

Supplementary Delegated Powers Memorandum – Nationality and Borders Bill

1. This memorandum, supplementary to the Delegated Powers Memorandum published on 10 December 2021, has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Nationality and Borders Bill (“the Bill”).
2. This memorandum identifies a further two provisions of the Bill that confer powers to make delegated legislation. It also expands on the nature of the duties imposed on the Tribunal Procedure Committee (TPC) to exercise its existing powers and the reason for the Parliamentary procedure selected.

ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 2: Historical inability of unmarried fathers to transmit citizenship

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument – Amendment to the British Nationality General Regulations 2003

Parliamentary Procedure: Negative

Context and Purpose

3. Section 17D of the British Nationality Act 1981 provides for a person to be registered as a British overseas territories citizen if they would have acquired that status automatically after commencement of the British Nationality Act 1981, had their parents been married. Section 17D(3) provides that a person under 18 should not be registered unless the parents’ consent has been signified “in the prescribed manner”.

Justification for taking the power

4. The British Nationality (General) Regulation 2003 set out the general and procedural requirements for British nationality applications, and the specific evidential requirements for each provision. Regulation 14 currently sets out the manner of signifying parental consent to registration for the purposes of other applications:

14. Where a parent, in pursuance of section 3(5)(c) or 4D(3) or 4G(3) of the Act, consents to the registration of a person as a British citizen under subsection 3(5) or section 4D or 4G, the consent shall be expressed in writing and signed by the parent.

5. Section 17D(3) will need to be added to that section.

Justification for the procedure

6. This approach is consistent with existing/previous legislation. The Home Secretary has the power (at section 41 of the British Nationality Act 1981) to prescribe in relation to applications for registration and naturalisation, which is done in the 2003 Regulations. It is therefore appropriate that those Regulations are amended to include the provisions inserted by Clause 2.

Clause 18(2): Asylum or human rights claim: damage to claimant's credibility

Power conferred on: Tribunal Procedure Committee/The Lord Chancellor

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

7. This clause imposes a duty on the Tribunal Procedure Rules Committee to introduce rules that require the First-tier Tribunal, where acting as the deciding authority, to include a statement of reasons within any decision that disposes of proceedings, explaining whether the claimant has engaged in behaviour to which this clause applies, and, where it considers the claimant has engaged in such behaviour, how it has taken account of the behaviour in making its decision.
8. This clause also provides that rules made under section 5 of the Special Immigration Appeals Commission Act 1997 must extend the same duty to the Special Immigration Appeals Commission (SIAC) where it is acting as the deciding authority.

Justification for taking the power

9. These rules are essential for clause 18 to become fully integrated within judicial decision-making and for the claimant and the Home Office to be able to understand clearly in all cases how the First-tier Tribunal or SIAC has addressed claimant behaviour to which this clause applies. This will assist in improving decision-making at all levels and ensure that clause 18 has the impact the Government intended.
10. It is right that the Tribunal Procedure Committee and SIAC should determine the wording of procedure rules that impose a duty on the First-tier Tribunal and SIAC. This will allow for rules to be created that have the required effect, whilst ensuring that those who apply them i.e. judicial decision-makers, have full opportunity to consider how such

rules will operate in practice and interact with existing duties and requirements.

Justification for the procedure

Tribunal Procedure Rules

11. It is considered that these are matters properly dealt with in Tribunal Procedure Rules and that, therefore, the procedure prescribed for Tribunal Procedure Rules by paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007 is appropriate.

SIAC Procedure Rules

12. It is considered appropriate to use the existing rule-making power in section 5 for this purpose, and therefore to use the standard Parliamentary procedure in respect of rules for the Special Immigration Appeals Commission.

Clause 21(5): Late compliance with priority removal notice: damage to credibility

Power conferred on: Tribunal Procedure Committee/The Lord Chancellor

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

13. This clause imposes a duty on the Tribunal Procedure Rules Committee to introduce rules that require the Upper Tribunal, when acting in the circumstances as set out in subsection 9 of this clause, to include a statement of reasons within any decision that disposes of proceedings, explaining whether the claimant has engaged in behaviour to which this clause applies, and, where it considers the claimant has engaged in such behaviour, how it has taken account of the behaviour in making its decision.
14. This clause also provides that rules made under section 5 of the Special Immigration Appeals Commission Act 1997 must extend the same duty to the Special Immigration Appeals Commission (SIAC) where it is making a decision that disposes of proceedings.

Justification for taking the power

15. These rules are essential for clause 21 to become fully integrated within judicial decision-making and for the claimant and the Home Office to be able to understand clearly in all cases how the Upper Tribunal or SIAC has addressed claimant behaviour to which this clause applies. This will assist in improving decision-making at all

levels and ensure that clause 21 has the impact the Government intended.

16. It is right that the Tribunal Procedure Committee and SIAC should determine the wording of procedure rules that impose a duty on the Upper Tribunal and SIAC. This will allow for rules to be created that have the required effect, whilst ensuring that those who apply them i.e. judicial decision-makers, have full opportunity to consider how such rules will operate in practice and interact with existing duties and requirements.

Justification for the procedure

Tribunal Procedure Rules

17. It is considered that these are matters properly dealt with in Tribunal Procedure Rules and that, therefore, the procedure prescribed for Tribunal Procedure Rules by paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007 is appropriate.

SIAC Procedure Rules

18. It is considered appropriate to use the existing rule-making power in section 5 for this purpose, and therefore to use the standard Parliamentary procedure in respect of rules for the Special Immigration Appeals Commission.

Clause 22: Priority removal notices: expedited appeals

Power conferred on: Tribunal Procedure Committee

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

19. Clause 22(4) imposes a duty on the Tribunal Procedure Committee to make Tribunal Procedure Rules ensuring that expedited appeals are brought and determined more quickly in the Upper Tribunal than an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 would, ordinarily, be brought and determined in the First-tier Tribunal.
20. Moreover, Clause 22(5) requires the Tribunal Procedure Committee to include in the rules provision to allow the Upper Tribunal to order an expedited appeal to continue as an appeal to the First-tier Tribunal and be transferred there, when satisfied that it is the only way to secure that justice is done in the case of a particular expedited appeal.

Justification for taking the power

21. The provision acts as a duty to exercise a power which the Tribunal Procedure Committee already had, so as to secure the provisions specified. Since these are matters which are within the power to make Tribunal Procedure Rules, the Government does not consider that it would be appropriate to legislate in statute to amend the Rules to achieve the same effect.

Justification for the procedure

22. In accordance with paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007, procedural rule changes are to be contained in a statutory instrument and subject to negative procedure. The provisions which the rules are required by this clause to contain are within the general power to make such rules, and the Government does not consider there to be any reason to depart from the normal procedure for making such rules.

Clause 23: Expedited appeals: joining of related appeals

Power conferred on: Tribunal Procedure Committee

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

23. Clause 23(6) imposes a duty on the Tribunal Procedure Committee to secure that the procedural rules provide that an “expedited related appeal” is consolidated or heard alongside an expedited appeal in the Upper Tribunal.
24. Furthermore, Clause 23(7) requires the Tribunal Procedure Committee to include in the rules provision to allow the Upper Tribunal to order an expedited related appeal to continue as an appeal to the First-tier Tribunal and be transferred there, when satisfied that it is the only way to secure that justice is done in the case of a particular expedited related appeal.

Justification for taking the power

25. The provision acts as a duty to exercise a power which the Tribunal Procedure Committee already had, so as to secure the provisions specified. Since these are matters which are within the power to make Tribunal Procedure Rules, the Government does not consider that it would be appropriate to legislate in statute to amend the Rules to achieve the same effect.

Justification for the procedure

26. In accordance with paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007, procedural rule changes are to be contained in a statutory instrument and subject to the negative procedure. The provisions which the rules are required by this clause to contain are within the general power to make such rules, and the Government does not consider there to be any reason to depart from the normal procedure for making such rules.

Clause 49(1)(b): Persons subject to immigration control: referral or assessment by local authority etc

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

27. The age of a person arriving in the UK is normally established from the documents with which they have travelled. Many who claim to be under 18 years old do not have any definitive documentary evidence to support their claimed age. Whilst many are clearly children, for some it is unclear and there is a need to assess their age.
28. There is no single technique, or combination of techniques, that can determine an individual's age with precision. However, where an age dispute arises of a person subject to immigration control, a decision must be made on their age.
29. Under the UK's existing framework, there are a number of incentives for adults to claim to be children. Those treated as children benefit in a number of respects, including the accommodation and support to which they may be entitled, the procedural and substantive treatment of their claims, the arrangements that would need to be made to secure their removal from the UK (where they do not establish a lawful basis to remain) and the question of whether or not they can be held in immigration detention.
30. As part of its wider package of age assessment reforms to address the current weaknesses in the age assessment system, the Nationality and Borders Bill establishes a decision-making function, referred to as the National Age Assessment Board (NAAB). The NAAB will be able to conduct age assessments on age-disputed persons, including where they are referred by a local authority.

31. Clause 49(1)(b), introduces a power for the Secretary of State to make regulations specifying that a public authority may make age assessment referrals to the NAAB.

Justification for taking the power

32. The ambition in establishing the NAAB is to create a dedicated team that develops significant expertise in the field of age assessment. While the vast majority of age assessments undertaken by the NAAB will be conducted upon referral from a local authority, it is necessary to provide flexibility to enable other public authorities to refer age assessment cases to the NAAB in the event that age assessments become necessary for the delivery of their official functions. It is considered appropriate to leave the specification of additional public authorities who may utilise the expertise of the NAAB to secondary legislation, to enable additional authorities to be added over time, following engagement with such bodies.

Justification for the procedure

33. The level of parliamentary scrutiny proposed is that the regulations are subject to negative procedure. It is considered that the negative procedure is appropriate for these regulations, as they are limited to specifying an additional public authority who can make age assessment referrals to the NAAB. The specification of additional public authorities within regulations would only occur following engagement with such authorities and, therefore, the exercise of this power is not anticipated to be controversial.

Clause 76: Tribunal charging power in respect of wasted resources

Power conferred on: Tribunal Procedure Committee

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

34. This clause amends the Tribunals, Courts and Enforcement Act 2007 (TCEA) in two respects. The first, which does not delegate legislative power, inserts a new section 25A which provides that the First-tier Tribunal and Upper Tribunal may order a party to pay a charge in respect of wasted or unnecessary tribunal costs incurred due to a party's unreasonable actions, broadening the Tribunal's power in relation to costs which at present under section 29 of the TCEA is limited to the legal costs of the parties as between themselves.

35. The second, which extends a delegated power to legislate, inserts into Schedule 5 to the TCEA a new paragraph 11A which provides that Tribunal Procedure Rules may make provision for regulating matters relating to the charging of amounts by the Tribunal under the power in the new section 25A, which may in particular include provision for scales of amounts which may be charged (corresponding to the existing power under paragraph 12 of Schedule 5 to prescribe scales of costs (or, in Scotland, expenses) as between parties).

Justification for taking the power

36. The matters which the extended power allows to be covered in Tribunal Procedure Rules are very much the sort of matters which are the province of rules, covering practice and procedure, and in particular the possibility of scales of charges akin to the scales of costs for which Tribunal Procedure Rules may already make provision. It would in the Government's view not be appropriate to fix such matters in statute, requiring further statutory amendment to make any future adjustment.

Justification for the procedure

37. The Government considers that there is nothing in the nature of the extension of the power to make Tribunal Procedure Rules which would justify departure from the general position that the rules of court and rules of procedure for tribunals should be subject to negative resolution procedure; and therefore considers that the proposed level of scrutiny is appropriate.

Clause 77: Tribunal Procedure Rules to be made in respect of costs orders etc

Power conferred on: Tribunal Procedure Committee

Power exercised by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

38. This clause imposes a duty on the Tribunal Procedure Committee to make Tribunal Procedure Rules in the First-tier and Upper Tribunal Immigration and Asylum Chamber which ensure that judicial consideration will be given to the making of a charge or cost order where specified events have happened. These rules must specify that there is a rebuttable presumption that certain conduct is to be treated as unreasonable and triggers the consideration of a costs order.

Justification for taking the power

39. The provision acts as a duty to exercise a power which the Tribunal Procedure Committee already had, so as to secure the provisions specified. Since these are matters which are within the power to make Tribunal Procedure Rules, the Government does not consider that it would be appropriate to legislate in statute to amend the Rules to achieve the same effect.

Justification for the procedure

40. In accordance with paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007, procedural rule changes are to be contained in a statutory instrument and subject to the negative procedure. The provisions which the rules are required by this clause to contain are within the general power to make such rules, and the Government does not consider there to be any reason to depart from the normal procedure for making such rules.