject to the draft affirmative procedure, ensuring regulations using this power are only made with the approval of each House.

Clause 65(1) – Pre-consolidation amendments of immigration legislation

Power conferred on: Secretary of State

Power exercised by: regulations by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

85. This clause gives the Secretary of State the power by regulations, made by statutory instrument, to make such amendments (to include repeals, revocations and modifications) to the legislation relating to immigration referred to in subsection (2) as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or greater part of that legislation ("the consolidating Act") and (see subsection (4)) regulations made under this clause do not come into force unless an Act is passed consolidating the whole or a substantial part of the Acts relating to immigration. Only one future consolidating Act is anticipated.

86. The regulation-making power in this clause is directly linked to the implementation of the recommendations in the Windrush Lessons Learned Review (WLLR), which was published on 19 July 2018 and found that it is widely accepted that immigration and nationality law is very complex. WLLR Recommendation 21 is to:

"Reduce the complexity of immigration and nationality law, immigration rules and guidance – Building on the Law Commission's review of the Immigration

Rules the Home Secretary should request that the Law Commission extend the remit of its simplification programme to include work to consolidate statute law. This will make sure the law is much more accessible for the public, enforcement officers, caseworkers, advisers, judges and Home Office policy makers."

87. In evidence to the Constitution Committee in 2017, the Senior President of Tribunals, two other immigration judges, the Immigration Law Practitioners Association and other legal representatives said that the need for simplification or consolidation of immigration law was a very pressing problem. The Court of Appeal and the Supreme Court have commented on the complexity of immigration law and how it drives litigation. It is likely that similar representations were made to the WLLR. The need for consolidation was also raised by the House of Lords Select Committee on the Constitution in the evidence session on the Immigration and Social Security Co-ordination (EU Exit) Bill. This represented the re-iteration of the Select Committee on the Constitution's previous recommendation related to the quality of legislation, which outlined the need of consolidation as a cornerstone in ensuring clarity and accessibility of the law.

88. The main reasons for the need to make pre-consolidation amendments are to:
    (a) ensure that consolidated law is clearer and much more accessible for the public, enforcement officers, caseworkers, advisers, judges and Home Office policy makers;
    (b) reduce the complexity of immigration law;
    (c) simplify, streamline, or make more consistent decision-making procedure;
    (d) ensure the reduction of fluctuations in the interpretation of the law; and
    (e) provide a better foundation for the consolidating Act and future legislation.

Justification for taking the power

89. The regulation-making power in this clause is wide, but is limited in scope by the fact that any pre-consolidation amendments must facilitate the consolidating Act and that does not extend to allowing the regulations to change the effect of the substantive law.

90. The consolidating Act will follow the consolidated Bill procedure. It is a standard measure to take a regulation-making power to make pre-consolidation amendments to facilitate that process as the consolidation must operate on the current law. Pre-consolidation regulation-making powers are a common feature of consolidation exercises and there are precedents for such powers, including:
    - section 36 of the National Health Service Reform and Health Care Professions Act 2002 (now repealed);
    - section 76 of the Charities Act 2006 (now repealed); and
    - section 2 of the Sentencing (Pre-consolidation Amendments) Act 2020.

91. This approach ensure that desirable changes can be made to facilitate the consolidation but ensures there is parliamentary scrutiny of those changes. In some cases, for example where it is desirable to update terminology, it will be necessary to amend primary legislation and therefore the regulation making power enables that to happen.

92. Regulations are an appropriate way of ensuring that desirable changes can be made to bring the legislation up-to-date and to iron out inconsistencies without changing the

substance. The subsequent consolidation (the consolidating Act) would provide clarity and accessibility and therefore a better foundation for future legislation.

Justification for the procedure

93. The regulations are subject to the affirmative procedure. Although the power is limited to amendments which will facilitate, or are desirable in connection with, the consolidation of immigration legislation, the regulations can amend primary legislation and the affirmative procedure ensures appropriate parliamentary scrutiny over the use of this Henry VIII power,

Clause 67 – Transitional and consequential provision

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative (if it does not amend primary legislation), otherwise affirmative

Context and Purpose

94. Clause 67 enables the Secretary of State by regulations to make transitional, transitory and saving provision in connection with the coming into force of the Bill (subsection 1), and consequential provision in connection with the provisions of the Bill (subsection 2). Such consequential provision may include amending, repealing or revoking both secondary legislation and primary legislation (fully defined in the definition of “enactment” in subsection (4)).

Justification for taking the power

95. The power to make transitional, transitory and saving provision is necessary to ensure a smooth transition from the existing provision to the provision under the Bill in connection with the commencement of the provisions in the Bill. The Department accepts that the power to make consequential provision is, on the face of it, wide. However, any consequential amendment made under this power must be genuinely consequential on the provisions in the Bill. Some consequential amendments have been provided for on the face of the Bill and the Department will endeavour to identify any further necessary consequential amendments to primary legislation. It is possible that some may be missed, and that there will also need to be consequential amendments to secondary legislation.

96. The Department considers it appropriate to enable true consequential amendments to be made by regulation in order to ensure that the changes effected by this Bill can be effectively delivered, mitigating the risk of undermining the immigration and asylum system if a provision were missed resulting in the need for immediate rectification.

Justification for the procedure

97. Regulations under this clause will be subject to the negative procedure unless they amend the type of enactment listed in subsection (5): an Act of Parliament, an Act of the Scottish Parliament, a Measure or Act of Senedd Cymru, and Northern Ireland

legislation (defined in Schedule 1 to, and section 24(5) of, the Interpretation Act 1978). The negative procedure is considered appropriate for regulations making transitional, transitory and/or saving provision, to ensure the smooth transitional from the existing position to the position provided for by Parliament in the Bill. If regulations under this clause do amend or repeal primary legislation, it is considered that the affirmative procedure is appropriate for a Henry VIII power of this type, providing the appropriate level of parliamentary scrutiny.

Clause 70 – Commencement

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: none

Context and Purpose

98. Subsection (1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations, other than the provisions which commence on Royal Assent (subsection (3)) and the provisions which subsection (4) provides come into force at the end of the period of two months beginning with Royal Assent.

99. Subsection (2) allows those commencement regulations appoint different commencement dates for different purposes or areas.

Justification for taking the power

100. Leaving a subset of provisions in the Bill, other than those for which the Bill itself provides the commencement date (see above), to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

101. As is usual with commencement powers, regulations made under clause 70 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

PLACEHOLDER CLAUSES

Clause 42 – Authorisation to work in the territorial sea

Power conferred on: Secretary of State

Power exercised by: regulations to be made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

102. This clause is designed as a placeholder for a substantive clause which will clarify the Secretary of State's powers to prohibit those who require leave to enter or remain in the UK from working in the territorial seas without authorisation. The substantive clause will build on the existing legislative framework and will make provision, as necessary, for any exemptions from the prohibition including where those are required by international obligations. It will also provide the framework for a person to obtain the relevant authorisation consistent with the requirements that must be met by skilled migrant workers who work on the UK landmass and make provision, as necessary, for enforcement of the requirements.

103. The placeholder clause enables the Secretary of State to make regulations providing that those who require leave to enter and remain in the UK are prohibited from working in the territorial seas without authorisation and providing for any exemptions from that prohibition. The regulations may also set out the requirements that must be met for a person to be granted authorisation (including in relation to fees and biometrics) and make provision for enforcement, specifically to impose civil and criminal penalties and conferring powers on immigration officers.

Justification for taking the power / for the procedure

104. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Clause 44 – Prisoners liable to removal from the United Kingdom

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

105. This clause is designed as a placeholder for a substantive clause which will allow the Secretary of State to amend the Early Removal Scheme (ERS).

106. Firstly, it will extend the period a Foreign National Offender (FNO) can be removed early from their custodial sentence for the purposes of deportation, increasing the early removal window from a maximum of 9 months to 12 months before the earliest point they may be released from custody (either automatically or via Parole Board review). They must still have served half of the requisite custodial period before removal.

107. Secondly, it will allow removal to take place at any point in the sentence on, or after, the eligibility date for the scheme. This will bring into scope for removal under the scheme those FNOs who are not removed before initial automatic release on licence and who are subsequently recalled to custody by the Secretary of State.

108. This clause will also introduce a 'stop the clock' provision, that will apply to FNOs removed under ERS on or after commencement. The new provision will, in effect, pause the sentence at the point a person is removed from prison under ERS. Thereafter, the removed FNO would be liable to serve the full balance of the outstanding custodial period of their sentence if they returned to the UK at any point in the future. Once they had served the outstanding custodial period from their original sentence and unless they had been deported again, they would be released in accordance with the release provisions relevant to their sentence like any other domestic prisoner. Such release may require a decision of the Parole Board.

Justification for taking the power / for the procedure

109. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Clause 58 – Age Assessments

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

110. This clause is designed as a placeholder for a substantive clause which will allow the Secretary of State to bring forward provision relating to the use of age assessments on individuals where there are doubts as to their claimed age. The Government wishes to strengthen and improve processes for assessing the age of those whose claimed age is doubted.

111. The age of a person arriving in the UK is normally established from the documents with which they have travelled. Many who claim to be children do not have any definitive documentary evidence to support their claimed age. Whilst many are clearly children, for some it is unclear and there is a need to assess their age.

112. Under the UK's existing framework, there are a number of incentives for adults to claim to be children. Those treated as children benefit in a number of respects, including the accommodation and support to which they may be entitled, the procedural and substantive treatment of their claims, the arrangements that would need to be made to secure their removal from the UK (where they do not establish a lawful basis to remain) and the question of whether or not they can be held in

immigration detention.

113. This clause intends to address the current weaknesses in the age assessment system and sets out the power for the Secretary of State to:
    a. set out how immigration officials are to conduct initial age assessments.
    b. establish a decision-making function in the Home Office, referred to as the national age assessment board (NAAB).
    c. set out the principles and guidelines on how to conduct full age assessments on individuals where there are doubts as to their claimed age.
    d. Set out the future use of appropriate scientific methods for assessing a person‘s age, once the Secretary of State is satisfied that the methods have been shown to be sufficiently reliable.
    e. provide for a statutory right of appeal against the age assessment decisions of local authorities or the NAAB.

Justification for taking the power and for the procedure

114. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Clause 59 – Processing of visa applications from nationals of certain countries

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

115. This clause is designed as a placeholder for a substantive clause which will allow the Secretary of State to impose visa penalties on any country that does not cooperate on the removal of its nationals who do not have a legal right to be in the UK.

116. Where individuals do not have a legal right to be in the UK, the Home Office may seek to remove them by deportations or administrative removals, usually to their country of nationality. The Government expects cooperation by the country of origin in receiving back their own nationals where a person has no right to be in the UK or has committed a serious criminal offence and is due for deportation. However, a very small number of countries do not.

117. As such, this placeholder clause creates a power for the Secretary of State to make regulations on visa penalties. The provision sets out the types of visa penalties which could be imposed on countries who do not cooperate on the matter of returning their nationals. This includes:
    a) slowing down the processing of visa applications;
    b) a temporary suspension on processing visa applications; and

c) imposing additional financial requirements for visa applications.

Justification for taking the power / for the procedure

118. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Clause 60 – Electronic travel authorisations

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative procedure

Context and Purpose

119. This clause is designed as a placeholder for a substantive clause which will allow the Secretary of State to require individuals who do not need a visa, entry clearance or other specified immigration status to obtain a permission to travel, in the form of an Electronic Travel Authorisation (ETA), in advance of their journey to the UK. This clause will also build on existing legislation to incentivise carriers to check passengers are in possession of an ETA, where so required, or risk a civil penalty.

120. The clause will provide for the creation of an Electronic Travel Authorisation ("ETA") scheme, requiring individuals who do not need a visa, entry clearance or other specified immigration status to obtain a valid ETA before travelling to the UK. This will be accompanied by sanctions for carriers who have not adequately checked to ensure that a traveller holds an ETA or another form of digital permission, such as a visa or an immigration status in electronic form. This will form part of the current carriers' liability scheme that penalises carriers who bring other inadequately documented travellers to the UK border.

121. The placeholder clause sets out the power to:
    a) require individuals to have an ETA before travelling to the UK
    b) impose civil penalties on owners of ships or aircraft which carry individuals in breach of a requirement to have an ETA
    c) make provision about the biometric information that must be provided with an ETA application; and
    d) make provisions about the recognition of ETAs issued in the Channel Islands and the Isle of Man.

Justification for taking the power / for the procedure

122. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use

the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Clause 61 – Special Immigration Appeals Commission

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

123. Section 1 of the Special Immigration Appeals Commission Act 1997 established the Special Immigrations Appeals Commission (SIAC) – an independent judicial tribunal to hear appeals against immigration decisions which are based upon or supported by sensitive material which is often provided by the Security Services. Immigration reforms between 2007 and 2014 have significantly reduced the number of immigration decisions that attract a right of appeal. Appeal rights are now limited to protection claim/status challenges and human rights refusals, EEA appeals, appeals against decisions under the EU Settlement Scheme, and appeals against deprivation of citizenship. This means that a number of immigration decisions that could previously have been certified and been heard as an appeal by SIAC can now only be challenged by way of an application for judicial review (JR).

124. This leaves a gap known as the 'SIAC gap' because JRs which relate to immigration decisions where there is no right of appeal cannot be certified to be heard by SIAC. There is some limited mitigation in that while most immigration related JRs are heard by the Upper Tribunal (Immigration and Asylum Chamber), impugned immigration decisions based on national security information can be transferred to the High Court and a Closed Material Procedure (CMP) applied as provided for by the Justice and Security Act (JSA) 2013. This mitigation is limited: firstly, a detailed application from the Secretary of State must be filed, considered and declaration made by the court permitting an application for a CMP (whereas closed material can always be used in SIAC cases); and secondly, under a CMP 'sensitive material' covers only that which would be damaging to the interests of national security and so cannot be utilised for cases concerning serious organised crime, sensitive international relations material or cases that rely upon historic security information.

125. The intention is to close this gap via a legislative amendment to the SIAC Act 1997 which will allow immigration decisions to be made and defended on the basis of sensitive material that should not be disclosed in the interests of national security, the interests of the relationship between the United Kingdom and another country or the public interest generally, but without giving individuals rights of appeal to which they otherwise would not be entitled. The purpose of the amendment to the legislation would be to ensure that any decision that could be challenged by JR could be certified so it is heard by SIAC in the same way that any decision that can be challenged by appeal can be certified.

126. The placeholder clause provides for the Secretary of State to make regulations specifying the decisions relating to immigration which may be certified for the purpose

of allowing an appeal to SIAC. These may specify the criteria according to which the decisions may be certified including, in particular:

a) national security;
b) the interests of the relationship between the United Kingdom and another country; and
c) the public interest generally.

127. It also provides that the Special Immigration Appeals Commission (Procedure) Rules 2003 (S.I. 2003/1034) can be amended.

Justification for taking the power / for the procedure

128. The placeholder provision is subject to an affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted, but to replace it with a substantive provision once further work has been completed. The substantive provision may mean that it is appropriate to remove the delegated power entirely or to replace it with a delegated power that is subject to a different parliamentary procedure.

Home Office

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