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UK BORDERS ACT 2007

1 The Act received Royal Assent on 30 October 2007. The following are the Acts on the subject of immigration and asylum currently on the statute book:

Immigration Act 1971
Immigration Act 1988
Asylum and Immigration Appeals Act 1993
Asylum and Immigration Act 1996
Special Immigration Appeals Commission Act 1997
Immigration and Asylum Act 1999
Nationality, Immigration and Asylum Act 2002
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
Immigration, Asylum and Nationality Act 2006
UK Borders Act 2007

2 Each Act since 1971 has heavily amended earlier Acts and introduced substantial new provisions, with the result that legislation on these topics is diffuse and complex. There is a desperate need for a consolidation Act to tidy up the law, but there is no sign of that as yet. Anyone practising in the field must also take into account the Human Rights Act 1998, the Race Relations Act 1976 and the British Nationality Act 1981.

3 The title “UK Borders Act” marks a complete change from earlier nomenclature, but this is deceptive. The purpose described in its long title is “to make provision about immigration and asylum: and for connected purposes.” It contains an assortment of sections amending existing legislation and introducing new measures. Its main provisions are:

- (i) New powers of detention for immigration officers at ports.
- (ii) New powers enabling the Home Secretary to make regulations requiring persons subject to immigration control to apply for a document recording external physical characteristics - a “biometric immigration document”.
- (iii) New and drastic procedures for the deportation of foreign criminals, obviously prompted by revelations about the shortcomings of existing procedures which came to light during 2006.

There are also provisions on the treatment of claimants and enforcement.

New powers of detention for immigration officers at ports

4 According to the Government Press release on the Act, sections 1-4, dealing with detention at ports are “the latest step in the Government’s shake up of the Border and Immigration Agency” – the new name for the former Immigration and Nationality Directorate. The release goes on to say that these sections increase the powers of the BIA to “build stronger borders, tackle organised crime and remove incentives for illegal immigrants wanting to come to Britain”. The Home Secretary may designate immigration officers who are fit and proper for the purpose and who have been suitably trained, to exercise powers of detention under the Act. Designated immigration officers may detain persons who are considered to have committed crimes which would make them liable to arrest by a police constable or in respect of whom warrants for arrest have been issued. If a designated immigration officer detains a person he must arrange for the attendance of a police constable as soon as possible and may not detain that person for longer than three hours.

5 This is a power to detain pending possible arrest by a police officer. The power extends to persons of any nationality and includes e.g. British citizens returning to the UK. Designated immigration officers are not given powers of arrest by these provisions, but see paragraph 9 for powers of arrest in different circumstances under section 23 of the Act.

Biometric registration

6 Section 5(1)(a) empowers the Home Secretary to make regulations requiring any person subject to immigration control to apply for the issue of a document recording biometric information, dubbed by the subsection a “biometric immigration document”. “Biometric information” is defined by section 15(1)(b) and (c) as information about external physical characteristics including fingerprints and features of the iris or any other part of the eye. “Person subject to immigration control” is defined by section 15(1)(a) as a person who under the Immigration Act 1971 requires leave to enter or remain in the United Kingdom, whether or not such leave has been given. Citizens of Member States of the European Economic Area (the European Union plus Switzerland, Liechtenstein, Norway and Iceland) do not fall within the definition. By Regulation 11(1) of The Immigration (European Economic Area) Regulations 2006 an EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA state. Section 5(1)(b) of the Act gives further powers to the Home Secretary to make regulations requiring a biometric immigration document to be used:

- (i) for specified immigration purposes
- (ii) in connection with specified immigration procedures, or
- (iii) in specified circumstances, where a question arises about a person’s status in relation to nationality or immigration.

Section 8 makes provision for the uses to which information contained in biometric information documents may be put. It may be used e.g. in connection with the investigation or prosecution of criminal offences or for purposes of national security. There is residual provision allowing the information to be used “for such other purposes (whether in connection with functions under an enactment or otherwise) as

the regulations may specify” – which covers just about anything. Regulations made under (iii) above could provide e.g. for a requirement to produce a valid document when seeking NHS medical treatment or claiming social security benefits

8 The regulation making powers in section 5 are extensive and include power to provide for cancellation of documents. Section 9 empowers the Home Secretary to impose a monetary penalty not exceeding £1000 for failure by any person to comply with a regulation made under section 5(1). The maximum may be increased by statutory instrument to reflect change in the value of money. Section 11 provides for appeals against penalties to the county court in England, Wales and Northern Ireland and to the sheriff in Scotland.

Treatment of claimants

8 Sections 16-22 contain a large number of detailed miscellaneous provisions amending earlier legislation. Most noteworthy among these sections is 21, requiring the Home Secretary to issue a code of practice to ensure that in exercising functions in the United Kingdom the BIA takes appropriate steps that while children are in the United Kingdom they are safe from harm. Children sometimes arrive alone and sometimes claim asylum alone. They normally become the responsibility of the Social Services departments of local authorities.

Enforcement

9 Sections 22-31 create a number of new offences and make provision for amendments to earlier legislation which created offences. By section 22 assaulting an immigration officer is made an offence punishable by a period of imprisonment not exceeding 51 weeks or a fine. By section 23 an immigration officer may arrest a person without warrant if he reasonably suspects that that person has committed an offence under section 22.

Automatic deportation

10 Sections 32-39 provide for the automatic deportation of foreign criminals on the ground that deportation is conducive to the public good. By section 32(5) the Home Secretary must make a deportation order in respect of a foreign criminal, subject to the exceptions in section 33 which are summarised in paragraph 11 below. A foreign criminal is defined as someone who is not a British citizen and is convicted in the United Kingdom of an offence resulting in his being sentenced to a period of imprisonment of at least 12 months *or* sentenced to imprisonment of any period on conviction of an offence specified by order of the Home Secretary under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. This latter was enacted for the purpose of construction and application of Article 33.2 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention). Article 33.1 is the basic provision of the Convention that a Contracting State shall not expel a person to a territory where his life or freedom would be threatened for a Convention reason – i.e. race, religion, nationality, membership of a particular social group or political opinion. Article 33.2 however, denies this protection to any person “whom, there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the security of that country”. Section 72(4) of the 2002 Act creates a presumption that a person shall be presumed to have been

convicted of just such a crime if he is convicted of an offence specified by order of the Home Secretary made by statutory instrument.

11 The expression “automatic deportation” is shown to be something a misnomer by the wide range of exceptions set out in section 33:

1. Crew of ships or aircraft.
2. Cases in which deportation of the foreign criminal would be in breach of his rights under the Refugee Convention or the European Convention on Human Rights.
3. If the Home Secretary thinks that the foreign criminal was under 18 on the date of conviction.
4. If deportation would breach the foreign criminal’s rights under the treaties relating to the European Economic Area or European Union.
5. If the foreign criminal is protected by one or other of various provisions in the Extradition act 2003.
6. If the foreign criminal is protected under provisions of the Mental Health Act 1983 or parallel legislation in Scotland or Northern Ireland.

Border and Immigration Inspectorate

12 As a result of government amendments during the passage of the Bill section 48 creates the new post of Chief Inspector of the BIA. The job of the Chief Inspector is to monitor and report on the efficiency and effectiveness of the BIA and of the discharge of immigration, asylum and nationality functions by other officials and by the Home Secretary. The Chief Inspector is appointed by the Home Secretary and his role is an independent one similar to that of the Inspector of Prisons in relation to the functioning of prisons.

13 Apart from section 17, concerned with support for failed asylum seekers, which became effective on Royal Assent, all provisions in the Act are to be brought into force by statutory instrument made by the Home Secretary. No such instruments have yet been made.

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2 December 2007

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