

ILLEGAL MIGRATION BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled further amendments to the Illegal Migration Bill for Lords Committee stage. These amendments include two modified delegated powers. This supplementary memorandum explains why the modifications have been made and the justification for the procedure selected.

New clause “*Procedure for Tribunal Procedure Rules*”: Power to make Tribunal Procedure Rules for the purposes of sections 43 to 48 (appeals in relation to suspensive claims) of the Bill

Power conferred on: The Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Made affirmative procedure

Purpose of the power

1. Clause 48 of the Bill provides that Tribunal Procedure Rules must make certain provision (including an expedited timetable for appeals and applications) regarding the conduct of suspensive applications and appeals to the Upper Tribunal (UT) under the Bill. “Tribunal Procedure Rules” is a term defined in section 22 of the Tribunals, Courts and Enforcement Act 2007 (TCEA), whereby rules regarding the practice and procedure in the First-tier Tribunal and the UT are made by the Tribunal Procedure Committee (TPC) which is constituted under Part 2 of Schedule 5 to the TCEA. The procedure under which the TPC must make those rules is set out in Part 2 of Schedule 5 to the TCEA.
2. New clause “Procedure for Tribunal Procedure Rules” makes provision to the effect that, on the first occasion after the passing of the Illegal Migration Act that rules of practice and procedure are made regarding suspensive applications and appeals to the UT under the Bill, those may be made by the Lord Chancellor instead of by the TPC. The usual rule making preserve of the TPC is not affected beyond the first occasion on which those rules are made. This means that the power for the TPC to be the sole rule-making body remains after that first occasion, with the Lord Chancellor having no UT rule making power thereafter. Subsection (2) of the new clause requires that when making these first rules, the Lord Chancellor must consult the Senior President of Tribunals, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland.

Justification for taking the power

3. Subject to parliamentary approval, the Illegal Migration Bill is expected to receive Royal Assent in July 2023. The government intends to implement the Act as soon as practicable thereafter. The government recognises that the normal procedure for making tribunal procedure rules, whereby the TPC publicly consults on and formulates rules, is in place rightly in order to ensure functional separation between

the judiciary and government, and that the expertise of the TPC is a safeguard to ensure both the interests of individuals using the tribunals and the proper functioning of the tribunal. The government does not dispute the value of that safeguard, nor seek to diminish it. The only reason for this new clause is that the TPC has indicated it will not be able to draft the first rules in time for the commencement of the Bill in the autumn, in compliance with its usual procedure, including its consultation obligations, under the TCEA. Absent the power for the Lord Chancellor to make the first rules, and in the likely scenario that the TPC are not able to make such rules in time for commencement of the appeal provisions in the Bill, the existing Upper Tribunal procedure rules would not cover applications and appeals under the Bill, meaning that there would be significant uncertainty, and potential variability, in relation to the conduct of suspensive claims under the Bill until such time as the TPC could make rules. In particular, the expedited timetable envisaged by the Bill could not during that period of time be guaranteed.

4. The power for the Lord Chancellor to make the first rules of court, in place of the body that usual makes such rules, after the passing of an Act is not without precedent. It was used in Part 2 of Schedule 3 to the Justice and Security Act 2013 in relation to the first rules for closed material procedure. On that occasion, the reason, and justification, was, as with the same use of the equivalent power in this Bill, the urgency of the need to have functioning rules in place within a short period of time.
5. The government believes that the delegated power in the new clause is a proportionate means of achieving the aim of having functioning UT rules in place in time for the commencement of the Bill. The power is strictly limited to the first occasion on which rules are made, therefore the usual rule-making preserve of the TPC is only temporarily modified. Whilst the safeguard of the usual TPC expertise will in the first instance not be available, mitigations are that the input of the senior judiciary (including the Senior President of Tribunals who has UK wide jurisdiction over and responsibility for tribunals) will be sought before any rules are made by the Lord Chancellor, and the TPC will be able to refine or replace those rules as soon as they have time and capacity to do so.

Justification for the procedure

6. By virtue of subsection (7) of the new clause, regulations made under subsection (1) are subject to the made affirmative resolution procedure whereby the rules are made before being laid before Parliament, but cease to have effect at the end of the period of 40 days beginning on the day that the instrument is made unless, during that period, the instrument is approved by resolution of each House of Parliament. This enhanced level of parliamentary scrutiny, compared with the negative procedure which applies to rules made by the TPC, is considered appropriate given the divergence from the usual rule-making procedure. Short of detailed tribunal procedure rules being included in the face of the Bill, the affirmative provides the highest level of parliamentary scrutiny. To place detailed tribunal procedure rules on the face of the Bill would not be possible within the timescales for the passage of the Bill. Even if that were possible, it would be undesirable because it would reduce the flexibility to alter the rules quickly if needed and to keep the operation of the rules under ongoing review, and would be

inconsistent with the current status of the TPC as the permanent rule making body under normal circumstances.

Amendment to clause 51: Power to make procedure rules for the Special Immigration Appeals Commission for the purposes of section 2AA of the Special Immigration Appeals Commission Act 1997

Power conferred on: The Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Made affirmative procedure

Purpose of the power

7. Clause 51 provides for appeals against a decision to refuse a suspensive claim to be heard by the Special Immigration Appeals Commission (“SIAC”) rather than the Upper Tribunal where the decision is based on information that should not be disclosed in the public interest. Section 5 of the SIAC Act 1997 provides for the Lord Chancellor to make rules regarding the practice and procedure to be followed in relation to appeals under the 1997 Act. Section 5(9) of the 1997 Act provides that the draft affirmative procedure must be followed when making rules under section 5.
8. New clause 51(10) to (12), as inserted by the government amendment, makes provision to the effect that, on the first occasion after the passing of the Illegal Migration Act, rules regarding suspensive applications and appeals to the SIAC under the Bill are subject to the made affirmative procedure instead of the draft affirmative procedure. The usual rule-making preserve of the Lord Chancellor is not affected beyond the first occasion on which those rules are made.

Justification for taking the power

9. Subject to parliamentary approval, the Illegal Migration Bill is expected to receive Royal Assent in July 2023. The government intends to implement the Act as soon as practicable thereafter. The reason for amending the procedure for SIAC rules is to enable rules to be in place in time for commencement of the Bill in the autumn. This is strictly limited to the first occasion on which rules are made.

Justification for the procedure

10. By virtue of new subsections (10) to (12) of clause 51, regulations are subject to the made affirmative resolution procedure whereby the rules are made before being laid before Parliament, but cease to have effect at the end of the period of 40 days beginning on the day that the instrument is made unless, during that period, the instrument is approved by resolution of each House of Parliament. The government considers that temporary modification of the procedure is a proportionate means of achieving the aim of having functioning SIAC rules in place in time for the commencement of the Bill.

Home Office / Ministry of Justice
25 May 2023