



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 2

### CRIMINAL LAW

#### *Genocide, crimes against humanity and war crimes*

#### **32 Genocide, crimes against humanity and war crimes: UK residents**

- (1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.
- (2) After section 8, insert—

#### **“8A Meaning of “United Kingdom national” and “United Kingdom resident”**

- (1) In this Part—
  - “United Kingdom national” means—
    - (a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,
    - (b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or
    - (c) a British protected person within the meaning of that Act,
  - “United Kingdom resident” means a person who is resident in the United Kingdom.
- (2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—
  - (a) an individual who has indefinite leave to remain in the United Kingdom,

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- (b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,
  - (c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,
  - (d) an individual who has made an asylum claim, or a human rights claim, which has been granted,
  - (e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,
  - (f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—
    - (i) the application or claim has been granted, or
    - (ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),
  - (g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,
  - (h) an individual—
    - (i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,
    - (ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and
    - (iii) who is in the United Kingdom,
  - (i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),
  - (j) an individual who is detained in lawful custody in the United Kingdom.
- (3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—
- (a) the periods during which the individual is, has been or intends to be in the United Kingdom,
  - (b) the purposes for which the individual is, has been or intends to be in the United Kingdom,
  - (c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and
  - (d) whether the individual has an interest in residential property located in the United Kingdom.
- (4) In this section—  
 “asylum claim” means—

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- (a) a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,
- (b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

“Convention rights” means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

“detained in lawful custody” means—

- (a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,
- (b) remanded in or committed to custody by an order of a court,
- (c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),
- (d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),
- (e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,
- (f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

“human rights claim” means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

“serious harm” has the meaning given by article 15 of Council Directive [2004/83/EC](#) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

- (5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.
- (6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).”.

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- (3) In section 28(1)(interpretation), the definitions of “United Kingdom national” and “United Kingdom resident” are repealed.

#### Commencement Information

**II** S. 32 in force at 28.3.2011 by S.S.I. 2011/178, art. 2, Sch.

### 33 Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

#### “9A Retrospective application of certain offences

- (1) Section 1 of this Act applies to acts committed on or after 1 January 1991.
- (2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.
- (3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.
- (4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.
- (5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—
  - (a) to conduct engaged in on or after 1 January 1991, and
  - (b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.
- (6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—
  - (a) conduct engaged in before 17 December 2001, or
  - (b) conduct engaged in on or after that date which was ancillary to an act or conduct that—
    - (i) was committed or engaged in before that date, and
    - (ii) would not constitute a relevant offence but for this section,
 unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.
- (7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—
  - (a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and
  - (b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.
- (8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in

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subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

- (9) In this section, “relevant offence” means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

### **9B Provision supplemental to section 9A: modification of penalties**

- (1) This section applies in relation to—
- (a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,
  - (b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),
  - (c) an offence ancillary to an offence within paragraph (a) or (b) above.
- (2) Section 3(5) of this Act has effect in relation to such an offence as if for “30 years” there were substituted “ 14 years ”.”.

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#### **Commencement Information**

**I2** S. 33 in force at 28.3.2011 by S.S.I. 2011/178, art. 2, Sch.

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