

# **BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part 4: Miscellaneous and General**

##### ***Section 53: Transfer of certain immigration judicial review applications***

201. Section 19 of the Tribunals, Courts and Enforcement Act 2007 amended the Supreme Court Act 1981 and the Judicature (Northern Ireland) Act 1978 to provide for the transfer of judicial review applications to the Upper Tribunal. Section 20 of the Tribunals, Courts and Enforcement Act 2007 made equivalent provision for Scotland. Under these provisions a judicial review application may not be transferred if it calls into question a decision under the Immigration Acts, the BNA 1981, an instrument having effect under those enactments or any other provision of law determining British citizenship.
202. Subsection (1) of section 53 allows immigration and asylum judicial review applications to be transferred from the High Court to the Upper Tribunal, provided that they call into question a decision by the Secretary of State not to treat submissions as an asylum or human rights claim within the meaning of part 5 of the NIAA 2002 wholly or partly on the basis that they are not significantly different from material that has been previously considered. Certain other conditions must also be met. These types of cases are commonly referred to as “fresh claims” cases. Subsections (2) and (3) make equivalent provision for Northern Ireland and Scotland.

##### ***Section 54: Trafficking people for exploitation***

203. **Section 54** expands the definition of exploitation in the offence of trafficking in section 4 of the AITCA 2004. This is to cover use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship. This section substitutes the existing definition in section 4(4)(d) of that Act, which provides that a person who is “requested or induced” to undertake any activity is exploited. The effect of this amendment is to ensure the offence of trafficking captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.
204. **Section 54** does not extend to Scotland (see section 57(4)).

##### ***Section 55: Duty regarding the welfare of children***

205. **Section 55** imposes a duty on the Secretary of State to make arrangements to ensure that certain specified functions are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. Subsection (1)(b) requires the Secretary of State to make similar arrangements to ensure that other persons, including

contractors, who carry out those functions also have regard to the need to safeguard and promote the welfare of children.

206. Subsection (2) sets out the list of functions which the Secretary of State must make arrangements for ensuring are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. These include the immigration and nationality functions of the Secretary of State, and any function conferred upon an immigration officer by or by virtue of the Immigration Acts. Further, they include the general customs functions of the Secretary of State, and the customs functions of a designated customs official.
207. Subsection (3) requires anyone carrying out any of the functions listed to have regard to any guidance issued to them by the Secretary of State for the purposes of subsection (1).
208. Subsection (4) imposes a duty on the Director to make arrangements for ensuring that the Director's functions are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. Subsection (4)(b) requires the Director to make similar arrangements to ensure that other persons carrying out the Director's functions also have regard to the need to safeguard and promote the welfare of children.
209. Subsection (5) requires any person exercising a function of the Director to have regard to any guidance issued by the Secretary of State for the purpose of subsection (4).
210. Subsection (6) provides that, for the purposes of this section, "children" means persons who are under the age of 18.
211. Subsection (7) provides that any reference to the Immigration Acts in an enactment other than the Act includes this section.
212. Subsection (8) repeals section 21 of the UKBA 2007, which imposes a duty on the Secretary of State to issue a code of practice designed to ensure that, in exercising its functions, the Border and Immigration Agency (now the UK Border Agency) takes appropriate steps to ensure that while children are in the UK they are safe from harm.

### ***Section 56: Repeals***

213. **Section 56** introduces the Schedule which sets out the extent to which current legislation is repealed by the provisions of the Act.

### ***Section 57: Extent***

214. Subject to certain exceptions set out in subsections (2) to (4), section 57 provides that the Act extends to England, Wales, Scotland and Northern Ireland and amendments, modifications and repeals effected by the Act have the same extent as the provisions to which they relate. Provisions, other than those of Part 1 (border functions) or section 53 (transfer of certain immigration judicial review applications), may be extended to any of the Channel Islands or the Isle of Man by Order in Council.

### ***Section 58: Commencement***

215. **Section 58** contains provisions relating to the coming into force of the Act. Subsections (2), (3)(a) and (4)(b) provide for specified provisions to come into force on such days as the Secretary of State by order appoints. Subsection (4)(a) provides for section 53 (transfer of certain immigration judicial review applications) to come into force on such day as the Lord Chancellor by order appoints. All other provisions come into force on the passing of the Act. Subsection (16) provides that before commencing section 52 (detention at ports in Scotland) the Secretary of State will consult the Scottish Ministers
216. **Section 58(9)** requires that the commencement order bringing into effect sections 39 to 41 will contain certain transitional provisions. These provisions are to ensure

*These notes refer to the Borders, Citizenship and Immigration Act 2009 (c.11) which received Royal Assent on 21 July 2009*

that people who apply for British citizenship before the earned citizenship provisions are commenced will be treated under the current law in respect of the outstanding application.

217. [Section 58\(9\)\(b\)](#) in conjunction with section 58(10) and (11) requires the order also to include transitional provisions for citizenship applications made by those with indefinite leave to remain on the date of commencement and those who – on that date - have submitted an application which is subsequently successful. The provisions must ensure that for a period of two years beginning with the date of commencement such persons can apply for British citizenship under the current law.
218. [Section 58\(12\)](#) distinguishes the commencement order to which (9) applies from an order commencing the regulation making provisions in sections 39 to 41 so that such an order can be made prior to the principal commencement order (which must include these transitional provisions).
219. Subsection (15) of section 58 provides that no order may commence section 53 (transfer of certain judicial review applications) unless the functions of the Asylum and Immigration Tribunal have been transferred under the Tribunals, Courts and Enforcement Act 2007.