EXPLANATORY MEMORANDUM TO

THE SPECIAL IMMIGRATION APPEALS COMMISSION (PROCEDURE) (AMENDMENT) RULES 2013

2013 No. [DRAFT]

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

2. Purpose of the Instrument

2.1. The Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2013 ("the 2013 Rules") amend the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI No. 2003/1034) ("the 2003 Rules"). The 2003 Rules prescribe the procedure to be followed for appeals to the Special Immigration Appeals Commission (SIAC) under sections 2 or 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and, as amended by the 2013 Rules, will also make provision for applications to SIAC for review under sections 2C or 2D of the 1997 Act. Sections 2 and 2B of the 1997 Act provide that a person may appeal to SIAC against an immigration, asylum or citizenship decision where they are unable to appeal to the Immigration and Asylum Chamber of the First-tier Tribunal due to the Secretary of State certifying that the decision was taken on national security or public interest grounds. Sections 2C and 2D provide that a person may make an application to SIAC to set aside certain naturalisation and exclusion decisions, where the Secretary of State has certified that the decision in question was made on the basis of material that should not be made public because of its sensitive nature. Applications under sections 2C and 2D will be determined according to judicial review principles.

2.2. The 2013 Rules are subject to the draft affirmative procedure.

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

3.1. None

4. Legislative Background

4.1. Section 15 of the Justice and Security Act 2013 ("the 2013 Act") inserted sections 2C and 2D into the 1997 Act. These provisions allow the Secretary of State to certify that certain exclusion, naturalisation and citizenship decisions were based on information that should not be made public for reasons of national security, international relations or otherwise in the public interest. Where the Secretary of State has certified such decisions, sections 2C and 2D permit the individuals affected by the decision to apply to SIAC to set aside the decisions.

4.2. The procedure rules for SIAC are made by the Lord Chancellor under sections 5 and 8 of the 1997 Act. Section 5(2) to (6) sets out those matters which the Lord Chancellor should have regard to when making rules, and the content of those rules. Section 8 deals with applications for permission to appeal from SIAC to an appellate court. Sections 5(9) and 8(4) prescribe the draft affirmative procedure for instruments under these sections. Paragraph 9 of Schedule 2 to the 2013 Act inserted new section 6A into the 1997 Act, so that the power to make rules in section 5 would apply in relation to applications under sections 2C and 2D and so that special advocates could be appointed in relation to such applications under section 6. Paragraph 9 of Schedule 2 also amended section 7 of the 1997 Act to provide that a party to a review under section 2C or 2D could appeal to the Court of Appeal. Section 8 of the 1997 Act permits rules to be made in respect of appeals to the Court of Appeal, including in respect of applications under section 2C or 2D.

5. Territorial Extent and Application

5.1. This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1. The Parliamentary Under-Secretary of State for Justice, Shailesh Vara has made the following statement regarding Human Rights:

In my view the provisions of the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2013 are compatible with the Convention rights.

7. Policy background

- *What is being done and why?*

7.1. The policy objective of these amendments is to ensure that SIAC is practically able to hear applications for review as described elsewhere in this memorandum.

7.2. The 2013 Act amended the 1997 Act so that certain decisions could be reviewed only in SIAC rather than the High Court. This instrument reflects the changes introduced by section 15 of the 2013 Act, as set out above.

Effect of the 2013 Rules

7.3. There follows a summary of the main amendments, several of which reflect the views of stakeholders. The numbers in brackets are references to the relevant rule in the 2013 Rules.

7.4. In the main, the amendments made by the 2013 Rules ensure that references to an "appeal" within the 2003 Rules also apply to an application for review under section 2C or 2D of the amended 1997 Act (hereafter referred to as "application for review"):

- the definition of “appellant” in the 2003 Rules is amended so that references to “appellant” also apply to a person making an application for review (2);
- the scope of the 2003 Rules is effectively widened so that they also apply to applications for review (3); and
- the delegated powers of SIAC are extended so that those powers extend to applications for review (4).

7.5. The following amendments collectively ensure that the procedures to be followed for applications for review are generally the same as those which currently exist for appeals, in the following regards:

- the procedure for starting an application for review (7, 8);
- the time limit for applying for review (9,10);
- the contents of the notice of application for review, this includes a requirement to specify the grounds for applying for a review, according to judicial review principles (11, 12);
- the setting of directions hearings (13);
- the process for seeking to vary grounds for application (19, 20);
- the process for withdrawing an application (21,22);
- the grounds on which the Commission may strike out an application for review, or the Secretary of State’s reply to an application (23);
- the formal requirements for the hearing of an application for review (24-25);
- the process for seeking leave to appeal from SIAC (26);
- the appointment of a Special Advocate and the closed material procedures (27-28) and
- the appointment of an interpreter (30).

7.6. Rule 10(d) of the 2013 Rules amends rule 8 of the 2003 Rules, so as to establish the time limits for making an application for review. In instances of a certification being made prior to the coming into force of the 2013 Rules, the window of opportunity for making that application begins from the date on which they come into force. The Home Office have undertaken to ensure that any persons affected by this will be individually notified when the 2013 Rules come into force.

7.7. Rule 18 of the 2013 Rules inserts a new rule 10B into the 2003 Rules. This establishes the obligations on the Secretary of State when replying to an application for review, which are distinct from the obligations that arise from an appeal. The

new rule places a requirement on the Secretary of State to file with SIAC a statement of the evidence on which the Secretary of State wishes to rely and material relevant to the issues in the application. This reflects the fact that applications under section 2C and 2D are to be determined on judicial review principles, whereas the existing rules concerning disclosure (rules 10 and 10A) are concerned with appeals (rules 14-17 of the 2013 Rules amend rules 10 and 10A to restrict their application to appeals).

7.8. Rule 29 of the 2013 Rules amends rule 40 of the 2003 Rules so that SIAC may in limited circumstances reinstate an appeal, application for review or the Secretary of State's reply where it had previously been struck out on the basis that either party had failed to comply with the 2003 Rules. This ensures that no party to a SIAC proceeding can lose their right to seek redress because of circumstances that are effectively out of their control. This reflects a judicial suggestion in *R1 v SSHD* (SIAC determination 21 May 2013).

8. Consultation outcome

8.1. There has been consultation with key stakeholders. This is did not take the form of a formal public consultation exercise, but nonetheless offered an opportunity for those representing the groups most likely to be affected by the changes to comment. This included:

- Special Advocates' Support Office (a Special Advocate is appointed where a case involves material which the Secretary of State certifies cannot be disclosed because doing so would be contrary to the public interest);
- The Law Society;
- The Bar Council;
- The Chairman of SIAC, Mr Justice Irwin;
- The Home Office;
- The Treasury Solicitor, who acts for the respondent in SIAC appeals and reviews;
- The Security and Intelligence Agencies; and
- The FCO.

8.2. There was broad acceptance of the need to update the 2003 Rules to enable SIAC to hear the applications for review. There was also a general agreement that the appropriate disclosure requirement was that applicable to judicial reviews and that the new rule 10B was appropriately drafted to capture that. Comments on some of the technical aspects of the rules and how they would work in practice were also received and amendments made accordingly.

9. Guidance

9.1. HMCTS produce guidance for SIAC which is available on the HMCTS website (http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission).

9.2. The guidance is updated as required to reflect changes to procedure.

10. Impact

10.1. The impact on business, charities or voluntary bodies is nil.

10.2. The impact on the public sector is nil.

10.3. A Regulatory Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. The Ministry of Justice will keep the 2003 Rules continually under review.

13. Contact

13.1. Liz Catherall at the Ministry of Justice can be contacted with queries regarding this instrument, on Liz.Catherall@justice.gsi.gov.uk or 020 3334 4406.