

EXPLANATORY MEMORANDUM TO
THE ILLEGAL MIGRATION ACT 2023 (AMENDMENT) REGULATIONS 2024

2024 No. 815

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Declaration

- 2.1 The Rt Hon Yvette Cooper, Secretary of State for the Home Department, confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Rebecca Nugent, Deputy Director for the Compliant Environment and Enforcement unit, at the Home Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Matthew Johnson at the Home Office, Telephone: +44(0)7388969032 or email: Matthew.Johnson1@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 This instrument amends the date of application of the Duty to Remove in section 2 of the Illegal Migration Act 2023. As a result, instead of the Duty to Remove having retrospective effect, meaning that it applies to any person who arrived on or after the day on which the Act received Royal Assent (20 July 2023), the date of application now refers to the day on which section 2 will come into force. The instrument also makes consequential amendments to other provisions of the Act to link them to the date from which the Duty to Remove applies.

Where does the legislation extend to, and apply?

- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom. Paragraph (7)(c) of regulation 3 relates to the ban on obtaining British citizenship, and in common with other citizenship legislation it also extends to the Channel Islands, the Isle of Man, and the British Overseas Territories.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the same as its extent (see above).

5. Policy Context

What is being done and why?

- 5.1 The annual cost of the asylum system is the highest in over two decades at more than £4.9 billion, with £8 million a day spent housing people in over 200 hotels. There is a

large and growing backlog of asylum claims, a high proportion of which are on support, creating demand for accommodation. Methods of irregular entry can also be dangerous and leave migrants open to exploitation by organised crime groups.

- 5.2 The Illegal Migration Act 2023 ('the Act') created a system based on the prompt removal of those who arrived in or entered the UK irregularly to either their home country or to a safe third country where their protection claims would be processed.
- 5.3 At the time it received Royal Assent the Act included retrospective provisions, including but not limited to, the Duty to Remove (section 2) and permanent bans against obtaining a lawful immigration status (sections 30-37). The former was retrospective in effect from 20 July 2023 (Royal Assent) but is not yet in force; the latter commenced on Royal Assent and was retrospective from 07 March 2023.
- 5.4 A number of other provisions tied to the Duty to Remove were also retrospective in effect. These provisions include: section 5 (disregard of certain claims, applications etc.); section 6 (removal for the purposes of the duty or power to remove); section 22 (modern slavery: provisions relating to removal and leave); and, section 28 (amendments to modern slavery provisions in the Nationality and Borders Act 2022).
- 5.5 The retrospective effect of the Act, and the differing dates underpinning their effect, created complexity for the operation of the immigration system. It resulted in the creation of different cohorts, who were subject to some or all of the measures in the Act depending on date of arrival. As a result, different operational processes would have been required to process these cohorts in line with the legislative provisions they were subject to. The complexity was further exacerbated because although the bans, and their retrospective effect, were commenced on Royal Assent of the Act they were not able to be implemented. This position resulted in an ongoing risk that the Home Office was acting inconsistent with the legislation, by granting leave ultra vires to those who should be subject to the bans on obtaining an immigration status.
- 5.6 The SI amends the dates underpinning the retrospective effect of the Act. In doing so the effect of the retrospective provisions is tied to a future date on which the Duty to Remove in section 2 comes into force.
- 5.7 The approach allows the Home Office to ensure it is operating compliant with the legislation, ensuring immigration status is not wrongly granted to those who are subject to the bans. It makes it clear that all arrivals from 07 March 2023 and until the Duty to Remove comes into force will continue to be treated under the provisions of the Nationality and Borders Act 2022 (NABA). As such, arrivals since 07 March 2023 who have made asylum or human rights claims and cases involving modern slavery referrals can be progressed. Furthermore, aligning the date of the bans to the Duty to Remove removes the complexity of cohorts being subject to different legislative regimes.

What was the previous policy, how is this different?

- 5.8 Amending both the dates of application of the Duty to Remove and the bans on obtaining a lawful immigration status in the UK will remove the retrospective effect of the Illegal Migration Act 2023. The practical effect of this is that the Duty to Remove and the bans on obtaining a lawful immigration status will only apply to persons who arrive after the amended date. Those people who arrived between 20 July 2023 and the date the duty comes into force will have their asylum claims, human rights claims and modern slavery referrals considered in the UK under the provisions of the Nationality and Borders Act 2022.

6. Legislative and Legal Context

How has the law changed?

- 6.1 This instrument amends the date of application of the Duty to Remove, and also consequentially amends the effective date of the bans. The amendments align the dates so both the Duty to Remove and the bans will apply from the same date, which would be the day the Duty to Remove comes into force.

Why was this approach taken to change the law?

- 6.2 Section 3(1) of the Illegal Migration Act confers a power on to the Secretary of State to amend, by Regulations subject to the negative Parliamentary procedure, the date specified in sections 2(3), 5(7)(a), 6(12)(a) and 6(14)(a) of the Act. Section 3(2) confers a power to allow the Secretary of State also make consequential amendments to other provisions of the Illegal Migration Act or any other legislation.
- 6.3 The use of primary legislation to amend the dates was considered as an alternative approach. However, it was not considered to be an appropriate use of Parliamentary time, given the existing powers available in the Act.
- 6.4 This instrument could not have been laid sooner as the decision to align and change the dates of the Duty to Remove and bans had not been made until now. But now that the decision has been made, it is considered appropriate for this instrument to come into effect as soon as possible. As such, this instrument does not follow the convention of allowing a minimum of 21 days before coming into force. We assess this as reasonable and proportionate in ensuring asylum decision-making can resume immediately for those persons who are subject to the bans thereby providing them with legal certainty and avoiding adding further to the current backlog of claims. Regrettably, due to an administrative error, the instrument came into force before it was laid in Parliament. In line with the *Statutory Instrument Practice*, the department has notified the Speaker of the House of Commons and Lord Speaker of the House of Lords.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 This instrument was not subject to a consultation exercise because it concerns the administration of immigration control. The instrument is focused on the legislative regimes which migrants who have arrived in or entered the UK irregularly are subject to.

8. Applicable Guidance

- 8.1 The Home Office guidance to staff will be updated to reflect changes made by this instrument. Guidance to general members of the public will also be published.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has been prepared for this instrument.
- 9.2 The Impact Assessment states that the value for money of this intervention is positive in monetised terms. Total discounted benefits range from £6.4bn to £27.1bn. Total

discounted costs range from £1.5bn to £10.2bn. The total Net Present Value of this SI is estimated to range from £4.7bn to £16.9bn.

Impact on businesses, charities and voluntary bodies

- 9.3 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument concerns the administration of immigration control. The administration of immigration control is a public-sector function.
- 9.4 The legislation does not impact small or micro businesses.
- 9.5 Regardless of whether the Nationality and Borders Act 2022 or the Illegal Migration Act 2023 applies, there remains a need for the Home Office to process irregular migrants to establish whether any claims they make mean it is appropriate for them to remain in or effect their removal from the UK. An overarching Impact Assessment was prepared and published for both the Nationality and Borders Act 2022 and the Illegal Migration Act 2023, during their respective Parliamentary passage.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The Home Office will continue to monitor and report the statistics of asylum claims, grant rates and appeals in the quarterly published statistics. The Home Office will continue to monitor across implemented asylum policy.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 None.

12. European Convention on Human Rights

- 12.1 The Rt Hon Yvette Cooper, Secretary of State for the Home Department, has made the following statement regarding Human Rights:

“In my view the provisions of the Illegal Migration Act 2023 (Amendment) Regulations 2024 are compatible with the Convention rights.”

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).