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

Section 51: Immigration cases: appeal rights; and facilitating combined appeals

66. Section 47 of the Immigration, Asylum and Nationality Act 2006 provides for the Secretary of State to make a decision that a person may be removed from the United Kingdom whilst the person has their leave extended so that they can bring an appeal against a decision on the variation, curtailment or revocation of their leave. Making both decisions and serving them simultaneously enables the two appeals to be considered at the same time. However, the Upper Tribunal concluded in the cases of both *Ahmadi*[1] and *Adamally and Jaferi*[2] that secondary legislation prevents the simultaneous service of these two decisions because the removal decision cannot be made until written notice of the decision to refuse to vary a person's leave to remain has been given to that person. To ensure section 47 of the 2006 Act remains effective, section 51 clarifies when the decision to remove can be made, so that written notice of this decision and the decision to refuse to vary, or to curtail or revoke, leave may be given in the same document or at the same time.

Section 52: Appeals against refusal of entry clearance to visit the UK

67. Section 4 of the Immigration Asylum and Nationality Act 2006 substituted a new version of section 88A for sections 88A, 90 and 91 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). Under section 88A(1)(a), which was commenced on 9 July 2012, a person may not appeal against a refusal of an application for entry clearance as a visitor unless the application was made for the purpose of visiting a person of a class or description prescribed in regulations. The Immigration Appeals (Family Visitor) Regulations 2012[3] prescribes the class or description of family members and includes, for example, where the applicant is the spouse, civil partner, father, mother, son or daughter of the person in the UK being visited. In July 2011, the Home Office published a consultation document entitled "Family Migration: A Consultation"[4]. The consultation sought views on a wide range of family migration proposals, including whether the full right of appeal for family visitors should be retained. The response to the consultation was published on 13 June 2012[5]. In regards to full appeal rights for family visitors it was decided first to restrict (by narrowing the description of the person to be visited and introducing a sponsor status requirement) and then to remove the full right of appeal altogether. Applicants continue to be able to appeal on European Convention on Human Rights ("ECHR") and race discrimination grounds. The first stage was implemented through regulations made under section 88A

1 http://www.bailii.org/uk/cases/UKUT/IAC/2012/00147_ukat_iac_2012_ja_afghanistan.html
2 http://www.bailii.org/uk/cases/UKUT/IAC/2012/00414_ukut_iac_2012_ma_sj_srilanka.html
3 S.I. 2012/1532
4 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary
5 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/cons-fam-mig.pdf

of the 2002 Act[6], which was further commenced for this purpose[7]; section 52 of the Act gives effect to the second stage of these proposals.

Section 53: Restriction on right of appeal from within the United Kingdom

68. The power to exclude a foreign national from the UK is a prerogative power and the decision to do so must be made personally by the Secretary of State (normally the Home Secretary). The Secretary of State will take such a decision if information presented to her leads her to conclude that the exclusion of a person from the UK would be conducive to the public good. The exclusion decision itself is a direction, provided to officials, requiring a mandatory refusal of all applications for entry clearance or entry to the UK courtesy of paragraph 320(6) of the Immigration Rules[8].

69. In March 2011 the Court of Appeal in the case of *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333 upheld the decision of Mr Justice Collins in the High Court that, despite being subject to an exclusion decision, the claimant had an in country right of appeal against the order of the Secretary of State to cancel his leave to enter under article 13(7)(a) of the Immigration (Leave to Enter and Remain) Order 2000[9]. The claimant had originally been granted refugee status and indefinite leave to enter the UK in 2001. The claimant had no right of appeal against the exclusion decision itself, but he did have a right of appeal under section 82(2)(e) of the 2002 Act, which gives a statutory right of appeal against a variation of a person's leave to enter or remain in the UK if, when the variation takes effect, the person has no leave to enter or remain. Under section 92(2) of the 2002 Act, this was an in country right of appeal, and under section 3D of the Immigration Act 1971 ("the 1971 Act"), a person has continuing leave while an appeal could be brought under section 82(1) of the 2002 Act. The Court of Appeal found that section 3D of the 1971 Act did not provide a power to exclude a person from entering the UK to exercise an in country right of appeal, and that the claimant had a right to return to the UK from abroad to exercise that right.

70. To ensure exclusion decisions remain effective, section 53 provides a certification power for the Secretary of State to remove the in country right of appeal against the decision of a Secretary of State to cancel an individual's leave to enter or remain in the UK on the grounds that the individual's presence in the UK would not be conducive to the public good.

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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'.

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6 The Immigration Appeals (Family Visitor) Regulations 2012 (S.I. 2012/1532)
7 The Immigration, Asylum and Nationality Act 2006 (Commencement No. 8 and Transitional and Saving Provisions) (Amendment) Order 2012 (S.I. 2012/1531)
8 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/
9 S.I. 2000/1161

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.

Section 56: Drugs and Driving

80. The Misuse of Drugs Act 1971 ("MD Act") prohibits the production, import, export, possession and supply of "controlled drugs" (subject to regulations made under the MD Act). The definition of the term controlled drugs is set out in section 2 of the MD Act. However, it is not an offence under the MD Act to have a controlled drug in your body. Also in relation to drugs, section 4 of the Road Traffic Act 1988 ("the 1988 Act") makes it a criminal offence to drive, or be in charge of, a mechanically propelled vehicle when under the influence of drink or drugs. The difficulties involved in proving impairment due to drugs means that section 4 of the 1988 Act is not often used in drug driving cases. While section 5 of the 1988 Act makes it a separate offence to drive or be in charge of a motor vehicle with an alcohol concentration above the prescribed limit, no similar offence exists for drugs.

81. In December 2009, Sir Peter North CBE QC was appointed, by the then Secretary of State for Transport, to conduct an independent review of the law on drink driving and drug driving. Sir Peter North's *Report of the Review of Drink and Drug Driving Law* was published in June 2010 and made a variety of recommendations in regards to drink and drug driving, including that further consideration should be given to introducing a new specific offence of driving or being in charge of a motor vehicle with a concentration of a controlled drug above a specified limit. Following Sir Peter North's report the Transport Select Committee published, in December 2010, a report on drink and drug driving law (HC 460). The Committee favoured the adoption of a "zero-tolerance" offence for illegal drugs which are known to impair driving.

82. The Secretary of State for Transport made a written ministerial statement on 21 March 2011 (House of Commons, Official Report, column 44WS to 46WS) which announced the publication of the Government's response to the reports by Sir Peter North and the Transport Select Committee on Drink and Drug Driving (CM 8050). The response endorsed Sir Peter North's recommendation that the case for a new offence relating to

drug driving should be examined further. Section 56 of the Act provides for such an offence.

Section 57: Public Order Offences

83. It is an offence under section 5 of the Public Order Act 1986 to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, within the sight or hearing of a person likely to be caused harassment, alarm or distress. It is also an offence under section 5 to display any writing or other visible representation which is threatening, abusive or insulting and likely to cause harassment, alarm or distress.

84. Section 57, which was inserted by a non-Government amendment passed during Lords Report stage, removes the word 'insulting' from section 5, thereby decriminalising insulting words, behaviour etc in the hearing or sight of someone likely to be caused harassment, alarm or distress.