These notes refer to the UK Borders Bill
as brought from the House of Commons on 10th May 2007 [HL Bill 68]

UK BORDERS BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the UK Borders Bill as brought from the House of Commons on 10th May 2007. They have been prepared by the Home Office in order to assist the reader of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY

Powers at ports

3. Clauses 1 to 4 provide for the Secretary of State to designate immigration officers acting at ports in England and Wales and Northern Ireland to have the power to detain an individual pending the arrival of a police constable and create offences of absconding from detention, and assaulting or obstructing an immigration officer in the course of exercising this power and the punishments associated with each. The meaning of "port" for these purposes is also defined.

Biometric registration

4. Clauses 5 and 6 confer a power to make regulations to require those subject to immigration control to apply for a document recording external physical characteristics a "biometric immigration document"; and to require a biometric immigration document to be used for specified immigration purposes, in connection with specified immigration procedures, and in specified circumstances where a question arises about a person's status in relation to nationality or immigration.

5. Clauses 7 to 15 deal with the effects and consequences of non-compliance with compulsory registration, including associated penalties, appeal rights and also how provision ought to be made for the use and destruction of an individual's biometric records.

Treatment of claimants

6. Clause 16 amends section 3(1)(c) of the Immigration Act 1971 to provide that reporting and residency conditions may be imposed on those with limited leave to enter or remain in the UK.

7. Clause 17 provides that an asylum-seeker remains eligible for support during an appeal related to his asylum claim. Support will be available also for those qualifying as dependants for support purposes.

8. Clause 18 provides for a power of arrest without warrant for an immigration officer in connection with offences under sections 105 and 106 of the Immigration and Asylum Act 1999 (offences relating to asylum support fraud). It also provides that certain associated powers for immigration officers shall apply to those offences.

9. Clause 19 defines the conditions under which late evidence may not be included in an appeal against the refusal of a Points-based application.

10. Clause 20 amends section 42 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and in doing so provides new powers to (i) over-cost charge in respect of applications or processes in connection with the sponsorship of migrants and (ii) to cross-subsidise between certain in-country services and between certain in-country and overseas services.

Enforcement

11. Clauses 21 and 22 create an offence of assaulting an immigration officer and give immigration officers the power to arrest a person who has committed or is about to commit such an offence.

12. Clauses 23 to 25 deal with the conditions under which cash may be seized and detained property forfeited and disposed of.

13. Clauses 26 and 27 cover the arrest of individuals who knowingly employ an illegal worker and searches that may be made by immigration officers for personnel records.

14. Clause 28 is an amendment that ensures that acts committed after an asylum seeker has arrived in the United Kingdom but before they have entered will be covered by the offence of facilitating an asylum-seeker's entry to the United Kingdom.

15. Clause 29 is an amendment that ensures that those non-UK citizens who commit acts of facilitation whilst outside of the UK in order to secure the illegal entry of individuals to the UK fall within the scope of the various facilitation offences.

16. Clause 30 amends existing trafficking for exploitation offences to ensure that acts committed after a person has arrived in the United Kingdom, but before they have entered, will be covered by the offences. This clause will also extend the extraterritorial application of the trafficking offences to cover acts of facilitation carried out overseas, irrespective of the nationality of the person carrying out the acts.

Deportation of criminals

17. Clauses 31 to 38 detail the conditions and procedure under which a foreign national prisoner will be automatically deported. They specify those foreign nationals subject to compulsory deportation and the sentences that will trigger it. They also detail permissible appeals, timings of deportation and detention beyond the end of sentence. Clarity around the sentences and the definitions of key phrases in these clauses is given in clause 37.

Information

18. Clauses 39 to 42 deal with the information sharing arrangements between the Border and Immigration Agency, HM Revenue and Customs (HMRC) and Revenue and Customs Prosecution Office. This includes confidentiality and wrongful disclosure.

19. Clauses 43 to 45 allow an immigration officer or a police constable to search premises for evidence of an arrested individual's nationality and to retain and copy these documents. Clause 46 enables a designated police civilian to exercise these powers.

Border and Immigration Inspectorate

20. Clauses 47 to 55 establish a single independent inspectorate for the Border and Immigration Agency. This will replace the existing inspecting bodies.

BACKGROUND

21. The UK Borders Bill will implement elements of the IND Review 'Fair, Effective, Transparent and Trusted: Rebuilding Confidence in our Immigration System', published in July 2006. The Bill is part of a package of measures to underpin the Border and Immigration Agency which consists of new powers, a substantial increase in enforcement resource and exploitation of identity technology, in particular to tackle illegal working.

TERRITORIAL EXTENT

22. The Bill extends to the whole of the UK, except for clauses 1-4 relating to powers of immigration officers at ports and clause 24 relating to forfeiture of property and clause 30(1) and (2) relating to trafficking offences. These extend only to England, Wales and Northern Ireland.

23. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

COMMENTARY ON CLAUSES

Part 1: Powers at ports

Clause 1 to 4: Designated immigration officers with powers to detain

24. Clauses 1 and 2 allow the Secretary of State to designate individual immigration officers acting in a port in England and Wales or Northern Ireland as having the power to detain a person where the immigration officer considers him someone who a constable could arrest without a warrant pursuant to section 24(1), (2) or (3) of the Police and Criminal Evidence Act 1984 (or the equivalent powers in Northern Ireland) or where a warrant is outstanding for the individual. This detention will be pending the arrival of a constable and is subject to a maximum detention period of three hours. The immigration officer may search a person detained under clause 2 for anything that could be used to assist escape or to cause physical injury and may pursue a person and return him to the port if the person attempts to abscond from detention. Clause 2 also enables Detainee Custody Officers to provide detention services in respect of individuals detained under this clause.

25. Clause 3 creates offences of absconding from detention, and assaulting or obstructing an immigration officer in the course of exercising this power and the sanctions associated with each.

26. Clause 4 defines "port" for the purpose of this power.

Part 2: Biometric Registration

Clause 5 to 16: Registration of those subject to border control

27. Clause 5(1)(a) enables the Secretary of State to make regulations requiring a person subject to immigration control to apply for the issue of a document recording information about his external physical characteristics. This document is called a "biometric immigration document". Regulations may require a biometric immigration document to be used for specified immigration purposes, in connection with specified immigration procedures or in specified circumstances where a question arises about a person's status in relation to nationality and immigration (*subsection (1)(b)*). The regulations may also provide that a person who produces a biometric immigration document pursuant to a requirement imposed under the regulations may be required to provide information to enable a comparison to be made between that information and information provided in connection with the application for the document (e.g. fingerprints). "External physical characteristics" includes fingerprints and features of the iris or any other part of the eye (*subsection(1)(c)*). "Document" includes a card or sticker and any other method of recording information, whether in writing, by the use of electronic or other technology, or by a combination of methods (*subsection (1)(d)*). A

"person subject to immigration control" means a person who, under the Immigration Act 1971, requires leave to enter or remain in the United Kingdom, whether or not leave has been given.

28. Clause 5(2) provides that the regulations requiring a person subject to immigration control to apply for the issue of a biometric immigration document (under clause 5(1)(a)) may, in particular, apply generally or to a specific class of persons subject to immigration control. A specific class may include persons making or seeking to make a specified kind of application for immigration purposes. The regulations may specify a period within which the person is required to apply for the biometric immigration document (*subsection(2)(b)*). They may make provision about the issue and contents of a biometric immigration document, for a biometric immigration document to be combined with another document, and for a biometric immigration document to begin to have effect and cease to have effect (*subsection (2)(c), (d), (e) and (f)*). The regulations may make provision permitting or requiring the Secretary of State to suspend or cancel a biometric immigration document in specified circumstances, or to require the holder of the document to notify the Secretary of State in certain circumstances (*subsection (2)(g) and (h)*). Regulations may also provide for the surrender of the biometric immigration document (*subsection 5(2)(i) and (j)*). The regulations may enable the Secretary of State to require the surrender of other documents on issuing a biometric immigration document (*subsection (2)(k)*).

29. Clause 5(3) provides that a person applying for a biometric immigration document may be required by regulations to provide information, (which may include biographical and or other non-biometric information). In particular, the regulations or rules may require or enable an authorised person to require the provision of information in a specified form (*subsection (3)(a)*). The regulations may require an individual to submit, or enable an authorised person to require an individual to submit, to a specified process by means of which biometric information is obtained or recorded (*subsection (3)(b)*). The regulations may confer a function on an authorised person, which may include the exercise of a discretion (*subsection (3)(c)*). They may permit the Secretary of State, instead of requiring the provision of information, to use or retain information which he already has in his possession (*subsection (3)(d)*). They may require an authorised person to have regard to a code (*subsection (3)(e) and (f)*). An "authorised person" means a constable, an immigration officer, a prison officer, an officer of the Secretary of State authorised for the purpose, or a person who is employed by a contractor in connection with the discharge of the contractor's duties under a removal centre contract (clause 15(1)(e)). Regulations under subsection (1)(c) (requiring a person producing a biometric immigration document to provide information for the purposes of allowing a comparison to be made) may, in particular, make provision of the same kind as that specified above for regulations in relation to a person applying for a biometric immigration document, with the exception that they will not be able to confer a function on an authorised person. *Subsection (5)* provides that immigration rules made under section 3 of the Immigration Act 1971 may require a person applying for a biometric immigration document to provide non-biometric information to be recorded in it or retained by the Secretary of State.

30. Clause 5(4) provides that regulations made under clause 5(1)(b) may require the production or use of a biometric immigration document that is combined with another document, including an identity card. If a biometric immigration document were to be combined with an identity card this provision also makes it clear that clause 5 take precedence over section 16 of the Identity Card Act 2006.

31. Clause 5(5) prevents the Secretary of State from making regulations that would in effect require a person issued with a biometric immigration document having to carry it with them at all times.

32. Clause 5(7) provides that subsections (3) to (6) are without prejudice to the generality of section 50 of the Immigration, Asylum, and Nationality Act 2006.

33. Clause 6 makes supplementary provision in respect of regulations under clause 5. Regulations amending or replacing earlier regulations may require a person who holds a biometric immigration document issued under the earlier regulations to apply under the new regulations (*subsection (2)*). Provision must be made, where a person under the age of 16 is required by or in accordance with regulations to submit to a process for recording biometric information, which is similar to sections 141(3) to (5) and (13) of the Immigration and Asylum Act 1999 (clause 6(3)). Section 141(3) to (5) provides that fingerprints may not be taken from a person under 16 except in the presence of an adult who is the child's parent or guardian, or a person who takes responsibility for the child for the time being. An authorised person may not act as the responsible adult in this situation.

34. Clause 6(4) provides that rules made under section 3 of the Immigration Act 1971 (the Immigration Rules) may make provision by reference to the compliance or non-compliance with regulations. Under clause 6(5), information which is in the possession of the Secretary of State which is used or retained in accordance with clause 5(3)(d) shall be treated for the purposes of requirements about treatment and destruction as having been provided in accordance with the regulations at the time which it is used or retained in accordance with them.

35. Clause 6(6) provides that regulations may make provision having effect generally or in specific cases and circumstances, may make different provision for different cases and circumstances, may include incidental, consequential or transitional provision, shall be made by statutory instrument, and shall not be made unless laid in draft before Parliament and approved by a resolution of each House.

36. Clause 7 makes provision for the effect of non-compliance. Regulations made under clause 5(1) shall include provision about the effect of failure to comply with a requirement of the regulations. In particular, regulations may provide for an application for a biometric immigration document to be refused, an application or claim in connection with immigration to be disregarded or refused, the cancellation or variation of leave to enter or remain in the

United Kingdom, the Secretary of State to consider giving a penalty notice, or the consequence of failure to be at the discretion for the Secretary of State (clause 7(2)).

37. Clause 8(1) makes provision about the use and retention of information. Regulations made under clause 5(1) must make provision about use and retention of biometric information provided in accordance with regulations. This may include provision permitting the use of information for specified purposes which do not relate to immigration.

38. Clause 8(2) provides that biometric information can be used by the Secretary of State for specified non immigration purposes, e.g. when using Royal Prerogative powers to issue British passports to British Nationals without a right of abode in the UK.

39. Clause 8(3) provides that regulations under clause 5(1) must include provision about the destruction of information obtained or recorded by virtue of the regulations or Immigration Rules made by virtue of clause 5(3). They must require the destruction of information if the Secretary of State thinks that it is no longer likely to be of use in accordance with provision made about the use and retention of information, or in connection with a function under the Immigration Act 1971. Regulations must include provision similar to section 143(2) and (10) to (13) of the Immigration and Asylum Act 1999 (which makes provision about the destruction of fingerprint data taken under section 141 of that Act).

40. Clause 8(4) provides that a requirement to destroy information shall not apply if an in so far as the information is retained in accordance with and for the purposes of another enactment.

41. Clauses 9 to 14 make provision for a civil penalty scheme for failure to comply with a requirement under regulations made under clause 5. Under clause 9 the Secretary of State may by notice require a person to pay a penalty for failing to comply with a requirement of the regulations. The notice must specify the amount of the penalty and the date before which the penalty must be paid (which must not be fewer than 14 days after the date on which the notice is given) (*subsection 9(2)(a) and (b) and (4)*). The notice must specify methods by which the penalty must be paid and explain the grounds on which the Secretary of State thinks the person has failed to comply with the regulations (*subsection (2)(c) and (d)*). The penalty notice must explain how the person can object to the penalty and appeal the penalty, and how the penalty may be enforced (*subsection (2)(e)*).

42. Clause 9(3) sets the maximum amount of penalty that may be levied, £1,000. The Secretary of State may, by order, change this limit to reflect a change in the value of money (clause 9(6)).

43. Clause 9(5) provides that a person who has been given a penalty notice may be given a further penalty notice in the case of continued failure. However, the further notice may not be given during the time available for objection or appeal against the previous notice, nor while an objection or appeal is pending.

44. Clause 10(1) provides that a person who has been given a penalty notice may by notice object to the Secretary of State on the grounds that he has not failed to comply with a requirement of the regulations, it is unreasonable to expect him to pay the penalty or the amount of the penalty is excessive. A notice of objection must specify the grounds of objection and the person's reasons for objecting (*subsection (2)(a)*). It must comply with any prescribed requirements as to form and content (*subsection (2)(b)*). The notice must also be given within a prescribed period (*subsection (2)(c)*). Under clause 10(3) the Secretary of State shall consider the notice of objection and cancel the penalty notice, reduce the penalty by varying the original penalty notice, increase the penalty by issuing a new penalty notice, or confirm the penalty notice. The Secretary of State shall do so in accordance with any prescribed requirements and within a prescribed period, unless the person and the Secretary of State agree a longer time period (*subsection (4)*).

45. Clause 11(1) provides that a person given a penalty notice may appeal that notice to a county court in England and Wales or Northern Ireland, or to the sheriff in Scotland. An appeal may be brought on the grounds that the person has not failed to comply with a requirement of the regulations, it is unreasonable to expect the person to pay the penalty, or the amount of the penalty is excessive. The court may then cancel the penalty notice, reduce the penalty by varying the penalty notice, increase the penalty notice, or confirm the penalty notice (*subsection (3)*). An appeal may be brought whether or not the person has objected, and irrespective of the Secretary of State's decision on any notice of objection (*subsection (4)*). The court may consider matters of which the Secretary of State was not and could not have been aware before giving the penalty notice (*subsection (5)*).

46. Clause 12 makes provision for enforcement of a penalty. Where a penalty has not been paid before the specified date, it may be recovered as a debt due to the Secretary of State (*subsection (1)*). However where an objection notice is given in respect of a penalty notice, the Secretary of State may not take steps to enforce the penalty notice before he has decided what to do in respect of the objection, and has informed the objector (*subsection (2)*). Additionally, the Secretary of State may not take steps to enforce the penalty notice while an appeal under clause 11 could be brought (disregarding the possibility of an appeal out of time) or has been brought and has not been determined or abandoned (*subsection (3)*). In proceedings for the recovery of a penalty, no question may be raised in respect of matters which are grounds for objection or for appeal (clause 12(3)).

47. Clause 12(5) requires that any money received by the Secretary of State in respect of a penalty under clause 9 are paid into the Consolidated Fund.

48. Clause 13 makes provision for a code of practice in respect of the civil penalty scheme. Under *subsection (1)* the Secretary of State shall issue a code of practice setting out the matters to be considered in determining whether to give a penalty notice and the amount of the penalty. The code may, in particular, require the Secretary of State to consider any decision already taken in respect of non-compliance with a requirement of the regulations (*subsection (2)*). The Secretary of State may revise and re-issue the code (*subsection (4)*).

Subsection (5) provides that before issuing or re-issuing the code the Secretary of State must publish proposals, consult members of the public and lay a draft before Parliament. *Subsection (6)* provides that the code shall come into force at the prescribed time.

49. Where a matter is "prescribed" under the civil penalty scheme, this means prescribed by order (clause 14(1)). An order may make provision generally or only for specified purposes, may make different provision for different purposes, shall be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament.

50. Clause 15(1) makes provision for the interpretation of clause 5. Clause 15(1)(g) provides that regulations may (but need not) enable something to be done by the Secretary of State only where the Secretary of State is of a specified opinion.

51. Clause 15(2) enables further provision to be made concerning the procedure to be followed, and for the charging of fees for an application for a biometric immigration document.

Part 3: Treatment of claimants

Clause 16: Conditional leave to enter or remain

52. This clause amends section 3(1)(c) of the Immigration Act 1971. Section 3(1)(c) already provides that a person who is given limited leave to enter/remain in the UK may be subject to any or all of the following conditions, namely –

- a condition restricting his employment or occupation in the UK;
- a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds; and
- a condition requiring him to register with the police.

53. This clause simply adds two new conditions under section 3(1)(c), namely -

- a condition requiring him to report to an immigration officer or the Secretary of State;
- a condition about residence.

Clause 17: Support for failed asylum-seekers

54. Clause 17 provides that a person whose claim for asylum has been determined and who can bring or has brought an in-country appeal against an immigration decision will remain an asylum-seeker for the purposes of section 4 and Part 6 of the Immigration and

Asylum Act 1999 (the 1999 Act), Part 2 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and Schedule 3 to the 2002 Act. The effect of this provision is that, whilst an in-country appeal against the immigration decision can be brought or is pending, such a person will be eligible for support on the same basis as asylum-seekers who have not yet received a decision on their claim. Support will continue for a prescribed period after the appeal ceases to be pending.

55. A judgment by the Court of Appeal in May 2006 (in the case of Slough Borough Council v R (oao M)) held that, for the purposes of Schedule 3 to the 2002 Act, save for when a right of appeal arises under section 83 of that Act, a person ceases to be an asylum-seeker as the time at which the Secretary of State notifies his decision on the claim and not when the appeal related to his asylum claim had been disposed of. Clause 17(3) defines an in country appeal as one brought while the appellant is in the United Kingdom and specifies that the possibility of bringing an appeal out of time with permission is to be ignored for the purpose of this clause.

56. The purpose of clause 17 is to avoid a situation where a person has made a claim for asylum and an in-country appeal against an immigration decision can be brought or is pending but support under Part 6 of the 1999 Act or Part 2 of the 2002 Act (currently not in force) is not available because the claim for asylum is deemed to be determined on conclusion of the prescribed period after the Secretary of State has notified his decision on the claim. Further, the clause ensures that such a person will not fall within any of the classes of ineligible person within Schedule 3 of the 2002 Act.

Clause 18: Support for asylum-seekers: enforcement

57. This clause applies existing immigration officer powers of arrest, entry, search and seizure in the Immigration Act 1971 (the 1971 Act) to the offences of dishonestly obtaining asylum support.

58. New section 109A (arrest) gives an immigration officer the power to arrest a person, without warrant, where the officer has reasonable grounds for suspecting that the person has committed an offence under section 105 or section 106 of the Immigration and Asylum Act 1999 (the 1999 Act) (false or dishonest representations in order to obtain support for asylum-seekers, respectively).

59. New section 109B (entry, search and seizure) extends the relevant powers of entry, search and seizure under sections 28B, 28D, 28E and 28G to 28L of the 1971 Act after a person has been arrested for an offence under section 105 or section 106 of the 1999 Act.

Clause 19: Points-based applications: no new evidence on appeal

60. Section 85(4) of the Nationality, Immigration and Asylum Act 2002 allows the Asylum and Immigration Tribunal (AIT) to consider any evidence that is relevant to the substance of the decision, including any evidence which arises after the date of decision. This does not apply to an appeal against the refusal of an entry clearance or a certificate of

entitlement: in these cases the AIT can only consider the circumstances as they were at the time of the decision to refuse.

61. This clause inserts a new section 85A into the 2002 Act which lists the exceptions to the general rule that the AIT can consider any evidence that is relevant to the substance of the decision, including any evidence which arises after the date of decision. It re-enacts the existing evidential restriction in appeals against the refusal of an entry clearance or a certificate of entitlement (*subsection (2)*), and adds a new restriction in relation to appeals against a refusal of leave to enter or a variation of leave to enter or remain. In appeals against a refusal of leave to enter or a variation of leave to enter or remain the AIT will be prevented from considering evidence adduced by the appellant which was not submitted at the time of making the original application, where that application was one made under a Points-based immigration rule. This exclusionary rule will not, however, apply insofar as the appeal is brought on the grounds that the decision was racially discriminatory or in breach of the appellant's rights under the Community Treaties, the Refugee Convention or section 6 of the Human Rights Act 1998. Additionally, evidence which was not submitted with the original application may still be adduced to rebut any reason for refusing an application which does not relate to the attainment of points under a Points-based immigration rule or in order to prove that a document is genuine or valid.

Clause 20: Fees

62. Clause 20(2) provides a power when setting the fees for applications or processes in connection with sponsorship of persons seeking leave to enter or remain in the UK under section 51(3) of the Immigration, Asylum and Nationality Act 2006 ('the 2006 Act'), to set them at above administrative cost recovery levels. It does so by allowing the Secretary of State to prescribe an amount which exceeds the administrative cost of the relevant application or process, based upon the benefits that he thinks are likely to accrue to the person who makes the application, to whom the application relates, or by or for whom the process is undertaken, if the application is successful or the process is completed.

63. It does so by inserting a new paragraph, (da), in subsection (2) of section 42 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Act'). This will mean that fees specified in regulations which are to be made under section 51(3) of the 2006 Act in reliance on section 42(1) of the 2004 Act, for applications or processes in connection with sponsorship of the relevant persons, will, by virtue of section 42(7) of the 2004 Act, be subject to approval by resolution of each House of Parliament.

64. Clause 20(3) provides the Secretary of State with a power when setting the fee for an in-country service in connection with immigration or nationality under section 51 of the 2006 Act to take into account the costs of:

(i) Other such services which are charged under section 51 of that Act; and

(ii) Certain out-of-country services, in particular applications for entry clearance, transit visas and certificates of entitlement to the right of abode in the United Kingdom, which are charged under section 1 of the Consular Fees Act 1980.

65. The effect of this is to enable the Secretary of State when setting the fees for immigration or nationality services under section 51 of the 2006 Act, to cross-subsidise between different in-country services in connection with immigration or nationality and between in-country and certain out-of country services in connection with immigration or nationality. This will mean that the Secretary of State can prescribe an amount which exceeds the administrative cost of the relevant service by taking into account the administrative cost of certain other services.

66. It does so by inserting a new subsection, (2A), into section 42 of the 2004 Act. By virtue of section 42(7) of that Act therefore, a draft of the regulations which are to be made under section 51(3) of the 2006 Act in reliance on this new power will be subject to approval by resolution of both Houses of Parliament.

67. Clause 20(4) provides a power when setting the amount of a fee under section 1 of the Consular Fees Act 1980 in respect of certain visa services, in particular applications for entry clearance, transit visas and certificates of entitlement to the right of abode in the United Kingdom, to set an amount which takes into account the costs of any in-country services in connection with immigration or nationality which are charged for under section 51 of the 2006 Act.

68. Again, it does so by inserting a new subsection, (3A), into section 42 of the 2004 Act. Therefore by virtue of section 42(7) of that Act, an Order in Council may not be made in reliance on this new power unless a draft of that Order has been laid before and approved by resolution of each House of Parliament.

69. In addition, by virtue of section 42(6) of the 2004 Act, an instrument, i.e. regulations or an Order in Council, may not be made in reliance on these new powers unless the Secretary of State has consulted with such persons as appear to him to be appropriate.

Part 4: Enforcement

Clause 21: Assaulting an immigration officer: offence

70. Clause 21 creates an offence of assaulting an immigration officer. It also establishes penalties for anyone found guilty of committing such an offence.

Clause 22: Assaulting an immigration officer: powers of arrest, &c.

71. Clause 22 creates a power of arrest for the offence of assaulting an immigration officer. It enables an immigration officer to arrest a person without warrant where he has reasonable grounds for suspecting that the person has assaulted or is about to assault an immigration officer. The clause also applies existing immigration officer powers of entry,

search and seizure in the Immigration Act 1971 to the offence of assaulting an immigration officer.

Clause 23: Seizure of cash

72. Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 allows a police constable or customs officer to search a person or premises for cash where there are reasonable grounds for suspecting that such cash is derived from or intended for use in unlawful conduct. The provisions also empower a police constable or customs officer to seize and detain any such cash. Seized cash can be further detained and forfeited on an application made to a court of summary jurisdiction. The power to apply for further detention and forfeiture of cash does not depend upon a criminal prosecution and the proceedings focus on the source of the cash which has been seized rather than the guilt of any individual. These clauses will extend the powers so that they may be exercised by immigration officers.

73. *Subsection (2)(a)* provides that the power to carry out a search for cash will be available to Immigration Officers where there are reasonable grounds for suspecting that the cash in question is derived from or intended for use in connection with an offence under the Immigration Acts. *Subsection (2)(b)* provides that the power to seize and detain cash may be exercised where there are reasonable grounds for suspecting that the cash is derived from or intended for use in connection with an offence under the Immigration Acts or an offence listed in section 14 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The safeguards that apply to constables and officers of HMRC will similarly apply to immigration officers. The code of practice will be amended to apply to immigration officers to provide guidelines on the operation of their search powers.

74. An immigration officer can only exercise the power to search for cash with the prior approval of a judicial officer, unless it is not practicable to obtain that approval at the time. *Subsection (2)(c)* provides that where it is not practicable to obtain the approval of a judicial officer an Immigration officer must seek the authority of a civil servant of at least the rank of assistant director in order to exercise the power of search.

75. *Subsection 2(f)(i)* provides that where an immigration officer continues to have reasonable suspicion that the seized cash is the proceeds of or intended for the use in an offence related to immigration, he will be able to make an application for an order to extend the detention period of the cash direct to the Magistrates Courts in England, Wales and Northern Ireland. *Subsection (2)(f)(ii)* provides that in Scotland such applications must either be made by the Scottish Ministers in connection with their functions under section 298 of Act or by a procurator fiscal.

76. *Subsection (2)(g)(i)* provides that whilst the cash is detained, an immigration officer will be able to make an application for a forfeiture order direct to the Magistrates Court in England, Wales and Northern Ireland. *Subsection (2)(g)(ii)* provides that in Scotland such applications must be made by the Scottish Ministers.

77. *Subsection (2)(h)* provides that compensation claims in relation to cash seized by immigration officers, for which no forfeiture order is made, will be paid by the Secretary of State.

Clause 24: Forfeiture of detained property

78. Clause 24 provides that where a court makes a forfeiture order, the court may order the property to be taken into the possession of the Secretary of State rather than the police (as is presently the case).

79. A "forfeiture order" means an order under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 (which extends to England and Wales) or Article 11 of the Criminal Justice (Northern Ireland) Order 1994 which allow the court to deprive a convicted offender of property used, essentially, for the commission of a crime or to facilitate the commission of a crime, or intended to be used in this way.

80. The court may order the property be taken into the possession of the Secretary of State only if it thinks that the offence in connection with which the order was made related to immigration or asylum, or was committed for a purpose connected with immigration or asylum. An order under this clause might be appropriate, for example, where the Immigration Service is leading the investigation of a criminal offence independently of the police.

81. Clause 58 makes transitional provision so that when clause 24 is commenced it will apply to criminal proceedings instituted before the passing of the Act.

Clause 25: Disposal of property

82. Clause 25 provides powers of disposal in respect of property which is in the possession of an immigration officer, or which has come into the possession of the Secretary of State in the course of the exercise of his immigration functions under the Immigration Acts. This includes property which has been forfeited or seized under the Immigration Acts, as well as property acquired in any other way (under *subsection (7)*).

83. Under *subsection (2)* a magistrates' court may, on the application of the Secretary of State or a claimant of property, order the delivery of the property to the person who appears to the court to be its owner. If the owner cannot be ascertained, the court may make any other order about the property. However, an order under subsection (2) is subject to the right of any person to bring legal proceedings for the recovery of the property within 6 months from the date of the order (*subsection (3*)).

84. *Subsection (4)* makes additional provision in respect of property which has been forfeited under section 25C of the Immigration Act 1971 or under clause 24 of this Bill. (Section 25C of the Immigration Act 1971 gives the court the power to forfeit a vehicle, aircraft or ship used in connection with an immigration facilitation offence under that Act, in certain circumstances.) A magistrates' court may make an order about the property under subsection (2) if the application is made within six months beginning with the date when the

forfeiture order was made (*subsection (4)(a)*). In addition, if the applicant is not the Secretary of State, an order may be made only if the applicant satisfies the court that he did not consent to the offender's possession of the property or that he did not know and had no reason to suspect that the property was likely to be used in connection with an offence (*subsection (4)(b)*).

85. *Subsection (5)* enables the Secretary of State to make regulations by statutory instrument, subject to annulment by resolution of either House of Parliament, for the disposal of property. The Secretary of State can make regulations where the owner has not been ascertained. For property which is in the possession of an immigration officer or the Secretary of State because it has been forfeited under section 25C of the Immigration Act 1971 or under clause 24 of this Bill, regulations may also provide for disposal where a court order under subsection (2) cannot be made because of *subsection (4)(a)* (that is, because six months has expired since a forfeiture order was made). Regulations may also provide for disposal where a court has declined to make an order under subsection (2) because it is not satisfied of the matters specified in *subsection (4)(b)* (that is, the applicant did not consent to the offender's use of the property or he did not know and had no reason to suspect that the property was likely to be used in connection with an offence).

86. *Subsection (6)* makes further provision about the regulations. The regulations may make provision which is the same as, or similar to, provision that may be made by regulations under section 2 of the Police (Property) Act 1897 or any similar enactment which applies in relation to Scotland or Northern Ireland. The regulations may apply, with or without modification regulations made under that Act. They may make provision for property to vest in the Secretary of State. They may make provision about the timing of the disposal (which may differ from the provision made under the Police (Property) Act 1897). The regulations shall have effect only where this is not inconsistent with any court order.

87. Clause 58 makes transitional provision so that when clause 25 is commenced, it will have effect in respect of property which is already in the possession of an immigration officer or the Secretary of State.

Clause 26: Employment: arrest

88. Section 21 of the Immigration, Asylum and Nationality Act 2006 introduced the new offence of knowingly employing an illegal worker and the associated powers to obtain a warrant to enter and search premises to arrest an individual who is liable to be arrested for this offence. The clause introduces an express power of arrest.

Clause 27: Employment: search for personnel records

89. The current offence of employing an illegal worker (section 8 of the Asylum & Immigration Act 1996) will be replaced by a regime of civil penalties for employers and a new offence of knowingly employing an illegal worker (sections 15-21 of the Immigration, Asylum and Nationality Act 2006). Section 8 of the 1996 Act will be repealed upon the commencement of sections 15-21 of the 2006 Act. This clause introduces an express power

to search for personnel records in connection with an offence under section 21 of the Immigration, Asylum and Nationality Act 2006.

Clause 28: Facilitation: arrival and entry

90. Clause 28 amends the existing offence in section 25A of the 1971 Act to provide that a person commits an offence if he knowingly and for gain facilitates the entry to the United Kingdom, as well as the arrival in the UK, of an individual that they know or reasonably believe to be an asylum-seeker. This amendment ensures that acts committed after an asylum seeker has arrived in the United Kingdom but before they have entered will be covered by the offence.

Clause 29: Facilitation: territorial application

91. Clause 29 amends section 25 of the Immigration Act 1971. Section 25 makes it an offence to assist unlawful immigration to a member State of the European Union. Presently, the section applies to anything done in the UK, anything done outside the UK by a British national and to anything done outside the UK by a body incorporated in the UK. Clause 29 removes these existing limitations on the territorial application of the offence to cover acts of facilitation committed inside or outside the UK, irrespective of the nationality of the person carrying out the act (*subsection (1*)).

92. *Subsection (2)* amends sections 25A (helping an asylum seeker to enter the United Kingdom) and 25B (assisting entry to United Kingdom in breach of a deportation or exclusion order) of the Immigration Act 1971 to extend the territorial application of the offences under those sections in the same way as described above for section 25.

Clause 30: People trafficking

93. Clause 30(1) amends section 4(1) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (the 2004 Act) to provide that a person commits an offence if they facilitate the arrival in, or the entry into, the United Kingdom of a person that they intend to exploit or who they believe is likely to be exploited by another person.

94. Similarly to the above, *subsection (3)* amends the existing offence of trafficking for sexual exploitation contained in Section 57(1) of the Sexual Offences Act 2003 (the 2003 Act) so that it is an offence for an individual to intentionally arrange the arrival in, or entry into, the United Kingdom of another person (A) with the intention of that individual or a third person then doing anything to or in respect of A that will involve the commission of a relevant offence (as defined at subsection (1) of section 60 of the 2003 Act).

95. These amendments will ensure that acts committed after a person has arrived in the UK but before they have entered the UK will be covered by the offences.

96. The trafficking people for exploitation offences contained in Section 4 of the 2004 Act and Sections 57 to 59 of the 2003 Act currently encompass anything done in the UK, anything

done outside the UK by a British national and anything done outside the UK by a body incorporated in the UK to facilitate the arrival or entry into the UK of an individual for the purposes of exploitation. Clause 30, *subsections (2) and (4)* amends sections 5(1) and (2) of the 2004 Act and sections 60(2) and (3) of the 2003 Act by removing these limitations on the territorial application of the offences and thereby ensuring that facilitating the arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, are now caught by the offences.

Part 5: Deportation of criminals

Clause 31: Automatic deportation

97. This clause provides that the Secretary of State must make a deportation order in respect of a "foreign criminal" unless certain exceptions apply.

98. *Subsection (1)* defines "foreign criminal" for the purposes of the new automatic deportation process. A "foreign criminal" in this context means a non-British Citizen who has been convicted in the United Kingdom of an offence and to whom Condition 1 or 2 applies. Condition 1 is that he is sentenced to a period of imprisonment of at least 12 months (*subsection (2)*). Condition 2 is that he is sentenced to a period of imprisonment for an offence specified in an order made under section 72(4) of the Nationality, Asylum and Immigration Act 2002 (*subsection (3)*).

99. *Subsection (4)* provides that the deportation of a foreign criminal is conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971.

100. *Subsection (6)* prohibits the Secretary of State from revoking a deportation order made under the automatic procedure unless he thinks that an exception applies (see clause 32 below), the application for revocation is made while the foreign criminal is outside the United Kingdom or clause 33(4) applies.

101. *Subsection (7)* confirms that the requirement on the Secretary of State to make an "automatic" deportation order under *subsection (5)* does not create a private right of action in respect of the consequences of non-compliance.

102. This clause gives effect to the commitment given in the Home Secretary's statement of 23rd May 2006 to create a direct link between deportation and the commission of a crime of the appropriate level of severity; and reduces the scope for challenging "automatic" deportation decisions through the appeals system. The existing legal framework (see Annex A) will continue to be available to deal with those who are exempt from the automatic procedure, those convicted of criminal offences who fall below the threshold for automatic deportation and other residual categories of case where it may be appropriate to exercise the "conducive to the public good" power to deport, for example national security cases and war criminals.

103. The clause creates a new statutory framework for the "automatic" deportation of certain non-British citizens convicted in the United Kingdom of a qualifying offence. Under the provision, the Secretary of State will be required to make a deportation order unless he thinks that removal would breach a person's rights under the European Convention on Human Rights or the United Kingdom's obligations under the Refugee Convention or one of the other exceptions in clause 32 applies.

Clause 32: Exceptions

104. This clause creates a number of exceptions to the automatic deportation procedure and preserves the existing exemptions from deportation in sections 7 and 8 of the 1971 Act. *Subsections (2) to (6)* set out the five exceptions:

- Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach a person's Convention rights, or the United Kingdom's obligations under the Refugee Convention (subsection (2)).

- Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction (subsection (3)).

- Exception 3 is where the removal of the foreign criminal would breach his rights under the Community treaties (subsection (4)).

- Exception 4 is where the Secretary of State has received a valid extradition request in respect of the foreign criminal (subsection (5)).

- Exception 5 is where certain provisions of the Mental Health Act 1983 or corresponding legislation in Scotland or Northern Ireland apply (the foreign criminal is a "mentally disordered offender")(subsection *(6)*).

105. *Subsection (7)* makes clear that those who are exempt from the automatic deportation procedure may continue to be deported under existing legislation and the application of an exception will not result in it being assumed either that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good. However, clause 31(4) will continue to apply to persons falling within exceptions 1 and 4.

Clause 33: Timing

106. *Subsection (1)* allows the Secretary of State to choose when the deportation order should be made under clause 31 subject to *subsection (2*) which provides that no order may be made while an appeal against a relevant conviction or sentence is pending (*subsection (2)(a)*), or could be brought (*subsection (2)(b)).* For the purpose of *subsection (2)(b)* the possibility of an appeal out of time must be disregarded and a person who has informed the Secretary of State in writing that he does not intend to appeal is treated as being no longer able to appeal (see *subsection (3)).*

107. *Subsection (4)* allows the Secretary of State to revoke a deportation order made in accordance with clause 31(5) for the purpose of taking of action under the Immigration Acts or immigration rules and subsequently taking a new decision that section 31(5) applies and making an automatic deportation order. This includes the certification of clearly unfounded asylum and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002. Once such action is complete a new deportation order may be made.

Clause 34: Appeal

108. This clause modifies the usual appeals regime for cases subject to the automatic deportation process.

109. *Subsection (2)* disapplies the prohibition on making a deportation order while an appeal to the Tribunal against a decision to make an automatic deportation order is pending or could be brought. If a deportation order is made it invalidates any leave to enter or remain that the person has or is subsequently given while the order is in force (section 5(1) of the Immigration Act 1971). However, new subsection (4) of section 79 of the Nationality, Immigration and Asylum Act 2002, inserted by subsection (2), provides that a deportation order made under clause 31 will not invalidate the deportee's leave to enter or remain while an in-country appeal against an immigration decision is pending.

110. *Subsection (3*) amends section 82 of the Nationality, Immigration and Asylum Act 2002 to provide that the definition of "immigration decision" includes a decision that clause 31(5) applies. The effect of this is that an appeal can be brought against the decision to the Asylum and Immigration Tribunal under section 82(1) of that Act. The clause distinguishes between a decision to make a deportation order under section 5(1) of the Immigration Act 1971 and a decision that clause 31(5) applies. Appeals against the former may be brought in the United Kingdom in reliance on section 92(2) of the Nationality, Immigration and Asylum Act 2002 while the latter may not. It will still be possible to bring an appeal in the United Kingdom against a decision that clause 31(5) applies in reliance on section 92(4) of the Nationality, Immigration and Asylum Act 2002. However, an appeal may not be brought in reliance on section 92(4) if the asylum or human rights claim is certified as clearly unfounded under section 94 of the 2002 Act.

Clause 35: Detention

111. This clause creates a new power for the Secretary of State to detain a person while he considers whether clause 31 applies, and pending the making of a deportation order under clause 31 (*subsection (1*)). Where an automatic deportation order has been made, the Secretary of State must exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 unless in the circumstances he thinks it inappropriate. A court determining appeal against conviction or sentence may direct release from detention under subsection (1) or (2) (*subsection (3*)). *Subsection (2*) provides that where a deportation order is made in accordance with clause 31(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 unless in the

circumstances the Secretary of State thinks it inappropriate. Paragraph 2(3) provides a power of detention in respect of a person if a deportation order is in force against that person.

112. *Subsections (4)* and *(5)* apply the existing provisions on bail, arrest and restriction orders to automatic deportation cases.

Clause 36: Family

113. This clause provides that a deportation order may not be made against a family member of a foreign criminal if more than eight weeks have elapsed since either the expiry of the time limit for appeal (if no appeal against an automatic deportation order is brought) (*subsection 3*) or such an appeal ceased to be pending (*subsection (4*)).

Clause 37: Interpretation

114. *Subsections (1) and (2)* further define a "period of imprisonment" so as to:

- exclude suspended sentences unless a court subsequently orders that the suspended sentence is to take effect;
- exclude (for the purpose of Condition 1 in clause 31) any sentence which amounts to at least 12 months only by virtue of being comprised of consecutive sentences which amount in aggregate to more than 12 months; and
- include indeterminate sentences and sentences served in institutions other than a prison.

115. *Subsection (3)* clarifies that a person subject to an order under section 5 of the Criminal Procedure Insanity Act 1964 has not been convicted of an offence for the purposes of clause 31.

116. *Subsection (4)* defines the following terms for the purposes of the automatic deportation process:

- British citizen;
- Convention Rights;
- Deportation order; and
- Refugee convention.

Clause 38: Consequential amendments
117. This clause makes several consequential amendments to section 72(11)(b) of the Nationality, Immigration and Asylum Act 2002 in respect of suspended sentences and consecutive sentences.

Part 6: Information
Clause 39: Supply of Revenue and Customs information
118. This clause provides that Her Majesty's Revenue and Customs (HMRC) and the Revenue and Customs Prosecutions Office (RCPO), as well as those authorised to act on behalf of those organisations, may supply the Secretary of State with information, documents or articles for use for those purposes which are specified in this provision, all of which relate to the exercise of the Secretary of State's immigration and nationality functions.

Clause 40: Confidentiality
119. This clause sets out the statutory duty of confidentiality placed on the Secretary of State, Ministers and their officials as well as those acting on their behalf in respect of information, documents and articles supplied by HMRC, the RCPO or those acting on either organisation's behalf under those provisions specified in *subsection (2)* unless it is for a purpose permitted in this provision.

120. It means that the Secretary of State, Ministers and the officials as well as those acting on their behalf are permitted to disclose information only if permitted to do so by any other enactment (not including an Act of the Scottish Parliament or of the Northern Ireland Assembly or an instrument made under such an Act) or the disclosure is for a purpose specified in *subsection (3)*.

Clause 41: Wrongful disclosure
121. This clause creates an offence of wrongful disclosure of certain information supplied by HMRC, the RCPO or those authorised to act on behalf of either of them. The offence is committed where a person in disclosing the information which relates to an identifiable natural or legal person contravenes clause 40. It does not apply to the disclosure of information about internal administrative arrangements of HMRC or the RCPO.

122. The offence applies in respect of the information supplied to the Secretary of State, etc. under the relevant provisions both before and after this provision is commenced.

Clause 42: Supply of police information, etc.
123. This clause amends section 131 of the Nationality, Immigration and Asylum Act 2002. That provision provides that information may be supplied under section 20 of the Immigration and Asylum Act 1999 for the purpose of determining whether an applicant for naturalisation under the British Nationality Act 1981 is of good character. Section 20 of the Immigration and Asylum Act 1999 provides for information to be supplied to the Secretary of State by a number of persons specified in *subsection (1)* or specified in an order made under *subsection (1)(f)* for immigration purposes as defined in that provision.

124. This clause in amending section 131 of the Nationality, Immigration and Asylum Act 2002, enables those persons (including chief officers of police and the Serious Organised Crime Agency) to supply information to assist the Secretary of State in determining whether applicants aged 10 or over for registration under a provision listed in section 58(2) of the Immigration, Asylum and Nationality Act 2006 are of good character. Such information may include evidence of previous convictions.

Clauses 43-46: Entry and search for nationality documents and seizure and retention of nationality documents

125. Where a person has been arrested for a criminal offence, and an immigration officer or a police constable suspects that the individual might not be a British citizen and documents relating to his nationality might be found on certain premises, the immigration officer or constable may enter and search the premises without warrant for the purpose of finding those documents (under clause 43).

126. A nationality document means a document showing the individual's identity, nationality or citizenship, the place from which he travelled to the United Kingdom, or the place to which he is proposing to go (*subsection (5)*). The premises which may be searched are premises occupied or controlled by the arrested person, or the premises in which he was when, or immediately before, he was arrested (*subsection (1)(b)*).

127. Under *subsection (3)* the power of entry and search may only be exercised with the written authority of a senior officer. In relation to an immigration officer, a senior officer is an immigration officer of at least the rank of chief immigration officer. In relation to a constable, a senior officer is a constable of at least the rank of inspector. The senior officer who authorises the search must arrange for a written record of the grounds for the suspicions in reliance on which the power was exercised and the nature of the documents sought (*subsection (3)(b)*).

128. Under *subsection (4)* the power of search may not be exercised where the arrested person has been released without charge.

129. Under clause 44, where it is believed that nationality documents may be held at premises other than those set out in clause 43, a warrant may be sought to enter and search those premises. This ensures judicial oversight for this wider search power, and *subsection (4)* provides additional safeguards for when a warrant may be sought. If a warrant is to be obtained by or executed by a police constable the safeguards in sections 15 and 16 of the Police and Criminal Evidence Act 1984 will apply.

130. Under clause 45 an immigration officer or constable may seize a document which he thinks is a nationality document relating to the arrested person, provided it is not a document subject to legal privilege (*subsection (2)*). An immigration officer or a constable may retain the seized document while he suspects that the individual to whom the document relates may be liable to removal, and that retention of the document may facilitate removal.

131. *Subsection (4) and (5)* provide for the access to and copying of any documents seized.

132. Clause 46 inserts a new paragraph 18A to Part 2 of Schedule 4 to the Police Reform Act 2002 (powers exercisable by police civilians: investigating officers). This enables an investigating officer to exercise the new powers of entry, search, seizure and retention, in the same way that a constable can, provided he is designated as having these particular powers.

Border and Immigration Inspectorate

Clause 47: Establishment

133. *Subsection (1)* requires the Secretary of State to appoint a Chief Inspector of the Border and Immigration Agency.

134. *Subsection (2)* sets out that the Chief Inspector shall monitor, and report on, the efficiency and effectiveness of the Agency. Without prejudice to the generality of this duty, a number of specific areas that the Chief Inspector shall consider and make recommendations about are set out.

135. *Subsection (2)(a)* states that the Chief Inspector shall look at consistency of approach within the Agency.

136. *Subsection (2)(b)* tasks the Chief Inspector with comparing the practice and performance of the Agency against similar bodies. This will allow the Chief Inspector to compare the performance of the Agency with other organisations and bodies doing similar things (for example, dealing with large volumes of applications), both within the United Kingdom and more widely.

137. *Subsection (2)(c)* states that the Chief Inspector shall look at practice and procedure in making decisions.

138. *Subsection (2)(d)* charges the Chief Inspector with looking at the way the Agency treats applicants. This will involve the Chief Inspector assessing the main processes involved for those experiencing the immigration system.

139. *Subsection (2)(e)* provides that the Chief Inspector shall look at certification of asylum and human rights claims as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002. Section 111 of that Act currently provides for oversight of this certification power by a monitor (the monitor of certification of claims as unfounded). That position is abolished by clause 53.

140. *Subsection (2)(f)* tasks the Chief Inspector with looking at compliance with discrimination law. This includes looking at reliance on authorisations made under section 19D of the Race Relations Act 1976, something which is currently done by the monitor provided for by section 19E of that Act (the position of which is abolished by clause 53).

141. *Subsection (2)(g)* sets out that the Chief Inspector shall assess the Agency's use of enforcement powers.

142. *Subsection (2)(h)* states that the Chief Inspector shall look at the provision of information. This will allow the Chief Inspector to assess how information is provided by the Agency at the United Kingdom's ports, through Agency websites and letters, by face-to-face contact, over the telephone and by way of e-mail contact and publications.

143. *Subsection (2)(i)* provides that the Chief Inspector shall look at the handling of complaints.

144. *Subsection (2)(j)* tasks the Chief Inspector with looking at information on other countries which the Secretary of State compiles and uses for immigration and asylum purposes. This role is currently undertaken by the Advisory Panel on Country Information provided for by section 142 of the Nationality, Immigration and Asylum Act 2002 (which is abolished by clause 53).

145. *Subsection (3)* defines the Border and Immigration Agency as immigration officers, and any other officials of the Secretary of State, and the Secretary of State, dealing with immigration, asylum or nationality.

146. *Subsection (4)* makes clear that the Chief Inspector shall not set out to investigate individual cases. However, he is not prevented from looking at individual cases and/or draw conclusions from them for the purpose of, or in the context of, considering a wider issue. So, for example, where there is an allegation of an immigration officer asking for sex in return for favourable immigration status decisions, the Chief Inspector can look at the individual case for the purpose of considering the measures which the Agency has in place to prevent members of staff abusing their positions in this way.

Clause 48: Chief Inspectorate: supplemental

147. Clause 48 deals with supplemental issues such as the appointment and pay of the Chief Inspector. *Subsection (1)* says that the Secretary of State must pay remuneration and allowances to the Chief Inspector. In terms of the Chief Inspector's budget, *subsection (2)* says that the Secretary of State must, before the start of each financial year, set the Chief Inspector's budget for the year. The Secretary of State can allow the Chief Inspector to exceed his budget for a specified purpose. *Subsection (3)* makes clear that the Chief Inspector shall hold and vacate office in accordance with terms of appointment. *Subsection (4)* allows him to appoint staff. *Subsection (5)* sets out that the Chief Inspector can not be employed by a government department or devolved administration.

Clause 49: Reports

148. Clause 49 states that the Chief Inspector shall report in writing to the Secretary of State (i) once a year and (ii) at such other times as requested by the Secretary of State in

relation to specified matters. The Secretary of State must lay before Parliament a copy of any report received from the Chief Inspector. *Subsection (3)* allows the Secretary of State to withhold material from the copy laid before Parliament if he thinks its publication is undesirable for reasons of national security or may places an individual in danger.

Clause 50: Plans

149. Clause 50 requires the Chief Inspector to prepare plans describing the objectives and terms of reference of inspections he proposes to carry out. The Secretary of State has the power to specify when plans should be prepared and what periods they should cover, although the Chief Inspector must prepare plans at such other times, and in respect of such other periods, as he thinks appropriate. The Secretary of State also has the power to lay down the form of plans, what information they must contain, who should be consulted (in addition to himself) when plans are being prepared by the Chief Inspector and who (in addition to himself) should receive copies of plans. The Chief Inspector is free to carry out actions even if they are not listed in a plan.

Clause 51: Relationship with other bodies: general

150. Clause 51 allows for close working between the Chief Inspector and other bodies. The Chief Inspector must co-operate with and may act jointly with such persons as the Secretary of State may specify, insofar as the Chief Inspector thinks it consistent with the efficient and effective performance of his functions. The Chief Inspector may also assist a person specified by the Secretary of State. The Chief Inspector may also delegate a specified aspect of his functions to a person specified by the Secretary of State. The relevant persons will be identified by order (see clause 54 below).

Clause 52: Relationship with other bodies: non-interference notices

151. Clause 52 gives the Chief Inspector the power to issue an notice preventing a person (specified by the Secretary of State) from conducting an investigation of the Border and Immigration Agency if the Chief Inspector thinks that it may place an unreasonable burden on the Agency. The person on whom the notice is served must comply with it, unless the Secretary of State cancels it on the basis that the inspection would not impose an unreasonable burden on the Agency. The Secretary of State has the power to specify the form of notices and what information they must contain and set out details about the timing, publication and revision or withdrawal of notices.

Clause 53: Abolition of other bodies

152. Clause 53 provides for the abolition of the monitor provided for by section 19E of the Race Relations Act 1976 (monitor of exception in relation to immigration cases), the Monitor of Accommodation Centres (provided for by section 34 of the Nationality, Immigration and Asylum Act 2002), the monitor provided for by section 111 of that Act (monitor of certification of claims as unfounded) and the Advisory Panel on Country Information (provided for by section 142 of that Act). Clause 47 tasks the Chief Inspector with the duties formerly carried out by these persons/bodies, with the exception of the Monitor of

Accommodation Centres, the position of which is being abolished because accommodation centres have never been established.

Clause 54: Prescribed matters

153. Clause 54 defines 'prescribed' for those clauses of the Bill that relate to the Chief Inspectorate of the Border and Immigration Agency as meaning prescribed by order of the Secretary of State. The clause makes supplemental provision about what an order under any of those clauses may do and sets out the parliamentary procedure which applies to such an order.

Clause 55: Senior President of Tribunals

154. Clause 55 amends what will become section 43(3) of the Tribunals, Courts and Enforcement Act 2007. That section requires the Senior President of Tribunals to report to the Lord Chancellor each year on certain matters in relation to relevant tribunal cases. Clause 55 adds cases coming before the Asylum and Immigration Tribunal to the definition of "relevant tribunal cases", with the result being that cases coming before the Tribunal are within the reporting remit of the Senior President.

155. The clause also requires the Senior President, in exercising his reporting function, to take into account the functions of the Chief Inspector of the Border and Immigration Agency and the power of the Secretary of State to request the Chief Inspector to report about specified matters. This is with an aim to avoiding duplication of effort by the Senior President and the Chief Inspector.

Part 7: General

Clause 56: Money

156. This clause gives the Secretary of State authority to spend money provided by Parliament for the purposes of the Act.

Clause 57: Repeals

157. The provisions specified will be repealed as they are replaced by or rendered obsolete by the provisions in the Bill.

Clause 58: Commencement

158. This clause sets out the arrangements for bringing into force the provisions of the Act.

159. *Subsection (1)* provides that clause 17 shall come into force on the day the Bill is passed.

160. *Subsection (2)* states that the other preceding provisions may be brought into force on a day which the Secretary of State may, by order, appoint.

161. *Subsection (3)* states that different provisions may be brought into force at different times and for different purposes and may include transitional provisions.

162. *Subsection (4)* specifies certain particular transitional provisions which the commencement order may make in relation to clauses 16, 24, 25 and 31.

Clause 59: Extent

163. Clause 47: the UK Borders Bill extends to the whole of the United Kingdom, with three exceptions, clauses 1-4 relating to powers of detention for immigration officers at ports, clause 24 relating to forfeiture of property, and clause 30(1) and (2) relating to trafficking offences. These will only apply to England, Wales and Northern Ireland.

164. Amendments to other Acts have the same extent as the amended Act (or the amended part thereof).

165. A provision of the Bill may be extended to any of the Channel Islands or to the Isle of Man by Order in Council.

FINANCIAL EFFECTS AND EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

166. Some of the provisions in the Bill will place an increased burden on the public sector. These are likely to be incurred by the training necessary required for increasing powers of frontline staff and costs associated with processing the prosecution of a greater number of cases through the courts. Specifically, the provisions relating to tackling facilitation offences are likely to incur additional costs for Crown Prosecution Service, Department for Constitutional Affairs, Prison Service and UKVisas. Where possible these costs have been estimated in the Regulatory Impact Assessment (RIA) for the Bill. With regard to the provision for the automatic deportation of foreign national prisoners, further modelling is being carried out to assess the impact on the Prison Service.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

167. A regulatory impact assessment is published with the Bill. There are no proposals that have an adverse impact on business.

EUROPEAN CONVENTION ON HUMAN RIGHTS

168. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention (as defined by section 1 of that Act). The statement has to be

made before transfer to the House of Lords. On 9th May 2007 Baroness Scotland of Asthal made the following statement on behalf of the Home Department:

> "In my view the provisions of the UK Borders Bill are compatible with the Convention rights."

169. The following provisions may be said to give rise to issues concerning the compatibility of the Bill with Convention rights.

Designation of immigration officers as having a power of detention pending the arrival of a constable

170. Clauses 1 and 2 allow the Secretary of State to designate individual Immigration Officers as having the power to detain a person where the immigration officer considers him someone who a constable could arrest without a warrant pursuant to section 24(1), (2) and (3) of the Police and Criminal Evidence Act 1984 or where a warrant is outstanding for the individual. This detention will be solely pending the arrival of a police constable, clause 2.

171. The power of detention engages Article 5 ECHR. As the new power is set out in legislation which will specify when it can it be exercised and the limitations on its use, the department considers its use will be "in accordance with a procedure prescribed by law" for the purposes of Article 5. It also falls within one of the permitted cases, namely Article 5(1)(c). Detention where there is an outstanding warrant for an individual's arrest may also fall within Article 5(1) (a).

172. The power to search individuals, and seize weapons or documents, raises potential issues under Article 8 ECHR and Article 1 of Protocol 1. There is clearly the potential for interference under both Articles, but in the Department's view any such interference can be justified under Article 8(2) and Article 1, Protocol 1. The powers of search and seizure pursue the legitimate aim of the public safety, the economic well-being of the country and/or the prevention of disorder or crime and are proportionate. The power to search is for specific and limited purposes and will be carried out by Immigration Officers who the Secretary of State has concluded are capable of, properly trained for and fit and proper to exercise the powers.

Biometric registration of persons subject to immigration control

173. The department recognises that taking biometric or other information from a person, storing that information (on existing Border and Immigration Agency biometric databases)

and requiring the biometric immigration document to be used for specific immigration purposes, is likely to be an interference in the right to respect for private life.[1] However, the department believes the interference is justified and proportionate.

174. In the department's view the proposals will be in accordance with the law.[2] The provisions will be set out in primary legislation and in secondary legislation (affirmative procedure), save for certain procedural requirements which will be provided for under the Immigration Rules. The intention is to ensure that the requirements of the regulations are formulated with sufficient precision so that their ambit is absolutely clear, accessible and foreseeable.

175. In the department's view it is necessary for the Secretary of State to have the proposed powers for the maintenance of immigration control by ensuring the integrity of documents which are evidence of a person's immigration status, and which are used to combat illegal working. As such, the proposals are necessary for the economic well-being of the country[3] and the prevention of crime.[4]

176. In the department's view the proposals are a proportionate way of achieving these objectives. The use of insecure, easily forged documents as evidence of immigration status is a real threat to the effective maintenance of immigration control, including the prevention of illegal working. Those subject to immigration control must be issued with specific documentary evidence of their status already.[5] It is reasonable and proportionate to require these individuals, who wish to be in the UK, to have a secure, reliable biometric immigration document as evidence of their status.

177. A new European Council Regulation is being negotiated which makes similar provision to the new proposals. This Regulation will require member States to issue a biometric residence permit to any third country national who is authorised to stay in its territory.[6] Member States may make domestic provision to require third country nationals to

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[1] *Murray v UK [1994] 19 EHRR* and *McVeigh v UK [1981] 25 DR 15, 49*, taking of personal details/fingerprints by the army/police an interference, although see also *Filip Reyntjens v Belgium [1992] 73 DR 136* where the Commission decided that it was not a breach of Article 8 to require a person to carry and produce an identity card.

[2] As required by *Olsson v Sweden (No 1) [1988] EHRR 259*.

[3] The European Court of Human Rights has recognised that the maintenance of immigration control is a legitimate aim under this heading, *Berrehab v Netherlands [1988] 11 EHRR 322* at paragraph 26.

[4] Illegal working and employing an illegal worker are criminal offences under section 24(1) of the Immigration Act 1971, and section 8 of the Asylum and Immigration Act 1996 respectively. Immigration control policy may fall within this heading, *Beldjoudi v France [1992] 14 EHRR 801* at paragraph 70.

[5] Under European Council Regulation (EC) 1030/2002, save visa applicants (who must be issued with documents under other EC legislation), those who wish to stay for fewer than 6 months, and those on temporary admission pending consideration of an immigration application or asylum claim.

[6] Apart from those authorised to stay by a visa, those who wish to stay for less than 6 months, and those who are on temporary admission pending consideration of an asylum or immigration application.

upgrade existing authorisations to a biometric residence permit.[7] The proposed power in the Bill will be used to make this domestic provision. There has been no suggestion in the course of negotiations that the European proposals are contrary to Article 8. The Republic of Ireland has published instructions to the Irish Parliamentary Counsel (which take the form of a draft Bill) for Irish legislation which will make similar provision.[8]

178. In connection with article 14 ECHR, there are two separate legal issues for consideration. Firstly, these measures will only apply to those who are subject to immigration control. Secondly, the measures will be rolled out to different categories of those subject to immigration control incrementally according to rational criteria. For both issues, the department considers the different treatment is not discriminatory[9] or (if wrong) any discrimination is justified.

Application of the measures to those subject to immigration control only

179. It is accepted that those subject to immigration control will be treated differently from those who are not, under the proposals. However, the department does not think this is discrimination. Those subject to immigration control are not in a comparable position to those who are not subject to immigration control. The Bill's measures are designed to reinforce the maintenance of immigration control, including by the prevention of illegal working. Those subject to immigration control are treated differently from those who are not. This fundamental assumption is reflected in the Immigration Acts.

180. If the department is wrong in thinking that there is no discrimination, it believes it is objectively justified and proportionate for the reasons given above in respect of Article 8.

Incremental implementation of the requirements

181. The requirement for those subject to immigration control to apply for a biometric immigration document will be implemented incrementally. Different categories of those subject to immigration control will be subject to the measures at different times by successive secondary legislation made under the power, and so will be treated differently.

182. The phases of the implementation will be determined by rational criteria. The precise order and categories for the phases are still being developed. It is likely that those categories who present the greatest risk to immigration control will be subject to a requirement first. The phases may also be determined by practical considerations, such as the availability of the necessary technology and resources for particular applicants.

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[7] Under Article 9(4) of Council Regulation (EC) 1030/2002 which will be amended by the draft Regulation under discussion.
[8] Scheme for an Immigration, Residence and Protection Bill, please see Head 21 to 34 at http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6TDJ3V-ga/$File/Scheme.pdf
[9] In the application of Article 8.

183. In the department's view, an incremental implementation according to rational criteria is, in principle, compatible with Article 14.

Power of arrest, entry, search and seizure in respect of two asylum-support offences

184. Clause 18 gives an immigration officer the power to arrest a person, without warrant, whom he reasonably suspects has committed an offence under section 105 or 106 of the Immigration and Asylum Act 1999 (false or dishonest representations to obtain asylum-support). This clause also applies existing powers to a section 105 or 106 offence. The extension of these existing powers gives an immigration officer the power to enter premises, with warrant, to search for a person liable to arrest for the offence. It gives an immigration officer the power to enter and search certain premises, with and without warrant, for evidence of the offence, and to seize and retain the evidence. It also gives an immigration officer the power to search the arrested person for, broadly speaking, dangerous items, items which may enable him to escape from custody, and relevant evidence. Items found can be seized and retained.

185. These powers are subject to the particular conditions and restrictions provided for in respect of each power (see section 28B (search and arrest by warrant), 28D (entry and search of premises), 28E (entry and search of premises following arrest), 28G (searching arrested persons) and 28H (searching persons in police custody) of the Immigration Act 1971), and also to the additional safeguards under sections 28I (seized material: access and copying), 28J (search warrants: safeguards) and 28K (execution of warrants) of the Immigration Act 1971 which are expressly applied by clause 18.

186. In the view of the department, the proposed power of arrest is in accordance with Article 5 and Article 8 of the ECHR, and the powers of entry, search and seizure are in accordance with Article 8 of the ECHR and Article 1 of the First Protocol to the ECHR.

Power of arrest

187. It is necessary for an immigration officer to have the proposed power to secure the lawful arrest of a person for the purpose of bringing him before the courts on reasonable suspicion of his having committed an offence under section 105 or 106 of the Immigration and Asylum Act 1999 (for the purposes of Article 5). This power is also necessary in the interests of the prevention of disorder or crime and for the economic well-being of the country (for the purposes of Article 8). Asylum-support fraud is a serious problem.

Powers of entry, search and seizure

188. The department recognises that the exercise of the powers of entry, search and seizure may engage Article 8 of the ECHR and Article 1 of the First Protocol to the ECHR. However, interference in this context may be necessary, for the investigation of a serious criminal offence, and for the protection of those investigating the offence (depending again on the particular circumstances of a particular case). As such it may be necessary for the prevention of crime, for the economic well-being of the country, and for the protection of right and freedoms of others (for the purposes of Article 8). The department considers for these reasons that any control on the use of or deprivation of property under these powers may be in the public interest (for the purposes of Article 1 of the First Protocol).

189. The department also considers that any such interference would be proportionate and strike a fair balance between the rights of the general community and the individual (for the purposes of both Article 8 and Article 1 of the First Protocol). In particular, the conditions and restrictions under section 28B, 28D, 28E, 28G, and 28H of the Immigration Act 1971 for the respective powers, combined with the safeguards under section 28I, 28J and 28K of the Immigration Act 1971 and the provisions of the clauses themselves, are intended to ensure this is the case.

Powers to enter premises to search for and seize nationality-related documents following arrest for a criminal offence

190. Clause 43 gives an immigration officer or a constable the power to enter certain premises without warrant in order to search for and seize documents which establish a person's nationality. This power may be exercised where a person has been arrested for a criminal offence.

191. The department recognises that the exercise of the powers of entry, search and seizure may engage Article 8 of the ECHR and Article 1 of the First Protocol to the ECHR. However, interference may be necessary. It is necessary to secure the deportation of those who are not British citizens who have committed a criminal offence, to ensure the economic well-being of the country,[10] the prevention of crime and the protection of rights and freedoms of others (for the purposes of Article 8). Seizure of nationality-related documents in appropriate cases achieves these objectives.

192. The department considers that any deprivation of property under these powers may be in the public interest for the same reasons (for the purposes of Article 1 of the First Protocol).

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[10] The European Court of Human Rights has recognised that the maintenance of immigration control is a legitimate aim under this heading, *Berrehab v Netherlands [1988] 11 EHRR 322* at paragraph 26.

193. The department believes that any such interference is proportionate, and strikes a fair balance between the rights of the general community and the individual (for the purposes of Article 8 and Article 1 of the First Protocol respectively). There is a strong public interest in securing deportation of those who are not British citizens who commit criminal offences; and deportation can best be achieved by establishing nationality at the earliest possible stage in the criminal justice process.

194. In addition, the conditions and restrictions and safeguards under clauses 43 and 45 are intended to ensure the power is proportionate. These conditions and safeguards replicate similar provisions which restrict the exercise of similar existing powers of search and seizure.[11] There has been no suggestion that the similar existing powers are contrary to the ECHR.

195. Clause 44 provides for a power of entry and search on premises not within clause 43. This power raises the same ECHR issues as the one provided for by clause 43. Given the broader scope of this power in terms of the premises which may be searched the department considers it right that the power to exercisable only with a warrant from a justice of the peace (or in Scotland a sheriff or justice of the peace). The conditions in subsections (2) and (3) must be satisfied before a warrant will be issued. The requirements in the Police and Criminal Evidence Act 1984 (sections 15 and 16) , for constables, and sections 28J and 28K of the Immigration Act 1971, for immigration officers, must be followed in the execution of the warrants. With these safeguards the department considers the provision to be compatible with the Convention Rights.

Seizure of cash

196. Clause 23 provides that Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 shall apply to immigration officers as it applies to officers of Revenue and Customs.

197. The exercise of the relevant powers is authorised by primary legislation. During the passage of this legislation a statement was made in accordance with section 19 of the Human Rights Act 1998 ('the 1998 Act') that the relevant provisions of the then Bill were compatible with Convention Rights (as defined in the 1998 Act). As the proposed change extends the exercise of the powers contained in that Act to Immigration Officers but does not extend the scope or operation of those powers we take the view that this proposal is also compatible with Convention Rights. It is also important to note that applications for continued detention and forfeiture of any cash seized must be authorised by a court of summary jurisdiction and that any party who claims an interest in the seized cash can apply to such a court for its release.

[11] See paragraph 25A and 25D of Schedule 2 to the Immigration Act 1971 for comparable safeguards.

Disposal of property

198. Clause 25 provides for the disposal of property which has come into the possession of an immigration officer, or the Secretary of State, in the course of, or in connection with, a function under the Immigration Acts.

199. The rights which are most obviously relevant are Article 8 of the ECHR (right to private life) and Article 1 of the first Protocol to the ECHR (protection of property). It is accepted that the disposal of property belonging to another person engages these rights. However, the department considers that any interference is justified for the following reasons.

200. The interference is in accordance with the law. The provisions will be set out in primary and secondary legislation (negative procedure). The department will ensure that the requirements of the regulations are formulated with sufficient precision so that their ambit is absolutely clear, accessible and foreseeable.

201. The justification for the disposal under Article 8(2) depends on the particular item and would have to be assessed at the time before disposal. Where the item has been seized because it could be used to harm persons or property (for example, under the power provided for by section 28G(6) of the Immigration Act 1971 (searching arrested persons)) the power of disposal may be necessary for public safety, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others. Where the item has been seized because it is relevant evidence of a criminal offence (for example, under section 28E of the Immigration Act 1971 (entry and search of premises following arrest)) then it may be necessary for the prevention of disorder and crime and for the protection of rights and freedoms of others. More generally, where the officer or Secretary of State is exercising immigration-related functions, disposal may be necessary as part of the maintenance of immigration control and so for the economic well-being of the country.[12] Similarly, an interference with the right to property under Article 1 of the First Protocol to the ECHR may be justified.

202. Before any particular item is disposed of, an assessment would have to be made as to whether disposal was proportionate (in respect of Article 8 ECHR and Article 1 of the First Protocol). In principle, the department considers that disposal may be proportionate. Parliament has given powers to immigration officers and the Secretary of State to seize and retain certain property. Without powers to dispose of the property in appropriate cases equivalent to the police, the Border and Immigration Agency has to retain the items, at considerable cost to the taxpayer.

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[12] The European Court of Human Rights has recognised that the maintenance of immigration control is a legitimate aim under this heading, *Berrehab v Netherlands [1988] 11 EHRR 322* at paragraph 26.

Deportation of criminals

203. Clauses 31 to 37 introduce a modified procedure for deportation of criminals. In relation to specified foreign criminals clause 28(5) provides that the Secretary of State must make a deportation order, subject to certain exceptions. An appeal against the making of a deportation order in cases falling within the new regime will be non-suspensive unless the appellant has, while in the United Kingdom, made an arguable asylum or human rights claim. Deportation could engage Convention rights. However, the department considers the provisions to be compatible with them.

204. First, one of the exceptions to the making of an automatic deportation order is that removal of the person would be incompatible with the Human Rights Act 1998 (clause 32(2)). Secondly, the right of appeal on the ground that the making of a deportation order is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention Rights (section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002) is not affected by any of the provisions. Thirdly, a person in respect of whom a deportation order is made who makes an arguable human rights claim will continue to enjoy a right of appeal from within the United Kingdom against the making of the deportation order.

205. Clause 58 provides that the provisions on automatic deportation may be applied to persons convicted of offences before the Bill is passed. This may be thought to raise issues under article 7 ECHR. The department does not consider that article 7 would be engaged. Persons are currently liable to deportation if the Secretary of State deems their deportation to be conducive to the public good (section 3(5) of the Immigration Act 1971). Any person who would fall within the Bill's provisions on automatic deportation is currently capable of being deported under these powers. Therefore, even if deportation were a penalty for the purposes of article 7, it is a penalty which *could* be imposed now under existing legislation on the persons to whom the automatic provisions will apply. The department does not consider that the change to make the making of a deportation order mandatory in certain circumstances has the effect of imposing a heavier sentence than was applicable at the time of commission of the offence (see the approach of the House of Lords to the automatic extension of licences to the three-quarter period of the sentence, rather than the two-thirds point applicable at time of commission of the offence in Uttley [2004] UKHL 38).

206. If the department's analysis above is wrong, the department considers that automatic deportation is in any event not a *penalty* for the purposes of article 7. That is the accepted position for deportation. While *automatic* deportation following conviction is new, the nature and purpose of deportation itself has not changed and the department considers that it would still be held to be essentially preventative and not punitive (applying the test in Welch v UK (1995) 20 EHRR 247).

Supply of Information by HM Revenue and Customs and the police to the Secretary of State

207. The department considers it likely that Article 8 rights will be engaged by the collection and use by the Secretary of State of the relevant information pursuant to clauses 39 and 42. However the department considers any such interference with this right to be justified under Article 8 (2) as the use of the information will be in accordance with the law and is necessary in a democratic society in the interests of public safety, the economic well being of the country and for the prevention or detection of crime (*MS v Sweden* (1997) 28 EHRR 151).

208. In respect of the offence of wrongful disclosure of information obtained by the Secretary of State from Revenue and Customs, clause 41 provides a defence if the person charged with the offence can show that they reasonably believed that they had lawful authority to make the disclosure in question or that the information had already been made available lawfully to the public. This mirrors the defence to other similar offences such as that in section 19 of the Commissioners for Revenue and Customs Act 2005 and paragraph 24 of Schedule 5 to the Finance Act 2006.

209. The department considers that this provision is compatible with Article 6 (2) applying the test set out in *DPP v Sheldrake* [2004] UKHL 43. The imposition of the burden of proof on the defendant is reasonable and proportionate as the statutory code of confidentiality for taxpayer information (an integral part of which is the offence for breach of tax payer confidentiality) is a very important safeguard to protect the rights and freedoms of others, particularly the tax payer's Article 8 rights. It is the disclosure of the tax payer's information which is the crux of the offence; and the prosecution must prove that beyond reasonable doubt. The question of whether or not the defendant reasonably believed he had lawful authority to disclose the information or that it had already lawfully been disclosed is something he is much better placed to give evidence on than the prosecution.

ANNEX A

Existing legal framework

Liability to deportation
Under the current legislative framework, a non-British citizen can be deported in accordance with section 3 of the Immigration Act 1971. Section 3(5)(a) provides that such a person is liable for deportation if the Secretary of Sate deems his deportation to be conducive to the public good. Section 3(5)(b) provides that a non-British citizen is liable to deportation if another person to whose family he belongs is or has been ordered to be deported. Section 3(6) provides that a non-British citizen is liable to deportation if he has reached the age of seventeen, is convicted of an offence which is punishable by imprisonment and is recommended for deportation by a court. Exemptions exists for Irish and commonwealth citizens and diplomatic and international functionaries under sections 7 and 8 of the 1971 Act.

Detention
Schedule 3 para 2 provides the consequent power of detention:

- where the court has made a recommendation;
- where a notice of decision to make a deportation order has been served and;
- where a deportation order has been made.

Appeals
Section 82(2)(j) of the Nationality, Immigration and Asylum Act 2002 defines a decision to make a deportation order as an immigration decision, which attracts a statutory right of appeal to the Asylum and Immigration Tribunal on grounds listed in section 84(1) of the 2002 Act. Under section 92(2) the appeal is exercisable from within the UK. Section 79(2) forbids the making of a deportation order whilst such an appeal is outstanding. Under sections 96 and 97 of the 2002 Act, the Secretary of State or an immigration officer can certify the immigration decision such that no appeal can be brought. S96 applies where the person should have raised the point in an appeal against an earlier immigration decision or in response to a one-stop notice. S97 relates to national security cases and directs appeal to Special Immigration Appeals Commission (SIAC). Refusal to revoke a DO is an immigration decision attracting an out of country right of appeal under s82(2)(k) of the 2002 Act.

EEA nationals
EEA nationals are considered for deportation in accordance with the Immigration (European Economic Area) Regulations 2006.

UK BORDERS BILL

EXPLANATORY NOTES

These notes refer to the UK Borders Bill
as brought from the House of Commons on 10th May 2007
[HL Bill 68]

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