These notes refer to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) which received Royal Assent on 22 July 2004

ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) ACT

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Asylum and Immigration (Treatment of Claimants, etc.) Act which received Royal Assent on 22 July 2004. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

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

BACKGROUND

3. The Minister of State for Citizenship, Immigration and Counter-Terrorism announced proposals on asylum reform to Parliament on 27 October 2003. Ministers from the Home Office and the Department for Constitutional Affairs published a letter on 27 October 2003 outlining the Government's proposals on asylum reform. This letter provides the background to the Act. The letter set out a range of proposals which are intended to:

- streamline the immigration and asylum appeals system;
- deal with undocumented arrivals;
- deal with situations where it is deemed that a country other than the United Kingdom is best placed to consider someone's asylum or human rights claim substantively;
- withdraw family support after appeal from those who are in a position to leave the UK; and
- enhance the powers of the Office of the Immigration Services Commissioner ("OISC").

4. During the passage of the Bill through the Lords a number of new policy proposals were put forward which are intended to:

- enable the provision of accommodation to failed asylum seekers to be made conditional upon the participation in community activities;
- establish a local connection, for housing purposes, for an asylum seeker who is provided with accommodation under section 95 of the Immigration and Asylum Act 1999;
- replace the current system of backpayments of income support and related benefits with a system of loans to refugees; and

- tackle sham marriages.

OVERVIEW

5. The Act is arranged under 9 headings:

- Offences
- Treatment of claimants
- Enforcement powers
- Procedure for marriage
- Appeals
- Removal and detention
- Immigration services
- Fees
- General

SUMMARY

6. The Act includes provisions which unify the immigration and asylum appeals system into a single tier of appeal with limited onward review or appeal, deal with undocumented arrivals and those who fail to comply with steps to co-operate with the re-documentation process, provide additional powers to the OISC, provide for failed asylum seekers to participate in community activities, create a system of integration loans for refugees and tackle sham marriages.

OFFENCES

7. The provisions:

- amend the existing offence of facilitating the commissioning of a breach of immigration law;
- create a new offence to deal with those arriving in the UK without a valid immigration document and who cannot show that they have a reasonable excuse;
- amend the offence of the forgery of immigration documents;
- create a new offence of trafficking a person for non-sexual exploitation;
- amend the offence prohibiting the employment of illegal migrant workers; and
- impose a duty on the Director of Public Prosecutions to give advice to immigration officers on matters relating to criminal offences.

TREATMENT OF CLAIMANTS

8. The provisions:

- provide that when a deciding authority is deciding whether to believe a statement made by an asylum or human rights claimant they are required to take into account

certain behaviour designed to conceal information or mislead or which is deemed to damage his/her credibility;

- add a new class of person who will cease to be eligible for support under Paragraph 1 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002;
- amend section 4 of the Immigration and Asylum Act 1999 to enable the criteria to be used in determining when accommodation should be provided to be set out in regulations and to permit the continuation of the provision of accommodation to be made conditional upon the performance of or participation in community activities;
- amend Part 7 of the Housing Act 1996 to establish a local connection for an asylum seeker who is provided with accommodation under section 95 of the Immigration and Asylum Act 1999;
- abolish the entitlement to backpayments of income support, housing benefit and council tax benefit for those who are recorded as refugees; and
- enable the Secretary of State to make regulations enabling him to make loans to refugees.

ENFORCEMENT POWERS

9. The provisions:

- provide immigration officers with powers of arrest, entry and search for a number of additional offences;
- allow fingerprints to be taken at the beginning of the enforcement process;
- allow an immigration officer to require a carrier to provide either a full or partial copy of any document relating to a passenger and containing information about that passenger;
- provide the Secretary of State or an immigration officer with the power to retain documents whilst it is suspected that the person the document relates to is liable to removal, and that retention of the document may facilitate their removal from the United Kingdom; and
- provide immigration officers with the power to cancel leave, where entry clearance has effect as leave to enter, where the person's purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.

PROCEDURE FOR MARRIAGE

10. The provisions:

- require the parties to a marriage which involves a non-EEA national(s) and which is to take place in the United Kingdom to give notice of the marriage only at a designated registration centre;
- require both parties giving notice of such a marriage in England and Wales to give notice together and in person, and give the Secretary of State the power, by regulations, to require this in prescribed cases in Northern Ireland;

- require non-EEA nationals who are party to such a marriage to hold entry clearance for the purpose of marriage, written permission from the Home Office (a certificate of approval) or be in an exempt category before notice of the marriage in the United Kingdom can be accepted; and
- give the Secretary of State the power to require applications for a certificate of approval to be made in writing and to charge a fee.

APPEALS

11. The provisions:

- unify the immigration and asylum appeals system into a single tier of appeal with limited onward review or appeal;
- amend Section 94 of the Nationality, Immigration and Asylum Act 2002 to allow the Secretary of State to add a state or part of a state to the list in section 94(4) in respect of particular groups of people only or to exclude particular groups from a state added to the list;
- limit the circumstances in which a person who arrives in the United Kingdom with entry clearance may appeal from within the United Kingdom against a refusal of leave to enter and remove the right to appeal from within the United Kingdom against a refusal of leave to enter for those persons who arrive with a work permit but no entry clearance and do not fall within a listed category of persons;
- provide an order-making power to specify a requirement in the immigration rules and where entry clearance is refused because that requirement is not met, there will be no right of appeal against that refusal;
- revise section 96 of the Nationality, Immigration and Asylum Act 2002 which sets out when a new claim or application may be certified under the "one-stop" system;
- restore the right of appeal for crew members of ships and aircraft who are to be removed from the United Kingdom under 1971 Immigration Act powers relating specifically to crew members of ships and aircraft; and
- create a right of appeal where the Special Immigration Appeals Commission has made a determination in respect of an application for bail by someone who has been certified as a suspected international terrorist under Part 4 of the Anti-terrorism, Crime and Security Act 2001.

REMOVAL AND DETENTION

12. The provisions:

- replace and extend the existing provisions on removal to safe third countries;
- amend existing provisions so that release on bail by a court will no longer prevent the detention under immigration powers of a person who is the subject of deportation action;
- introduce an offence if a person fails without reasonable excuse to comply with steps that he/she may be required to take with a view to obtaining a travel document; and

- allow for the electronic monitoring of persons subject to immigration control.

IMMIGRATION SERVICES

13. The provisions:

- amend the categories of advisers qualified to provide immigration advice or services under section 84 of the 1999 Act;
- give the Immigration Services Commissioner a power of entry to premises where he suspects there is material likely to be of substantial value to an investigation of a criminal offence under section 91 of the 1999 Act;
- create a new criminal offence of advertising or offering to provide immigration advice or services when unqualified;
- remove the right of appeal to the Immigration Services Tribunal where the Commissioner has left the determined complaint on file; and
- place an obligation on designated professional bodies to comply with any request for information from the Immigration Services Commissioner.

FEES

14. The provisions:

- provide that the Secretary of State may set a fee for specific types of non-asylum immigration applications at a level which exceeds the administrative cost of determining or processing the application in question and reflects the benefits that the Secretary of State believes are likely to accrue to the successful applicant; and
- extend the scope of the existing power to prescribe fees for applications to transfer an indefinite leave stamp into a new passport, to cover applications to transfer limited leave stamps.

GENERAL

15. General provisions on interpretation, repeals, commencement, the title of the Act and extent.

COMMENTARY ON SECTIONS

OFFENCES

Section 1 : Assisting Unlawful Immigration

16. Section 1 amends section 25 of the Immigration Act 1971 which creates an offence of facilitating the commission of a breach of immigration law. "Immigration law" means a law which has effect in a member State and which controls entitlement to enter the State, transit across the State or be in the State.

17. The amendment allows the Secretary of State to make an order prescribing additional States which are to be regarded as "member States" for the purposes of the section if he considers it necessary for the purpose of complying with the United Kingdom's EU obligations. The nationals of these states are also to be deemed to be citizens of the European

Union for the purposes of section 25 of the 1971 Act. This is necessary to comply with the EU Council Directive (2002/90/EC) and EU Council Framework Decision (2002/946/JHA). The Directive and associated Framework Decision require member States to create the offence of assisting a person who is not a national of a member State to enter or reside in a member State contrary to the laws of that member State. This offence must apply in relation to Norway and Iceland as well as the member States.

18. Subsection (2) makes a minor amendment to section 25C of the 1971 Act to make clear that the references to "member State" and "immigration law" in subsection (9)(a) thereof have the same meaning as in section 25.

Section 2 : Entering the UK without a passport, &c.

19. Section 2 creates two new criminal offences. If a person is unable to produce an immigration document at a leave or asylum interview in respect of either himself or a child with whom he claims to be living or travelling then he will commit an offence. A person does not commit the offence if the interview takes place after the person has entered the United Kingdom and within the period of three days beginning with the date of that interview the person provides an immigration document to an immigration officer or to the Secretary of State

20. There are various defences to the charges. In respect of a person's failure to produce his own document it will be a defence for the him to prove that: (a) he is an EEA national, (b) he is a member of the family of an EEA national and he is exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom, (c) he has a reasonable excuse for not being in possession of an immigration document, or (d) he travelled to the United Kingdom without, at any stage since he set out on that journey, having possession of an immigration document. It is also a defence for a person to produce a false immigration document and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom.

21. In respect of a person's failure to produce a document for a child with whom he claims to be living or travelling it will be a defence for him to prove that: (a) the child is an EEA national, (b) the child is a member of the family of an EEA national and that he is exercising a right under Community Treaties in respect of entry to or residence in the United Kingdom, (c) the person has a reasonable excuse for not being in possession of an immigration document in respect of the child, or (d) that he travelled to the United Kingdom with the child without, at any stage since he set out on the journey, having possession of an immigration document in respect of the child. It is also a defence for a person to produce a false immigration document and to prove that it was used as an immigration document for all purposes in connection with the child's journey to the United Kingdom.

22. The burden of proving the defence on the balance of probabilities rests with the defendant.

23. A person will not be able to rely on the deliberate destruction or disposal of a document as their excuse for not being in possession of it unless it was done for a reasonable cause or was beyond his control. It will not be reasonable cause, however, if the document was destroyed or disposed of with a view to delaying a claim or increasing its chances of success or on the instructions or advice of a facilitator – unless it would have been unreasonable to expect non-compliance.

24. An immigration officer or a police constable who has a reasonable suspicion that an offence under the section has been committed may arrest the person without a warrant. Immigration officers and police constables also have various other powers of search and entry common to other immigration-type offences.

25. The offences may be tried summarily or on indictment. On summary conviction the maximum penalty is six months imprisonment, a fine up to the statutory maximum or both. On conviction on indictment the maximum penalty is two years imprisonment, a fine or both. When section 154 of the Criminal Justice Act 2003 is commenced the sentence that may be passed on summary conviction will increase to twelve months in England and Wales. It is expected that at the same time a similar amendment will be made in respect of Scotland and Northern Ireland.

Section 3 : Immigration documents: forgery

26. Section 3 amends section 5 of the Forgery and Counterfeiting Act 1981 so that "immigration documents" become instruments to which section 5 of the 1981 Act applies. "Immigration documents" are cards or stickers (or other instruments) either: (i) designed to be given to persons who have been granted leave to enter or remain in the UK and which carry information about the leave granted (such as duration or entitlement to employment), or (ii) given to persons to confirm rights under the Community Treaties to enter or reside in the UK. Cards and stickers will increasingly be used instead of ink stamps in future. Possession of ink stamps (both genuine and replica), without reasonable excuse, is already an offence under section 26B of the Immigration Act 1971 (as inserted by section 149 of the Nationality Immigration and Asylum Act 2002). As a result of the amendment, the possession of a false card or sticker, or equipment with which such things may be made will be an offence in the circumstances set out in section 5 of the 1981 Act.

Section 4 : Trafficking people for exploitation

27. Section 4 introduces new criminal offences of trafficking people into, within or out of the UK for the purpose of exploitation. A person found guilty of an offence under section 4 is liable, on conviction on indictment, to imprisonment for up to fourteen years, to a fine or to both, or on summary conviction, to imprisonment for up to twelve months, to a fine not exceeding the statutory maximum or to both. A person commits an offence if he arranges for a person to arrive in or depart from the UK and he intends to exploit that person or believes that another person is likely to do so. The offence is also committed if a person arranges travel within the UK by a person if he believes that the person has been brought into the UK to be exploited, and he intends to exploit that person or believes that another person is likely to do so. For the purposes of the offence, a person is exploited if he is:

- the victim of behaviour contravening Article 4 of the ECHR (slavery or forced labour);
- encouraged, required or expected to do something which would mean an offence is committed concerning organ removal;
- subjected to force, threats or deception designed to induce him to provide services or benefits or enable another person to acquire benefits; or
- requested or induced to do something, having been chosen on the grounds that he is ill, disabled, young or related to a person, in circumstances where a person without

the illness, disability, youth or family relationship would be likely to refuse or resist.

Section 5: Section 4: supplemental

28. Section 5 is supplemental to section 4.

29. Subsection (1) provides that the offences in subsections (1) to (3) of section 4 apply to anything done: (i) in the United Kingdom; or (ii) outside the United Kingdom by: (a) a person to whom subsection (2) applies (e.g. a British citizen), or (b) a body incorporated under the law of a part of the United Kingdom.

30. Subsection (4) provides that sections 25C and 25D of the Immigration Act 1971 shall apply in relation to an offence under section 4, as they apply in relation to an offence under section 25 of the 1971 Act. Sections 25C and 25D of the 1971 Act provide for the forfeiture and detention respectively of vehicles, ships or aircraft in certain circumstances.

31. Subsection (6) amends the Criminal Justice and Court Services Act 2000 to make each of the offences in section 4 capable of being an "offence against a child" for the purposes of the 2000 Act. Under the 2000 Act, in certain circumstances a court must disqualify a person convicted of such an offence from working with children. Subsection (10) makes a similar provision in relation to Northern Ireland.

32. Subsection (7) adds the offences in section 4 to the list of lifestyle offences in paragraph 4 of Schedule 2 to the Proceeds of Crime Act 2002. This has the effect that a person who has been convicted of an offence under section 4 is held to have a criminal lifestyle for the purposes of the Proceeds of Crime Act 2002. Subsections (8) and (9) make equivalent provision in relation to Scotland and Northern Ireland.

33. Subsection (11) provides that until the commencement of section 154 of the Criminal Justice Act 2003, the reference to twelve months in section 5(5)(b) should be read as if it were a reference to six months. Subsections (12) and (13) also provide that the reference to twelve months in section 5(5)(b) shall be read as a reference to six months in Scotland and Northern Ireland respectively. It is anticipated that at the time section 154 of the Criminal Justice Act 2003 comes into force a similar amendment will be made by the devolved administrations.

Section 6: Employment

34. Subsection (1) amends section 8 of the Asylum and Immigration Act 1996, the principal statutory control on illegal migrant working, to make the offence in that section, which was previously triable summarily only, triable either way. It is a criminal offence under section 8 of the 1996 Act to employ a person subject to immigration control who has attained the age of 16, if (a) the employee has not been granted leave to enter or remain, or (b) the employee's leave is not valid and subsisting or is subject to a condition precluding him from taking up the employment. As a summary offence, the maximum penalty on conviction was a fine of up to level 5 on the standard scale. By enabling more serious cases to be tried on indictment (following conviction on which there is no limit to the level of fine that can be imposed), this provision effectively increases the maximum penalty which the courts may impose in these cases.

35. Subsection (2) makes a consequential change to the time limit for prosecution of the section 8 offence. The normal rule in relation to offences which are triable summarily only is

that proceedings must be instituted within 6 months of the commission of the offence. Section 8(9) of the 1996 Act (inserted by section 147 of the Nationality, Immigration and Asylum Act 2002) applies the extended three year time limit for prosecutions contained in section 28(1) of the Immigration Act 1971 to the section 8 offence. However, it is a general principle of law that there is no time limit for the commencement of criminal proceedings in respect of offences which are triable either way. Subsection (2) therefore disapplies the extended time limit for prosecutions in relation to the section 8 offence.

Section 7: Advice of Director of Public Prosecutions

36. Section 164 of the Immigration and Asylum Act 1999 amended section 3(2) of the Prosecution of Offences Act 1985 to enable the Director of Public Prosecutions (DPP) to take over the conduct of any criminal proceedings instituted by an immigration officer. Section 7 makes a further amendment to section 3(2) of the 1985 Act to make it the duty of the DPP to give advice to immigration officers on matters relating to criminal offences. This will allow the DPP to give immigration officers advice on criminal offences for which the latter have a power of arrest prior to proceedings being instituted in respect of those offences.

TREATMENT OF CLAIMANTS

Section 8: Claimant's credibility

37. Section 8 sets out various behaviours which a deciding authority is required to take account of (as being damaging to credibility) when deciding whether to believe a statement made by or on behalf of a person making an asylum or human rights claim. A "deciding authority" is an immigration officer, the Secretary of State, the Asylum and Immigration Tribunal (or an adjudicator and the Immigration Appeal Tribunal until such time as the Asylum and Immigration Tribunal is established) and the Special Immigration Appeals Commission.

38. Subsection (2) provides that behaviour which a deciding authority thinks:

a) is designed or likely to conceal information,

b) is designed or likely to mislead, or

c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant,

is behaviour which damages the claimant's credibility and should be taken into account when determining whether to believe a statement made by a person who makes an asylum or human rights claim.

39. Subsection (3) provides that various behaviours relating to the non production of passports (without reasonable explanation), the production of false passports as if they were valid, and the failure to answer questions (without reasonable explanation), will be treated as behaviours which damage credibility.

40. Subsection (4) similarly provides that a person's failure to take a reasonable opportunity to make an asylum or human right claim whilst in a safe third country will be treated as behaviour that damages his credibility. For the purposes of this section a "safe country" means a country to which Part 2 of Schedule 3 applies.

41. Subsections (5) and (6) provide that it is also behaviour which damages credibility where a person makes an asylum or human rights claim only after they have been notified of an immigration decision or extradition proceedings and that claim does not rely wholly on matters arising after the notification; or where the claim is made after a person has been arrested under an immigration provision and there was a reasonable opportunity to make the claim before arrest and the claim does not rely wholly on matters arising after the arrest. Subsection (7) sets out the meaning of an "immigration decision" and an "immigration provision".

42. Subsection (12) provides that section 8 does not prevent a deciding authority from determining not to believe a statement on the grounds of behaviour to which the section does not apply.

Section 9: Failed asylum seekers: withdrawal of support

43. Section 9 creates a fifth class of person (failed asylum seeker with family) who will cease to be eligible for support under Paragraph 1 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (withholding and withdrawal of support). The section adds a new paragraph, Paragraph 7A, to the Schedule.

44. Failed asylum seekers with dependent children receive asylum support until such time as they leave the United Kingdom or fail to comply with a removal direction if sooner. However, under this provision, if the Secretary of State certifies that, in his opinion , such a person has failed without reasonable excuse to take reasonable steps to leave the United Kingdom voluntarily or place himself in a position in which he is able to leave the United Kingdom voluntarily (by, for example, co operating with steps taken to obtain a travel document on his behalf) then asylum support for the family will cease. The family is also rendered ineligible for various other types of support or assistance, although the children in the family may still be supported by, for example, the local authority. There is a right of appeal to the Asylum Support Adjudicator under section 103 of the Immigration and Asylum Act 1999 against the Secretary of State's certification.

Section 10 : Failed asylum seekers: accommodation

45. Section 10 amends section 4 of the Immigration and Asylum Act 1999 (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002) which gives the Secretary of State power to provide, or arrange for the provision of accommodation to certain categories of person including failed asylum seekers. The amendments make provision for the criteria to be used in determining when accommodation should be provided to be set out in regulations (until now, the criteria have been set out in the Secretary of State's policy bulletins). The amendments also permit the continuation of the provision of accommodation to be made conditional upon the performance of or participation in community activities.

46. Subsection (1) adds subsections (5), (6), (7), (8) and (9) to section 4 of the 1999 Act. The new subsection (5) provides for the Secretary of State to make regulations specifying the criteria to be used when determining whether or not the Secretary of State should provide, or continue to provide, accommodation to a person under section 4.

47. Under new subsection (6) of section 4 the regulations may provide for the continuation of the provision of accommodation to be conditional upon the performance of or participation in community activities or to be subject to other conditions.

48. New subsections (7)-(9) of section 4 set out further details on the arrangements in relation to community activities.

49. Subsection (2) provides that the regulations made pursuant to new subsection 5 of section 4 will be subject to the affirmative resolution procedure,

50. Subsections (3) to (5) amend section 103 of the 1999 Act so as to provide for a right of appeal to the Asylum Support Adjudicator from decisions of the Secretary of State not to provide accommodation to a person or not to continue to provide accommodation to a person under section 4 of the 1999 Act. Section 103 of the 1999 Act has been amended by section 53 of the 2002 Act but that provision has not yet been brought into force. Subsection (3) deals with the position before section 53 comes into force; subsection (4) deals with the position after it comes into force.

51. Subsection (7) makes clear that the regulations to be made under section 4(5)(b) of the 1999 Act will apply equally to those persons receiving support at the time the regulations come into force as those receiving support after the regulations come into force.

Section 11 : Accommodation for asylum seekers: local connection

52. Subsection (1) amends section 199 of the Housing Act 1996, such that asylum seekers who are provided with accommodation under section 95 of the Immigration and Asylum Act 1999 establish a local connection (for the purposes of Part 7 of the Housing Act 1996) with the district of the local housing authority where the accommodation is provided. Where accommodation is provided in more than one district, a local connection is established only with the district where accommodation was most recently provided. However, this provision does not apply where accommodation is provided in an accommodation centre. The Housing Act 1996 extends only to England and Wales.

53. Subsection (2) provides that section 193 of the Housing Act 1996 does not apply in respect of homeless applicants who have formerly been provided with accommodation under section 95 of the 1999 Act in a place in Scotland, and who do not have a local connection with a district in England, Wales or Scotland.

54. Subsection (3) provides that, in cases where the section 193 duty does not apply, local housing authorities in England and Wales may secure that accommodation is available for occupation by the person for a period that will give him a reasonable opportunity of securing accommodation for himself, and may provide the person (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.

Section 12: Refugee: backdating of benefits

55. This section abolishes the entitlement to backpayments of income support, housing benefit and council tax benefit for those who are recorded as refugees.

56. Asylum seekers are not eligible for mainstream benefits by virtue of section 115 of the Immigration and Asylum Act 1999. Where relevant, they may be supported by the Secretary of State under section 95 of the 1999 Act. Regulations have been made under section 123 in relation to backpayments of income support, housing benefit and council tax benefit.

57. Subsection (1) repeals section 123 of the 1999 Act which gives the Secretary of State power to make regulations permitting those who are recorded as refugees to claim backpayments of benefits including income support, housing benefit and council tax benefit.

58. Subsection (2) revokes the regulations made under the power of section 123 of the 1999 Act to make backpayments of income support, housing benefit and council tax benefit to refugees. These regulations would lapse in any event on repeal of section 123 of the 1999 Act, but for the sake of clarity and certainty the legislation confirms that these regulations cease to have effect.

59. Subsection (3) revokes the regulations which preserve, for transitional purposes, an earlier backpayments scheme made under section 11(2) of the Asylum and Immigration Act 1996.

60. Subsection (4) confirms that on commencing the provision, it may be applied to those who have outstanding asylum claims. Backpayments will therefore cease for all those recorded as refugees after a specified date, irrespective of when they made their claim for asylum.

Section 13 : Integration loan for refugees

61. Section 13 makes provision for the Secretary of State to make regulations enabling him to make loans to refugees. For these purposes a refugee is a person who is granted refugee status and given indefinite leave to enter or remain in the United Kingdom. It is intended that these loans will be made for integration purposes and will be known as refugee integration loans.

62. The regulations will prevent a person from receiving a loan if s/he is under 18, is insolvent (within the meaning given by the regulations) or has already received a refugee integration loan.

63. The regulations will also include:

- matters which the Secretary of State must take into account when deciding whether to make a loan and in particular may relate to a person's income or assets; likely ability to repay a loan; or the length of time since a person was recorded as a refugee
- provision for the Secretary of State to specify the minimum and/or maximum amount of a loan
- provision about repayment of the loan which may include interest payable and repayment by deduction from a Social Security benefit
- provision for the Secretary of State to attach conditions to a loan which might include conditions about the use of the loan
- provision about how an application is to be made and what information must be provided

64. The regulations may also:

- make provision about steps that the Secretary of State might take to establish an applicant's ability to repay
- provide for a loan to be made jointly

- confer a discretion on the Secretary of State

65. Regulations made under this section are subject to the affirmative procedure.

ENFORCEMENT POWERS

Section 14 : Immigration officer: power of arrest

66. Section 14 provides immigration officers with the power of arrest – and ancillary powers of entry, search and seizure – in respect of a number of specified offences. Their powers of arrest are currently restricted to offences under the Immigration Acts. The new power is only to be available where an immigration officer forms a reasonable suspicion that one of the specified offences has been committed in the course of exercising a function under the Immigration Acts. In other words, immigration officers must uncover the evidence of the offences in the course of their usual duties investigating immigration matters. The offences are specified in subsection (2).

67. Subsection (3) provides that certain powers of entry, search and seizure which immigration officers already have in relation to offences under the Immigration Act 1971, shall also apply in relation to the specified offences.

Section 15 : Fingerprinting

68. Section 15 amends section 141 of the Immigration and Asylum Act 1999 which allows fingerprints to be taken from specified persons during specified periods. Section 141 applies to any person in respect of whom removal directions have been given and permits fingerprints to be taken between the time the directions are given and the time when the person is removed or deported (or, if a deportation order has been made against him, its revocation or otherwise ceasing to have effect).

69. As the setting of removal directions no longer attracts a right of appeal (by virtue of changes introduced by the Nationality, Immigration and Asylum Act 2002), directions are now set at the end of the enforcement process, shortly before removal is due to take place. This means that there is now only a short period of time within which fingerprints can be taken. Section 15 amends section 141 of the 1999 Act to allow fingerprints to be taken at the beginning of the enforcement process, notwithstanding that removal directions will not be set until the end of that process. In that respect, it restores the pre-2002 Act position.

Section 16: Information about passengers

70. Section 16 amends paragraph 27B of Schedule 2 to the Immigration Act 1971 to make it clear that an immigration officer may ask a carrier to provide a copy of a document (or part of a document) that relates to a passenger and contains "passenger information" (as that term is defined in paragraph 27B). In particular, this means that the owner of a ship or aircraft which is expected to arrive in the United Kingdom could be requested to provide a copy of the biodata page of the passport (containing a photograph of the holder), of each passenger to be carried to the United Kingdom on that ship or aircraft. An officer may ask for copies of documents relating to: (a) a particular ship or aircraft of the carrier, (b) particular ships or aircraft of the carrier, or (c) all of the carrier's ships or aircraft. A request must be in writing and must state the date on which it ceases to have effect (which cannot be more than six months from the date on which it is made).

Section 17: Retention of documents

71. Section 17 provides the Secretary of State and an immigration officer with the power to retain documents (which could include a passport or birth certificate) whilst it is suspected that the person the document relates to is liable to removal, and that retention of the document may facilitate their removal from the United Kingdom. It complements current powers, such as those in paragraphs 4(2A) and 18(2) of Schedule 2 to the Immigration Act 1971, which already permit the seizure and retention of documents in certain circumstances.

Section 18: Control of entry

72. Section 18 amends paragraph 2A of Schedule 2 to the Immigration Act 1971. It provides immigration officers with the power to examine a person who arrives with entry clearance that takes effect as leave to enter for the purpose of establishing whether the leave should be cancelled on the grounds that the person's purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.

PROCEDURE FOR MARRIAGE

Section 19: Person subject to immigration control: procedure for marriage: England and Wales

73. Section 19 applies to a marriage to be solemnised in England and Wales on the authority of certificates issued by a superintendent registrar under Part III of the Marriage Act 1949 where a party to the marriage is subject to immigration control.

74. Section 19(2) requires that the notices which are required to be given of such a marriage must be given to a superintendent registrar of a registration district specified in regulations made by the Secretary of State (after consultation with the Registrar General) and must be given in person by both parties to the marriage together.

75. Under section 19(3) registrars may only accept notice of such a marriage where satisfied that the party subject to immigration control holds either entry clearance for the purpose of marriage, written permission from the Secretary of State or is in an exempt category (to be specified in regulations).

76. Section 19(4) gives definitions of the terms "person subject to immigration control", "EEA National", "entry clearance" and "specified evidence".

Section 20: Section 19: supplemental

77. Section 20 provides that the Marriage Act 1949 will have effect in relation to a marriage to which the section 19 applies with any necessary consequential modifications.

Sections 21 and 22: Persons subject to immigration control: procedure for marriage: Scotland and supplemental

78. Sections 21 and 22 relate to a marriage where a party to the marriage is subject to immigration control and the marriage is to be solemnised in Scotland.

79. Under section 21(2) notice of such a marriage may only be given to the district registrar of a registration district prescribed in regulations made by the Secretary of State (after consultation with the Registrar General for Scotland).

80. As with section 19(3), under section 21(3) registrars may only accept notice of such a marriage if satisfied that the party subject to immigration control holds either entry clearance for the purpose of marriage, written permission from the Secretary of State or is in an exempt category (to be specified in regulations).

Sections 23 and 24: Person subject to immigration control: procedure for marriage: Northern Ireland and supplemental

81. Sections 23 and 24 relate to a marriage which is to be solemnised in Northern Ireland where a party to the marriage is subject to immigration control.

82. Under section 23(2)(a) notice of such a marriage can only be given to a registrar prescribed in regulations made by the Secretary of State (after consultation with the Registrar General for Northern Ireland).

83. Section 23(2)(b) allows the Secretary of State, after consultation with the Registrar General for Northern Ireland, to prescribe in regulations cases in which notices must be given in person at a prescribed register office.

84. As with section 19(3), under section 23(3) registrars may only accept notice of such a marriage if satisfied that the party subject to immigration control holds either entry clearance for the purpose of marriage, written permission from the Secretary of State or is in an exempt category (to be specified in regulations).

Section 25: Application for permission under section 19(3)(b), 21(3)(b) or 23(3)(b)

85. Section 25 makes provision in relation to applications for permission to marry. The Secretary of State may by regulations require persons seeking permission to make an application in writing and pay a fee. The regulations will specify the information to be contained in this application, the amount of the fee and the manner of the payment. The regulations may specify persons exempt from payment, permit specified persons to pay a reduced fee, and specify circumstances that would lead to a refund of all or part of the fee.

APPEALS

Section 26: Unification of appeal system

86. Section 26 (1) replaces section 81 of the Nationality, Immigration and Asylum Act 2002, which made provision for the appointment of asylum adjudicators under the two-tier system. Section 26 establishes a single-tier tribunal called the Asylum and Immigration Tribunal, which is referred to in the rest of this part of the Act as "the Tribunal".

87. Section 26 (2) amends section 82(1) of the 2002 Act. Section 82 lists the immigration decisions that attract a right of appeal to an adjudicator. This amendment is consequential upon the merger of the two-tier system. With the amendment, the appeal is to the new Tribunal.

88. Section 26 (3) makes a similar consequential amendment to section 83(2) of the 2002 Act which states the circumstances in which a person has a right of appeal from rejection of an asylum claim. Appeals will be to the new Tribunal.

89. Section 26(4) substitutes a new Schedule (found at Schedule 1) for Schedule 4 of the 2002 Act. The old Schedule 4 made provision for the terms of office, staffing, remuneration

and sitting arrangements for adjudicators. It is replaced by a Schedule making similar provision in respect of Tribunal members, and related matters.

90. Section 26(5) repeals sections 100 to 103 and Schedule 5 of the 2002 Act, thereby abolishing the Immigration Appeal Tribunal (IAT), the second tier of the current system. As a consequence of this, this section also removes the right of appeal to the IAT, the right to seek statutory review of a refusal by the IAT to grant permission to appeal to itself, and the right to appeal from the IAT to the higher appellate courts. Schedule 5 made provision as to the membership, staffing and sitting arrangements of the IAT.

91. Section 26(6) inserts new sections 103A to 103E into the 2002 Act.

92. Section 103A enables a party to an appeal to the Tribunal to apply to the appropriate court for an order requiring the Tribunal to reconsider its decision on appeal on the grounds that the Tribunal made an error of law. If the appropriate court thinks the Tribunal may have made an error of law it will order the case to be reconsidered by the Tribunal.

93. The application must be made within 5 working days of receipt of the Tribunal determination but if made from abroad the application must be made within 28 days. An application will be determined by reference to the written submissions of the applicant, and where rules of court permit, other written submissions. The decision of the appropriate court will be final.

94. In this section the 'appropriate court' is: in relation an appeal decided in England and Wales, the High Court; in relation to an appeal decided in Scotland, the Outer House of the Court of Session; in relation to an appeal decided in Northern Ireland, the High Court in Northern Ireland.

95. This section does not apply to a decision of the Tribunal where its jurisdiction is exercised by three or more legally qualified members. In such cases, higher court oversight would be by way of appeal on a point of law under section 103E.

96. Section 103B provides for a party to an appeal, where an appeal has been reconsidered, to bring a further appeal on a point of law to the appropriate appellate court. An appeal may only be brought with the permission of the Tribunal, or if the Tribunal refuses permission, the appropriate appellate court.

97. The reference to 'reconsideration' is to a reconsideration following an order under section 103A(1) or a remittal to the Tribunal under section 103C or 103E.

98. In this section the 'appropriate appellate court' is: in relation to an appeal decided in England and Wales, the Court of Appeal; in relation to an appeal decided in Scotland, the Inner House of the Court of Session; in relation to an appeal decided in Northern Ireland, the Court of Appeal in Northern Ireland.

99. Section 103C enables the appropriate court, on consideration of an application under section 103A(1), to refer a case straight to the appropriate appellate court if it thinks the case raises a question of law of such importance that it should be decided by that court.

100. In this section 'appropriate court' has the same meaning as in section 103A and 'appropriate appellate court' has the same meaning as in section 103B.

101. Section 103D provides for an enabling power to make regulations for an appellant's costs for review and reconsideration under section 103A to be paid out of the Community

Legal Service Fund. This type of legal aid remuneration will apply only where it is the appellant who is the party applying for review and reconsideration.

102. Section 103D(1) enables the appropriate court to order an appellant's costs to be paid in respect of the review application. Section 103D(3) enables the Tribunal to order an appellant's costs to be paid in respect of both the review application and the reconsideration

103. The power to make regulations about the exercise of the power in subsections (1) and (3) would be exercised by the Secretary of State for Constitutional Affairs. Regulations made under this section are subject to the affirmative resolution procedure.

104. The regulation-making power enables restrictions to be placed upon the exercise of the power in 103D(1) and (3) by reference to the appellant's prospects of success at the time the application under section 103A(1) was made. Regulations will also govern detailed matters such as the manner of determining the amount payable. Regulations can also add to the Legal Services Commission's statutory functions and apply, modify or disapply other enactments relating to the funding (in England, Wales or Northern Ireland) the funding of legal services.

105. In this section 'appropriate court' has the same meaning as in section 103A.

106. This Section only has effect in relation to an appeal decided in England, Wales or Northern Ireland.

107. Section 103E provides that a party to an appeal that has been decided by the Tribunal exercising its jurisdiction by three or more legally qualified members may bring an appeal to the appropriate appellate court. An appeal may only be brought with the permission of the Tribunal, or if the Tribunal refuses permission, the appropriate appellate court.

108. In this section 'appropriate appellate court' has the same meaning as in section 103B.

109. Section 26(7) gives effect to Schedule 2, which makes consequential amendments and transitional provisions.

110. Section 26(8) enables the Lord Chancellor to vary time limits specified in section 103A(3)(a), (b) or (c) or paragraph 29(5)(b) of Schedule 2, by order. An order made under this section is subject to the negative resolution procedure and the Lord Chancellor is required to consult the heads of judiciary in the parts of the United Kingdom affected by the order.

Schedule 1: New Schedule 4 to the Nationality, Immigration and Asylum Act 2002

111. Schedule 1 replaces Schedule 4 of the 2002 Act, as specified in section 26(4).

112. Schedule 4 made provision for the appointment of asylum adjudicators and related matters. As the two-tier system of adjudicators and the Immigration Appeal Tribunal is replaced by the single tier Asylum and Immigration Tribunal, the new Schedule makes provision for the appointment of members of the new Tribunal and related matters instead.

113. Paragraph 1 imposes on the Lord Chancellor the duty and responsibility for appointing the members of the new Tribunal.

114. Paragraph 2 specifies the qualifications required to become a member of the new Tribunal. There will be legally qualified members and non-legal members.

115. Paragraph 3 specifies when the appointment of a Tribunal member shall end, including specifying a retirement age of 70, and otherwise makes the holding of office subject to the terms of the holder's appointment. The terms and conditions may make provision for removal from office, and also about the training, appraisal and mentoring of members the Tribunal by other members.

116. Paragraph 4 allows the Lord Chancellor to make provision for the title of members of the Tribunal. Read together with paragraph 23 of Schedule 2, the order is subject to the negative resolution procedure.

117. Paragraph 5 provides for the Lord Chancellor to appoint a President of the Tribunal, and one or more Deputy Presidents, and specifies the qualifications for appointment as President. It also makes provision for the powers and functions of the Deputy Presidents.

118. Paragraphs 6 to 8 are provisions for the sitting arrangements, constitution of the Tribunal composition and allocation of proceedings to members of the Tribunal. In particular, paragraph 7 provides that it is for the President to determine, having regard to various factors, whether cases are heard by a single Tribunal judge or a panel of members, and when non-legal members will sit. The direction making power is subject to rules.

119. Paragraph 9 allows the Lord Chancellor to appoint Tribunal staff. Paragraphs 10 and 11 make provision for the remuneration and allowances to members and staff of the Tribunal.

Schedule 2: Asylum and Immigration Tribunal: Consequential Amendments and Transitional Provision

120. Part 1 of this Schedule makes consequential amendments to other legislation. Where legislation refers to an "adjudicator" or the "Immigration Appeal Tribunal", these are changed to refer to the new Asylum and Immigration Tribunal and Tribunal members.

121. Paragraph 4 (British Nationality Act 1981). This provision has the effect that appeals under this Act are handled in the same way as appeals under Part 5 of the 2002 Act, and the same provisions for higher court oversight and legal aid are applied. It also has the effect that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently.

122. Paragraph 20 (Nationality, Immigration and Asylum Act 2002). This paragraph amends the powers of the Lord Chancellor to make rules governing the procedure of the Tribunal. They are enlarged to cover matters contained in section 26, such as the reconsideration of cases reviewed by the High Court under s.103A, and during the transitional period when senior members of the Tribunal consider s.103A applications before they go to the higher court. A purposive provision is added as s.106(1A) that in making rules, the Lord Chancellor should aim to ensure that the rules are designed to ensure that the proceedings are handled as fairly, quickly and efficiently as possible, and that they confer on members of the Tribunal similar responsibility for ensuring that proceedings are dealt with in that way.

123. Paragraph 23. This adds to the provision in the 2002 which provides for the parliamentary procedure for subordinate legislation made under the 2002 Act. It provides that any regulations made under s.103D (legal aid for reviews and reconsiderations), attract the affirmative resolution procedure.

124. Part 2 makes transitional provisions for the office holders and staff currently at the Immigration Appellate Authority. Persons appointed as adjudicators (under s.81 of the Nationality, Immigration and Asylum Act 2002) and members of the Immigration Appeal Tribunal (under Schedule 5 of the 2002 Act) will automatically be considered on commencement to have been appointed as a member of the new Tribunal. Similarly, the staff of the IAT automatically become staff of the AIT at commencement.

125. Paragraph 29 introduces transitional arrangements for the operation of section 103A. For a period beginning with commencement and ending on a date appointed by order of the Lord Chancellor, an application made under section 103A(1) will be considered by a member of the Asylum and Immigration Tribunal. On consideration of the application the Tribunal member can make an order under section 103A(1). If the Tribunal member does not make an order under section 103A(1) the applicant can elect for his application to be looked at by the appropriate court.

126. An order under paragraph 29 will be subject to the affirmative resolution procedure and the Lord Chancellor has a statutory requirement to consult before making the order. He may make a further order reviving the transitional arrangements by the same procedure.

Section 27: Unfounded human rights or asylum claim

127. Section 27 amends section 94 of the Nationality, Immigration and Asylum Act 2002. Section 94 provides that a person may not bring an appeal while in the United Kingdom solely by virtue of having made an asylum or human rights claim where the Secretary of State certifies that claim as clearly unfounded. It also provides that where the Secretary of State is satisfied that an asylum or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim as clearly unfounded unless satisfied that it is not. Subsection (5) provides an affirmative order-making power under which a State or part of a State may be added to the list in subsection (4) where certain conditions are met. Those conditions are that:

> a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
>
> b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

128. Section 27 extends the order-making power in section 94. It provides that where the conditions in section 94(5) are met for a "description of person" within a State or part of a State then that State or part may be added to the list in subsection (4) in respect of that description of person only. Examples of what might constitute a "description of person" are given in new subsection (5C) of section 94.

129. The effect of using the power in section 27 to add a State or part to the list in section 94(4) is that where an asylum or human rights claimant is both entitled to reside in the State or part added and falls within the defined "description of person" for that State or part, the Secretary of State shall certify the claim as clearly unfounded unless satisfied that it is not. The purpose of this section is to provide extra flexibility to identify groups of persons within a State or part for whom conditions are generally safe.

130. Section 27(4) deletes from the list in section 94(4) of the 2002 Act the 10 States which joined the European Union on 1 May 2004. From that date, the appeal rights of a national of one of those State who makes an asylum claim have been governed by different legislation (at present, the Immigration (European Economic Area) Regulations 2000 as amended by the Immigration (European Economic Area) (Amendment No.2) Regulations 2003).

131. Section 27(7) disapplies the requirement in section 94(3) of the 2002 Act to certify a clearly unfounded asylum claim made by a claimant entitled to reside in a state or part designated under section 94(4) where that claimant is subject to extradition proceedings or has been arrested in anticipation of extradition proceedings pursuant to the Extradition Act 1989 or the Extradition Act 2003. The effect of section 27(7) is that a claimant who is subject to extradition proceedings and would normally have a non-suspensive right of appeal by virtue of section 94 of the 2002 Act will have a suspensive right of appeal against any refusal of his asylum or human rights claim.

132. Section 27 also amends section 94 of the 2002 Act to provide that an asylum or human rights claimant will not benefit from a suspensive right of appeal in reliance on section 92(2) against an immigration decision of a kind in section 82(2)(c), (d) or (e) of the 2002 Act if the Secretary of State certifies the asylum or human rights claim as clearly unfounded.

Section 28: Appeal from within United Kingdom

133. Section 28 replaces section 92(3) of the Nationality, Immigration and Asylum Act 2002. It sets out the circumstances in which a person who arrives with entry clearance may appeal against a refusal of leave to enter from within the United Kingdom. Refusal of leave to enter will give rise to a right of appeal exercisable from within the United Kingdom where the person is in the United Kingdom at the time of refusal and has entry clearance on arrival, except where his purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.

134. Section 28 provides an exception to this provision for a British overseas territories citizen, a British Overseas citizen, a British National (Overseas), a British protected person, or a British subject within the meaning of the British Nationality Act 1981. A person who falls within the listed categories will benefit from an appeal against refusal of leave to enter from within the United Kingdom in the additional circumstance where he is in the United Kingdom and has a work permit at the time of refusal.

Section 29: Entry clearance

135. Section 29 provides an affirmative order-making power under which the Secretary of State may specify requirements in the immigration rules. Where entry clearance is refused because a specified requirement is not met, there will be no right of appeal against that refusal. However, the section preserves the right to appeal on human rights or race discrimination grounds.

Section 30: Earlier right of appeal

136. Section 30 amends section 96 of the Nationality, Immigration and Asylum Act 2002. Section 96 sets out when a new claim or application may be certified under the "one-stop" system. Certification prevents an appeal being lodged against the decision on the new claim

or application. The revision has the effect of removing provisions for certifying appeals after they have been lodged; those provisions are no longer needed. It also clarifies the circumstances in which a certificate may be issued. There are now two options:

a) where the person was notified of a right of appeal against an earlier immigration decision, the matter being raised in the new claim or application could have been raised at that appeal, and there is no satisfactory reason for not having raised it at that appeal. It does not matter if the person did not exercise the earlier right of appeal or did not pursue it to determination, so long as they had the opportunity to do so.

b) where the person has been given a one-stop notice under section 120 of the 2002 Act in relation to a previous immigration decision, the matter being raised in the new claim or application should have been raised in response to that notice, and there is no satisfactory reason for not having raised it in response to that notice.

Section 31: Seaman and aircrews right of appeal

137. Section 31 restores the right of appeal for a small number of people, crew members of ships and aircraft, who are to be removed from the United Kingdom under 1971 Immigration Act powers relating specifically to crew members of ships and aircraft. The right of appeal is subject to section 92 of the Nationality, Immigration and Asylum Act 2002, and in common with other rights of appeal against removal decisions cannot be exercised in the UK unless an asylum or human rights claim has been made here, or the crew member claims that the decision breaches certain Community Treaty Rights.

Section 32: Suspected international terrorist: bail

138. Section 32 creates a right of appeal on a point of law to the Court of Appeal (in Scotland, the Court of Session, or in Northern Ireland, the Court of Appeal in Northern Ireland) where the Special Immigration Appeals Commission has made a determination in respect of an application for bail by someone who has been certified as a suspected international terrorist under Part 4 of the Anti-terrorism, Crime and Security Act 2001.

REMOVAL AND DETENTION

Section 33 and Schedule 3: Removing asylum seekers to a safe country

139. Section 33 and Schedule 3 deal with situations where a person can be removed to a safe third country without substantive consideration of his asylum claim. They replace and extend the provisions currently contained in sections 11 and 12 of the Immigration and Asylum Act 1999.

140. In considering whether a claimant for asylum can be removed to a third country, obligations under the Refugee Convention and the Human Rights Act are potentially relevant. Under section 11 of the 1999 Act, certain countries are deemed safe for Refugee Convention purposes – that is to say they are to be regarded as:

a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and

b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

141. This prevents any claimant who is to be removed to one of these countries from challenging their removal on Refugee Convention grounds. A person can still challenge removal to those countries on the ground that it would be unlawful under Section 6 HRA as being incompatible with his Convention rights. But where the Secretary of State certifies a human rights claim as clearly unfounded, any appeal on this ground can only pursued from abroad. Section 11 encompasses countries which have agreed to be bound by the Dublin arrangements (Council Regulation (EC) No. 343/2003 or the Dublin Convention). Countries can also be certified as safe for Refugee Convention purposes under section 12 on a case by case basis.

142. Under the new provisions there will continue to be a deeming provision for Refugee Convention purposes in relation to those countries bound by the Dublin arrangements and a limited human rights deeming provision (preventing challenge on the basis of onward removal from the third country in breach of human rights) will be added.

143. In addition, the deeming provision for Refugee Convention purposes will be capable of extending to countries that would not be covered by section 11. Other countries can be certified as safe for a given individual as at present. In addition, in relation to certain countries, the legislation will provide for human rights claims to be certified as clearly unfounded unless the Secretary of State is satisfied that they are not clearly unfounded. The provisions therefore take a graduated approach to the "safety" of third countries for Refugee Convention and ECHR purposes.

144. Section 33 repeals sections 11 and 12 of the Immigration and Asylum Act 1999 and introduces Schedule 3, which contains the replacement provisions (see below). It also repeals sections 80 and 93 of the Nationality, Immigration and Asylum Act 2002 which set out an amended version of section 11 and limited the right to an "in country" appeal in relation to removals to safe third countries, respectively. The appeals provision is now dealt with in Schedule 3.

145. Part 2 of Schedule 3 deals with countries that are deemed safe for Refugee Convention purposes and for claims that onward removal from the state would breach the ECHR. All other human rights claims against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that they are not.

146. The countries listed at paragraph 2 are those which are subject or have agreed to be bound by the Dublin arrangements which are currently the members of the enlarged European Union as from May 2004 together with Norway and Iceland. Additional countries joining the Dublin arrangements may be added by order – see Part 6 below.

147. Under paragraph 3 in considering whether a person may be removed there, they are to be treated as places:

> a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
>
> b) from which a person will not be sent in contravention of his rights under the Human Rights Convention, and
>
> c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

148. Paragraph 4 disapplies section 77 of the Nationality, Immigration and Asylum Act 2002 (which prevents removal while an asylum claim is pending) where the Secretary of State certifies that a person is to be removed to a listed State and he is not a national or citizen of that State. Paragraph 5 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for Refugee Convention purposes or ECHR purposes in terms of onward removal. Paragraph 5 provides that where a human rights claim made on another basis is certified as clearly unfounded a person being removed is similarly prevented from bringing an appeal within the United Kingdom. Finally, paragraph 5 provides that any human rights claim against removal (other than the on basis of onward removal) will be certified by the Secretary of State as clearly unfounded unless he is satisfied that it is not.

149. Paragraph 6 prevents a person bringing an appeal from outside the United Kingdom on any ground inconsistent with the provisions in paragraph 3 described above.

150. Part 3 of Schedule 3 deals with countries (not listed under Part 2) that are deemed safe for the purposes of the Refugee Convention. All human rights claims against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that they are not. The list of countries is to be specified by order, and may be amended in accordance with Part 6 below.

151. Under paragraph 8, in considering whether a person may be removed there, they are to be treated as places:

> a)where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
>
> b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

152. Paragraph 9 disapplies the provision in section 77 of the 2002 Act in the same way as paragraph 4 described above. Paragraph 10 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for Refugee Convention purposes or on human rights grounds where the claim is certified as clearly unfounded. Paragraph 10 also provides that a human rights claim against removal will be certified by the Secretary of State as clearly unfounded unless he is satisfied that it is not.

153. Paragraph 11 prevents a person bringing an appeal from outside the United Kingdom on any ground which is inconsistent with the provisions of paragraph 8 described above.

154. Part 4 of Schedule 3 deals with countries that are deemed safe for the purposes of the Refugee Convention only. Human rights claims against removal may be certified by the Secretary of State as clearly unfounded. The list of countries is to be specified by order and may be amended in accordance with Part 6 below.

155. Paragraph 13 provides that the countries are to be treated as safe for Refugee Convention purposes in the same way as under paragraph 8 above.

156. Paragraph 14 disapplies the provision in section 77 of the 2002 Act in the same way as paragraph 4 described above. Paragraph 15 prevents a person being removed bringing an appeal within the United Kingdom on the basis that the country is not safe for Refugee

Convention purposes or on human rights grounds where the claim is certified as clearly unfounded. Paragraph 16 has the same effect in relation to this Part as paragraph 11.

157. Part 5 of Schedule 3 provides for the Secretary of State to certify a country (not listed under Parts 2, 3 or 4 of the Schedule) as safe for Refugee Convention purposes for a particular individual. Human rights claims against removal may be certified by the Secretary of State as clearly unfounded. Where a country is certified as safe for Refugee Convention purposes, section 77 of the 2002 Act is disapplied by virtue of paragraph 18 and the in country and out of country appeal rights are limited by paragraph 19 to the same extent as under paragraphs 15 and 16 discussed above.

158. Part 6 of Schedule 3 provides order-making powers to amend the lists under Parts 2, 3, and 4.

Section 34: Detention pending deportation

159. Schedule 3 to the Immigration Act 1971 deals with deportation. Where someone has been recommended for deportation by a court under section 3(6) of the Act, paragraph 2(1) of Schedule 3 specifies that that person shall be detained pending the signing of the deportation order unless (a) he is already detained by virtue of the sentence or order of any court, or (b) he is released on bail by any court having power so to release him, or (c) the court which made the recommendation (or an appeal court) or the Secretary of State directs that he is to be released, or he is granted bail under paragraph 2(4A) of that Schedule. Similarly, where someone has been notified that the Secretary of State intends to make a deportation order against him under section 3(5) of the Act, paragraph 2(2) allows that person to be detained unless he is already detained by virtue of the sentence or order of a court or released on bail by a court having the power to release him.

160. Although it may be implicit that it is only bail granted by a court which is both aware of and involved in the deportation process which affects the power to detain under these paragraphs, on the face of it, it could mean bail granted by any court. This would mean that bail granted by a court which was unaware of the impending deportation action, or perhaps was granted before deportation came into prospect, could prevent detention pending the making of a deportation order if this was considered appropriate.

161. Section 34 amends paragraphs 2(1) and 2(2) to remove the reference to the grant of bail by a court. A person who is detained under Schedule 3 will continue to be able to apply for bail from the Immigration Service or from the appropriate immigration appellate body by virtue of paragraph 2(4A) of the Schedule which came into force in February 2003.

Section 35: Deportation or removal: cooperation

162. Under section 35 the Secretary of State may require a person to take specified action if he believes that that will enable a travel document to be obtained on the person's behalf and the travel document will facilitate the person's deportation or removal from the United Kingdom. A person who fails, without reasonable excuse, to comply with the Secretary of State's requirement commits an offence.

163. Travel document is defined in the subsection (7) and includes a passport as well as other official documents which enable or facilitate travel from the United Kingdom to another state.

164. The section sets out the types of steps the Secretary of State may require someone to take, but these are not meant to be exhaustive. They include things like obtaining documents, providing documents and providing fingerprints.

165. Many people arrive in the United Kingdom without a passport or other identification and cannot, in many cases, be removed or deported unless a travel document is obtained on their behalf. A travel document is obtained from the person's relevant embassy or high commission and before issuing such a document the embassy must be satisfied of the person's identity and nationality. This requires certain information to be obtained from and, on some occasions, attendance at interviews by, the person concerned.

166. The offence may be tried summarily on or indictment. On summary conviction the maximum penalty is six months imprisonment, a fine up to the statutory maximum or both. On conviction on indictment the maximum penalty is two years imprisonment, a fine, or both. When section 154 of the Criminal Justice Act 2003 is commenced the sentence that may be passed on summary conviction will increase to 12 months in England and Wales. It is expected that at the same time a similar amendment will be made in respect of Scotland and Northern Ireland.

Section 36: Electronic monitoring

167. Section 36 makes provision for the electronic monitoring of persons subject to immigration control who are at least 18 years of age in the following circumstances:

- where a residence restriction is imposed (subsection (2));
- where a reporting restriction could be imposed (subsection (3)); and
- where immigration bail is granted subject to a recognizance or bail bond (subsection (4)) (except where bail is granted by a police officer) (subsection (1)(d)(ii)).

168. A person subject to electronic monitoring in accordance with these provisions is required to cooperate with arrangements for detecting and recording his location at specified times, during specified periods of time or throughout the currency of the arrangements. The electronic means employed in connection with such arrangements may include voice recognition technology, the use of a "tag" to confirm the presence of absence of the person from a specified location and in the future "tracking" technology to monitor the person's whereabouts on a continuous basis.

169. Subsection (8) provides power for the Secretary of State to make rules about the arrangements for electronic monitoring under section 36.

170. Subsection (10) prevents the imposition of a requirement to submit to electronic monitoring unless the authority imposing the requirement has been notified by the Secretary of State under subsection (8)(b) that satisfactory monitoring arrangements are available in the relevant area(s).

IMMIGRATION SERVICES

Section 37: Provision of immigration services

Section 37 amends the categories of advisers qualified to provide immigration advice or services under section 84 of the Immigration and Asylum Act 1999 and makes consequential amendments.

171. Subsection (1) amends section 84(2) and (3) of the 1999 Act. The effect of the amendment is to require that unqualified advisers, who wish to be qualified by virtue of their association with a qualified adviser, must be acting on behalf of, and under the supervision of that qualified adviser, which is a change from the existing provision, which allows them to either be employed by or supervised by that qualified adviser.

172. Subsection (4) amends section 90(4) of the 1999 Act. The effect is to define those advisers subject to the jurisdiction of a disciplinary body as those authorised by the relevant designated professional body and those acting on behalf of and supervised by an authorised person.

Section 38: Immigration Services Commissioner: power of entry

173. Section 38(1) inserts a new section 92A in the Immigration and Asylum Act 1999. It gives the Commissioner a power, subject to obtaining a warrant, to enter and search premises (including a dwelling) where there are reasonable grounds for suspecting that there is material likely to be of substantial value to the investigation of the offence under section 91 of the 1999 Act of providing immigration services or advice when unqualified to do so. The list of those qualified to provide immigration advice is set out in section 84 of the 1999 Act.

174. Subsection (1) enables a justice of the peace to issue a warrant authorising the Commissioner to enter and search premises.

175. Subsection (2) provides that warrants can only be issued if there are reasonable grounds for believing that an offence under section 91 is being committed and that there is material on the premises which is of substantial value to the investigation of the offence.

176. Subsection (3) sets out other conditions. Any one of those conditions must be satisfied before a warrant can be issued. Those conditions are: where it is impracticable to communicate with a person entitled to grant entry or access to the premises; where entry to the premises will be prevented unless a warrant is produced; where the purpose of the search may be seriously prejudiced unless immediate entry on arrival at the premises is secured.

177. Subsection (4) enables the Commissioner to retain material he has seized.

178. Subsection (5) makes it an offence for anyone to obstruct the Commissioner in exercising the warrant.

179. Subsection (6) sets the penalty for obstructing the Commissioner, following a summary conviction, as imprisonment for up to six months or a fine not exceeding level 5 on the standard scale, or both.

180. Subsection (7) clarifies the following references in the section. A reference to the Commissioner includes a reference to a member of his staff authorised in writing by him. A reference to premises includes a reference to premises used wholly or partly as a dwelling. A

reference to material includes material subject to legal privilege, and material which would not be admissible as evidence at a trial.

181. Subsections (8) and (9) set out how the provisions of the new section 92A are to be applied in Scotland and Northern Ireland.

182. Section 38(2) amends paragraph 7 of Schedule 5 to the Immigration and Asylum Act 1999. The effect is to extend the Commissioner's power to enter premises and require the provision of documents and information. The existing power applies to advisers registered under the regulatory scheme. Section 38(2) extends the application of the power to include advisers certified as exempt by the Commissioner, under section 84(4)(a) of the 1999 Act.

Section 39: Offence of advertising Services

183. Section 39 inserts a new section 92B in the Immigration and Asylum Act 1999.

184. Subsection (1) creates a new criminal offence of advertising or offering to provide immigration advice or services when unqualified. Those qualified to provide immigration advice are listed in section 84 of the 1999 Act.

185. Subsection (2) sets out the behaviour that would constitute advertising or offering to provide immigration advice or services.

186. Subsection (3) establishes the maximum penalty for the offence which will be a Level 4 fine (£2,500).

187. Subsection (4) applies subsections (3) to (7) of section 91 of the 1999 Act so that if the new offence is committed by a body corporate, an officer (including partners in Scotland) of that body will be culpable.

188. Subsection (5) enables the Commissioner to lay an information before a magistrate within six months of the date of the alleged advertising offence having been committed, or within two years of that date and within six months of the offence coming to the attention of the Commissioner. Subsections (6), (7) and (8) provide for the same limits to apply in Scotland and Northern Ireland.

Section 40: Appeal to Immigration Services Tribunal

189. Section 40 provides that section 87(3)(f) of the Immigration and Asylum Act 1999 shall cease to have effect.

190. Section 87(2) of the 1999 Act provides a right of appeal to the Immigration Services Tribunal against a relevant decision of the Immigration Services Commissioner; section 87(3) lists the relevant decisions. The relevant decision in section 87(3)(f) is one recorded under paragraph 9(1)(a) of Schedule 5 of the 1999 Act. Paragraph 9(1)(a) of Schedule 5 provides that on determining a complaint against a registered adviser, an employee, or someone being supervised by a registered adviser, the Commissioner may record the complaint and the decision on it for consideration when that registered person next applies for his registration to be continued.

191. The effect of this section, therefore, is to remove the right of appeal to the Tribunal where the Commissioner has recorded a complaint on file for consideration when an application for continued registration is received from the immigration adviser concerned. If

the Commissioner were to refuse that application for continued registration from such an adviser, a right of appeal would remain by virtue of sections 87(3)(d) of the 1999 Act.

Section 41: Professional Bodies

192. Section 41 amends section 86 of the Immigration and Asylum Act 1999 and paragraph 21of Schedule 5 to that Act.

193. Subsection (2) inserts a new subsection (2) in section 86. The effect of new subsection (2)(b) is to extend the Secretary of State's existing power to make an order removing the name of a designated professional body from those listed in section 86 of the 1999 Act so that he make such an order if he considers a designated professional body has failed to comply with a request from the Commissioner for information.

194. Subsection (3) substitutes a new subsection (9)(b) in section 86. The effect of new subsection (9)(b)(ii) is to extend the Commissioner's existing responsibility when reporting to the Secretary of State about a designated professional body, to include a duty to report where the body has failed to comply with an information request from him.

195. Subsection (4) inserts a new subsection (9A) in section 86. The effect is to place an obligation on all designated professional bodies to comply with requests from the Commissioner for information.

196. Subsection (5) amends section 166(2) of the 1999 Act. It ensures that the definition of an "order" in that section does apply to an order under section 90(1) of that Act, which therefore need not be made by statutory instrument.

197. Subsection (6) substitutes a new paragraph 21(2) in Schedule 5 to the 1999 Act. The effect of new sub-paragraph 21(2)(b) is to extend the Commissioner's existing responsibility, when making his Annual Report to the Secretary of State, so as to include a duty to report on failures on the part of designated professional bodies to comply with requests by him for information.

FEES

Section 42: Amount of fees

198. Section 42 gives the Secretary of State the power, when setting a fee under existing powers in respect of certain immigration and nationality applications, to do so at a level which exceeds the administrative cost of determining or processing an application and which reflects the benefits likely to accrue to the person making that application or for whose benefit the application is made. This power may only be exercised with the consent of the Treasury.

199. Subsection (2) sets out the existing fee-setting powers in respect of which this power is available. It states that the new power is available when the Secretary of State prescribes a fee under section 41(2) of the British Nationality Act 1981 (fees for nationality applications); section 5(1)(a) and (b) of the Immigration and Asylum Act 1999 (fee for an application for leave to remain or variation of leave to enter or remain, where that application is not asylum-based) and sections 10 and 122 of the Nationality, Immigration and Asylum Act 2002 (fees for an application for a certificate of entitlement to the right of abode and an immigration employment document, respectively).

200. Subsection (3) provides a similar power where an Order in Council under section 1 of the Consular Fees Act 1980 prescribes a fee in relation to an application for the issue of a certificate of entitlement to the right of abode in the United Kingdom. The power can be exercised in this limited circumstance without the need for Treasury consent.

201. Subsection (4) provides that, where a fee is set in exercise of the power in this section, the instrument that prescribes that fee may provide that the part of the fee that exceeds the cost of determining an application or undertaking a process may be refunded if the application is unsuccessful or a process is not completed. Subsection (5) provides a discretionary power to the Secretary of State or another person to determine whether in making provision under subsection (4) a refund should be made and the amount which should be refunded.

202. Subsection (6) provides that, prior to the introduction of a fee in exercise of this power, the Secretary of State must consult those persons who he thinks it appropriate to consult. Subsection (7) provides that an instrument made in exercise of the new power shall be subject to the affirmative resolution procedure.

203. Subsection (8) is a technical provision. It ensures that the existing power under section 102 of the Finance (No.2) Act 1987 - to specify matters and functions to be taken into account when setting a fee - is not prejudiced by the operation of section 42. It does not introduce a new power, but ensures that section 42 can be operated concurrently with the existing section 102 provision.

Section 43: Transfer of leave stamps

204. Section 43 amends section 5 of the Immigration and Asylum Act 1999 which enables the Secretary of State, with the approval of the Treasury, to make regulations prescribing fees to be paid in connection with certain immigration applications. In particular, section 5(1)(c) enables fees to be prescribed for applications for an indefinite leave stamp to be transferred into the applicant's passport or travel document as the result of the renewal or replacement of his previous passport or travel document.

205. This section substitutes a new section 5(1)(c) which will enable fees to be prescribed for applications for limited leave stamps as well as indefinite leave stamps to be transferred into the applicant's passport or other document issued to the applicant, where the leave stamp was previously fixed in another passport or document issued to the applicant.

206. This section also replaces section 5(5) Act 1999 (which defines "indefinite leave stamp") with a new subsection (5), which defines "limited leave stamp" and "indefinite leave stamp" for the purposes of section 5. In particular this makes clear that "leave stamps" include stamps, stickers and any other attachment which indicates that a person has been granted limited or indefinite leave to enter or remain in the United Kingdom.

GENERAL

Section 48: Commencement

207. Section 48 contains provisions relating to the coming into force of the Act. Section 2 (Entering United Kingdom without passport, &c.) and section 35 (Deportation or removal: co-operation) will come into force two months after Royal Assent. Section 32 (Suspected international terrorist: bail) will apply to any such determinations made two months after

Royal Assent or later. Subsection (3) provides that the remaining provisions come into force on such dates as the Secretary of State (or the Lord Chancellor in the case of section 26 (Unification of appeal system) or Schedule 1 or 2) appoints.

208. Orders under subsection (3) may make transitional provisions and subsections (4) and (5) sets out specific transitional provision powers in relation to the commencement of section 26.

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard Reference
House of Commons		
Introduction	27 November 2003	Vol. 415 Col. 141
Second Reading	17 December 2003	Vol. 415 Col. 1587
Committee	8 January – 27 January 2004	Standing Committee B
Report and Third Reading	1 March 2004 1 March 2004	Vol. 418 Col. 616 Vol. 418 Col. 716
House of Lords		
Introduction	3 March 2004	Vol. 658 Col. 658
Second reading	15 March 2004	Vol. 659 Col. 49
Grand Committee	5 April 2004 26 April 2004 27 April 2004 4 May 2004	Vol. 659 Col. 1595 Vol. 660 Col. 656 Vol. 660 Col. 690 Vol. 660 Col. 991
Report	18 May 2004 7 June 2004	Vol. 661 Col. 150 Vol. 662 Col. 13
Committee on Recommitment	15 June 2004	Vol. 662 Col. 632
Report on Recommitment	28 June 2004	Vol. 663 Col. 13
Third Reading	6 July 2004	Vol. 663 Col. 669
House of Commons		
Commons Consideration of Lords Amendments	12 July 2004	Vol. 423 Col. 1157
House of Lords		

Lords Consideration of Commons Amendments	14 July	Vol. 663 Col. 1271
House of Commons		
Commons consideration of Lords Amendments	20 July	Vol. 424 Col. 288

Royal Assent - 22 July 2004 House of Commons Vol. 424 Col 514

House of Lords Vol. 664 Col 333

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