These notes refer to the Crime and Courts Act 2013 (c.22) which received Royal Assent on 25 April 2013

CRIME AND COURTS ACT 2013

EXPLANATORY NOTES

BACKGROUND

Part 3: Miscellaneous and General
54:

54: Deportation on national security grounds: appeals

71. The framework for appeals against a decision to make a deportation order, and other immigration decisions, is set out for most cases in Part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Section 82(1) of the 2002 Act provides that where an 'immigration decision' is made in respect of a person he may appeal to the Tribunal. Section 82(2) defines 'immigration decision' for the purposes of section 82(1). A decision to make a deportation order is an immigration decision by virtue of section 82(2)(j). Section 82(3A), however, provides that section 82(2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007 ("the 2007 Act"); but a decision that section 32(5) applies is itself an immigration decision and therefore appealable. Section 32 of the 2007 Act requires the Secretary of State to make a deportation order in respect of 'foreign criminals' as defined in section 32(1), provided none of the exceptions set out in section 33 of the 2007 Act applies. Deportation orders made under section 32(5) of the 2007 Act are known as 'automatic deportation orders'.

72. Several sections in Part 5 of the 2002 Act qualify or restrict the right of appeal set out in section 82. In particular, section 92 makes provision for certain appeals to be in-country and therefore suspensive of removal, and for other appeals to be out of country and therefore non-suspensive of removal. Section 92(2) provides that an appeal under section 82(2)(j) against a decision to make a deportation order will be in-country, but an appeal against a refusal to revoke a deportation order need not be. An appeal against a decision that section 32(5) of the 2007 Act applies will not be in-country unless it is made in the circumstances described in section 92(4). Section 92(4)(a) provides that an appeal against any immigration decision will be in-country, if the appellant has made an asylum claim, or a human rights claim, while in the UK.

73. If an appeal falls to be in-country by virtue of section 92(4)(a), section 94(2) provides that the Secretary of State may nevertheless certify that the appellant's asylum or human rights claim is 'clearly unfounded'. The effect of a certificate under section 94(2) is that the appeal in question will not be in-country or suspensive of removal as a result of section 92(4)(a). A certificate under section 94(2) may not be appealed, but is amenable to challenge by way of judicial review.

74. An appeal against a deportation order which states that it is made in accordance with section 32(5) of the 2007 Act may therefore be rendered non-suspensive by a certificate under section 94 of the 2002 Act, and such a certificate could be subject to challenge by way of judicial review.

75. Section 97 of the 2002 Act provides for the Secretary of State to certify that an immigration decision was taken wholly or partly in the interests of national security

or of the relationship between the UK and another country, or that an immigration decision was taken wholly or partly in reliance on information which should not be made public in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest. Section 97A of the 2002 Act provides for the Secretary of State to certify that a person's deportation would be in the interests of national security. Certificates made under section 97 or section 97A have, among other consequences, the effect that appeals may not be brought or continued under Part 5 of the 2002 Act.

76. Section 2(1) of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provides an alternative right of appeal when appeals under Part 5 of the 2002 Act are prevented or discontinued by virtue of certificates under section 97 or 97A of the 2002 Act. Section 2(2) of the 1997 Act then provides that certain provisions in the 2002 Act shall apply, with any necessary modifications, in relation to an appeal against an immigration decision under that section as they apply in relation to an appeal under section 82(1) of the 2002 Act. Section 2(2)(c) of the 1997 Act lists sections 78 and 79 of the 2002 Act. This means that when an immigration decision, including a decision to make or not to revoke a deportation order, is subject to a certificate under section 97 of the 2002 Act, the subject of the decision cannot be removed (section 78), and, where relevant, no deportation order can be made against him (section 79). Section 78(4) restricts the prohibition on removal so that it only applies if the appeal is in-country as a result of section 92 and is still pending, as per the definition in section 104 of the 2002 Act. Section 2(5) of the 1997 Act confirms that an appeal may only be brought under that section in-country if it could be brought or continued in-country under section 82(1) of the 2002 Act. This means that, in respect of most national security immigration decisions, including refusals to revoke a deportation order, it is possible to render appeals out of country using section 94 of the 2002 Act.

77. Section 97A of the 2002 Act is subject to amendment by section 54 of this Act. Prior to amendment, section 97A(2)(c) made alternative provision about the circumstances in which an appeal against a decision to make a deportation order in national security cases certified under section 97A(1) ("a certified decision") would be in-country. Section 97A(2)(a) provided that section 79 will not apply to a certified decision. This means the Secretary of State could make a deportation order while an appeal is still pending. This would have the effect of cancelling the person's leave to enter or remain. Section 97A is the only mechanism that would allow a deportation order to be made, and therefore a person to be deported, while their appeal is pending in a national security case.

78. Even in cases certified under section 97A in its original form, section 78 may have continued to prevent removal in relation to appeals which must be in-country as a result of section 92. But section 97A(2)(c)(i) provided that section 92 of the 2002 Act would not apply to a certified decision by virtue of section 92(2) to 92(3D) of the 2002 Act. This meant that an appeal against a certified decision was not automatically appealable in-country. Section 97A(2)(c)(ii) of the 1997 Act provided that section 92 of the 2002 Act would not apply to a certified decision by virtue of section 92(4)(a) of the 2002 Act in respect of an asylum claim. Section 97A(2)(c)(iii), however, provided that section 92(4)(a) of the 2002 Act was capable of applying to an appeal against a certified decision by reference to a human rights claim, unless the Secretary of State further certified that the removal of the person from the UK would not breach the UK's obligations under the ECHR. Such certification was subject to an in-country appeal as a result of section 97A(3). The effect of these provisions was that there would be a suspensive substantive appeal on the human rights challenge to a deportation order, but the challenge to the national security case would be out of country.

79. There have therefore been three broadly distinct sets of arrangements for making and challenging deportation orders: first, ordinary deportation orders, which are subject to an appeal with automatic suspensive effect; second, deportation orders made under section 32(5) of the 2007 Act, in which appeals may be non-suspensive if any asylum or human rights claim is certified as clearly unfounded; and, third, national security

deportation orders, which may be certified under section 97A(2)(c)(iii) of the 2002 Act. Section 54, explained in detail below, amends the third of these sets of arrangements.