



Border trouble

Adrian Berry and Hina Majid unravel the UK Borders Act

The UK Borders Act 2007 (UKBA 2007) takes forward the government's five-year plan for immigration and asylum, but perhaps more broadly represents its political response to the recent foreign national prisoners' scandal and successive headlines about illegal immigration. UKBA 2007 received Royal Assent on 30 October 2007.

At the time of writing, ss 1–8, 10–11, 13–18, 20, 22, 23 and 26, 29–31 and 40–43, together with the relevant schedule, have been brought into force through the UK Borders Act 2007 (Commencement No 1 and Transitional Provisions) Order (SI 2008/99) and the Asylum Support (Prescribed Period following Appeal) Regulations 2007 (SI 2007/3102). It should, however, be noted that some of these provisions are only partially in force, while others are subject to transitional provisions.

UKBA 2007 is split into seven parts, the key aspects of which are outlined below.

POWERS TO DETAIN AT PORTS: SS 1–4

UKBA 2007 creates "designated" immigration officers and an accompanying power to detain individuals, including British citizens. Designated officers may detain those they believe to be liable to arrest by a constable under the Police and Criminal Evidence Act 1984, s 24, or are subject to a warrant for arrest at ports.

BIOMETRIC IMMIGRATION DOCUMENTS: SS 5–15

UKBA 2007 requires those subject to immigration control to apply for biometric immigration documents containing information about external characteristics including fingerprints and iris features. Worryingly, much of the detail is left to future regulations, however it is clear that:

- biometric information may be retained and used for immigration and nationality functions, control of borders, criminal offences, and protection of national security;

- the scheme will not require an individual to carry the document at all times; and
- immigration rules may require a person applying for the document to provide non-biometric information to be recorded or retained.

Non-compliance with future regulations may lead either to: refusal or curtailment of leave; or a penalty notice, issued by the secretary of state, and the imposition of fines of not more than £1,000. Individuals may object to these on grounds that they did not fail to comply, it is unreasonable to pay, or the amount is excessive.

TREATMENT OF CLAIMANTS: SS 16–21

UKBA 2007, s 16 states that people granted leave to enter or remain may have conditions imposed on them relating to residence, or reporting to immigration officers or the secretary of state. Section 17 removes legislative definitional ambiguity and makes clear that for asylum support purposes a person remains an asylum seeker, following determination of his claim, during any period when an in-country appeal could be brought to the Asylum and Immigration Tribunal and where an appeal is pending.

Section 18 provides powers of arrest, entry, search and seizure for criminal offences relating to asylum support under the Immigration and Asylum Act 1999.

UKBA 2007, s 19 states that in appeals relating to entry clearance, and the refusal of certificates of entitlement to the right of abode, the tribunal should consider only those circumstances appertaining at the time of the decision. In relation, however, to either a refusal of leave to enter, or a refusal to vary leave which results in no residual leave, where such a decision is made and it relates to an application under the points-based system, a subsequent appeal is brought on grounds that the decision was not in accordance with the immigration rules (or otherwise in accordance with the law) or on the basis that a discretion under the rules ought to have been exercised

IN BRIEF

- Establishes a biometric documentation scheme for those subject to immigration control.
- Creates a new automatic deportation scheme for foreign criminals and an accompanying set of detention powers.
- Introduces new limitations on admissible evidence in appeals against refusal, or variation of leave to enter, under a points-based immigration rule.

differently. The tribunal may consider the appellant's evidence only where it:

- is submitted in support of, and at the time the application is made;
- relates to grounds of appeal other than those mentioned above;
- is adduced to prove that a document is genuine or valid; or
- is adduced in connection with the exercise of discretion under the immigration rules to refuse the application on grounds not related to the acquisition of points under the points-based system.

ENFORCEMENT POWERS: SS 22–31

- Sections 22–23 introduce an offence of assaulting an immigration officer together with a corresponding set of penalties, and a range of powers including a power of arrest and powers of entry search and seizure;
- Sections 24–26 expand the power of immigration officers so that they replicate existing police powers and arrangements under the Proceeds of Crime Act 2002. Immigration officers are permitted to carry out searches, and seize and detain cash derived from (or intended for use in connection with) offences under the Immigration Acts. The secretary of state is empowered to apply for forfeiture of cash.
- Sections 27–28 are concerned with enforcement of the new illegal working regime within the Immigration, Asylum and Nationality Act 2006. They attach a power of arrest to the offence of knowingly employing an illegal worker, and introduce a power to search for connected personnel records.
- Sections 29–31 aim to plug shortcomings in enforcement in relation to the facilitation of unlawful entry, and trafficking. The effect is to extend their territorial scope so that they apply to acts committed both within the UK and outside, and are not limited on grounds of nationality.

They also extend the offence of trafficking and assisting unlawful immigration so that they apply in relation to both arrival and entry.

AUTOMATIC DEPORTATION: SS 32–39

An “automatic deportation” scheme is established which applies to non-British citizens who have been sentenced to: a period of imprisonment for 12 months (suspended sentences are not included unless a court orders that part of the sentence should take effect, neither are consecutive sentences cumulatively adding up to 12 months); or a period of imprisonment for one of many offences specified in the Nationality Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (SI 2004/1904). The effects of falling within the scheme are to:

- remove all discretion from the secretary of state in relation to deportation orders;
- create an assumption that deportation is conducive to the public good;
- require the secretary of state to make a deportation order (this can be made at any time providing there is no pending criminal appeal against a conviction or sentence); and
- prohibit the secretary of state from revoking a deportation order unless: (i) one of the exceptions below applies; (ii) an application for revocation is made while individuals are outside the UK; or (iii) a new Borders Act deportation order is made.

The categories that are exempt from the automatic deportation scheme are:

- (i) those who are presently exempt from deportation altogether;
- (ii) cases in which deportation would breach an individual’s rights under the Human Rights Act 1998, the Refugee Convention, or the Community treaties;
- (iii) those individuals the secretary of state believes were under the age of 18 on the date on which they were convicted;
- (iv) those subject to extradition proceedings; and
- (v) those subject to mental health legislation.

With the exception of the first category listed above (save for those relying on Community treaties), the effect of falling within an exempt category is not to exclude an individual from deportation. Indeed, the

assumption that deportation is conducive to the public good, will remain for those exempt individuals exempt on grounds (i) and (ii) above, together with those subject to extradition proceedings. The effect instead is for the secretary of state to merely retain her discretion in relation to deportation.

There is to be a restricted right of appeal to the tribunal, however that right of appeal is to be far more limited than at present as it will be confined to consideration of whether the automatic deportation provisions apply. As a Borders Act deportation order does not, unlike present orders, invalidate leave while an in-country appeal is pending, it cannot be enforced until either the time limit for lodging an appeal has expired, or an appeal is finally determined. It will only attract an in-country right of appeal if a non certified asylum or human rights claim is made, or in circumstances where a European Economic Area national/family member makes a claim that the decision breaches treaty rights in relation to entry or residence.

Family members will not be dealt with through the automatic deportation scheme. The current rule, however, that a deportation order cannot be signed against a family member of a principal more than eight weeks after the principal has been deported is to be reinterpreted. The eight weeks in the case of a Borders Act deportation order will run from the expiry of the deadline for an appeal, or where an appeal has been lodged, once the appeal is no longer pending.

DETENTION: S 36

The automatic deportation scheme is accompanied by a set of extremely wide powers of immigration detention, as well as powers to impose residence, reporting and occupation conditions on those who have served a period of imprisonment. These will be applicable in the following circumstances.

- While the secretary of state considers whether the scheme for automatic deportation applies.
- Where the secretary of state thinks the automatic deportation provisions apply pending the making of the order regardless of whether they do or not.
- Where a deportation order has been made. There is a presumption of detention as the secretary of state is required to exercise her powers of detention unless she thinks it is inappropriate. Clearly this raises compatibility issues with Art 5 (right to liberty) of the European

Convention on Human Rights which creates a presumption against detention.

CONTROL OF INFORMATION: SS 40–47

These provisions enable HM Revenue & Customs, and the Revenue & Customs Prosecution Office to supply the secretary of state with information for use in connection with: immigration control; criminal offences; carriers’ liability; employment restrictions; asylum support; and nationality matters relating to good character and deprivation of nationality. Measures also enable the police to disclose information for nationality purposes though provision is made to keep the information disclosed confidential.

New powers also permit immigration officers or constables to search premises for nationality documents relating to individuals who have been arrested on suspicion of offences, where it is suspected that they may not be British citizens, and nationality documents relating to the person arrested may be found. They also permit retention of nationality documents where it is suspected that individuals may be liable to removal from the UK and this may facilitate removal.

BORDER AND IMMIGRATION INSPECTOR: SS 48–56

These provisions create a chief inspector of the Border and Immigration Agency. Their role will be to monitor and report on the effectiveness of the Border and Immigration Agency though they will not be concerned with investigating individual cases. UKBA 2007 sets out a number of specific areas on which they are to report. These include:

- the practice and procedure in making decisions;
- the treatment of claimants and applicants;
- unfounded claims certification; and
- compliance with discrimination law.

As the remit of the certification, race and accommodation centres monitors as well as the Advisory Panel on Country Information are subsumed within the inspector’s remit, they are abolished altogether.

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