EXPLANATORY MEMORANDUM TO

THE ASYLUM (DESIGNATED STATES) ORDER 2010

2010 No. 561

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order adds Republic of Korea (South Korea) and Republic of Kosovo (Kosovo) to the list of states designated as generally safe in the context of asylum and human rights claims. The Secretary of State considers that South Korea and Kosovo are generally safe and by this order adds them to the list of designated countries. Kosovo was previously designated as a province of Serbia in April 2003. Kosovo became an independent state on 17 February 2008 and as a consequence it is necessary to add it to the list in its own right.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 94 of the 2002 Act is concerned with appeal rights in respect of asylum and human rights claims that are clearly unfounded.

4.2 Section 94(2) provides that a person may not rely on having made an asylum or human rights claim in order to appeal from within the United Kingdom if the Secretary of State certifies the asylum or human rights claim as clearly unfounded.

4.3 Section 94(3) provides that where the Secretary of State is satisfied that a person is entitled to reside in a State listed in subsection (4) he shall issue a certificate under subsection (2) unless satisfied that the claim is not clearly unfounded.

4.4 Subsection (5) confers an order-making power on the Secretary of State to add a State or part of a State to the list in subsection (4) provided certain conditions are met. By virtue of section 112(4), any such order is subject to the affirmative resolution procedure.

4.5 Subsection (5) sets out that to add a State or part to the list in subsection (4), the Secretary of State must be satisfied that:

"(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and

(b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

4.6 In deciding whether to add a State or part to the list Section 94(5D) requires the Secretary of State to have regard to:

(a) all the circumstances of the State or part (including its laws and how they are applied), and

(b) information from any appropriate source (including other member States and international organisations).

4.7 Section 94(6) enables the Secretary of State by order (under the negative resolution procedure – section 112(5) refers) to remove from the list in subsection (4) a State or part added under subsection (5).

4.8 Ten States were originally listed in subsection (4) on the face of the 2002 Act, namely:

(a) the Republic of Cyprus

(b) the Czech Republic

(c) the Republic of Estonia

(d) the Republic of Hungary

(e) the Republic of Latvia

(f) the Republic of Lithuania

(g) the Republic of Malta

(h) the Republic of Poland

(i) the Slovak Republic

(j) the Republic of Slovenia

These States were removed from the list on 1 October 2004 when section 27(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was commenced. These removals flowed from the accession of those States to the European Union.

4.9 Twenty four States are currently listed in subsection (4). They comprise five added by the Asylum (Designated States) Order 2003 (S.I 2003/970); namely:

(k) the Republic of Albania

(n) Jamaica

(o) Macedonia

(p) the Republic of Moldova

a further five added by the Asylum (Designated States) (No.2) Order 2003 (S.I 2003/1919); namely:

(s) Bolivia

(t) Brazil

(u) Ecuador

(w) South Africa

(x) Ukraine

one added by the Asylum (Designated States) Order 2005 (S.I 2005/330); namely:

(y) India

three added by the Asylum (Designated States) (No 2) Order 2005 (S.I 2005/3306); namely:

(z) Mongolia

(aa) Ghana (in respect of men)

(bb) Nigeria (in respect of men).

Ten added by the Asylum (Designated States) Order 2007 (S.I 2007/2221); namely:

(cc) Bosnia Herzegovina

(dd) Gambia (in respect of men)

(ee) Kenya (in respect of men)

(ff) Liberia (in respect of men)

(gg) Malawi (in respect of men)

(hh) Mali (in respect of men)

(ii) Mauritius

(jj) Montenegro

(kk) Peru

(ll) Sierra Leone (in respect of men)

4.10 Bangladesh and Sri Lanka were added to the list by the Asylum (Designated States) (No.2) Order 2003 (S.I 2003/1919) and then removed by the Asylum (Designated States)

(Amendment) Order 2005 (S.I 2005/1016) and the Asylum (Designated States) (Amendment) (No.2) Order 2006 (S.I 2006/3275) respectively.

4.11 Bulgaria and Romania, which had been added to the list by the Asylum (Designated States) Order 2003 (S.I 2003/970), were removed by the Asylum (Designated States) (Amendment) Order 2006 (S.I 2006/3215) with effect from 1 January 2007 following those States' accession to the European Union.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister of State for the Home Department, Phil Woolas, has made the following statement regarding Human Rights:

In my view the provisions of the Asylum (Designated States) Order 2010 are compatible with the Convention rights.

7. Policy background

- **What is being done and why**

7.1 The purpose of section 94 of the 2002 Act is to ensure that where an individual makes an asylum or human rights claim that is clearly unfounded they will not be able to suspend their removal from the UK by virtue of pursuing such a claim by way of an in country appeal.

7.2 The inclusion of a list of States does not alter the core feature of the section, namely that a right of appeal in the United Kingdom can be denied only where an asylum or human rights claim is considered, after an individual assessment, to be clearly unfounded. However, inclusion of a State on the list does have an effect by obliging, as opposed to permitting, the Secretary of State to certify a claim which is clearly unfounded, unless satisfied that it is not.

7.3 The list balances the need to retain individual consideration of claims with the need to operate an effective and credible asylum system that deals swiftly and firmly with unfounded claims. The Government places considerable importance on reducing the number of unfounded asylum claims and section 94 and the orders made under it contribute towards that aim.

7.4 The number of asylum and human rights applications made by those covered by the designations listed in this Order was approximately 75 in 2007, 80 in 2008 and 25 in 2009 (January-Sept). The Secretary of State considers that designation of these States will contribute towards reducing the number of unfounded asylum and human rights claims which are made by those entitled to reside in these States. Full statistics are in the attached table.

7.5 The Secretary of State is satisfied that the States listed in this Order meet the conditions set out in section 94(5) in respect of everyone entitled to reside in those States. Country information

from a wide range of publicly available sources has been considered as part of the designation of the States listed in the Order as required by section 94(5D) (which was enacted by the Asylum (Procedures) Regulations 2007 (S.I 2007/3187) in order to comply with the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status). In particular, the country information used looked at the circumstances of the State and the application of the laws in that State. Country information considered has included information available from the United Nations High Commission for Refugees (UNHCR), human rights organisations, inter-governmental organisations, NGOs, news media and the Foreign and Commonwealth Office.

8. Consultation outcome

8.1 The Independent Advisory Group on Country Information (IAGCI) was consulted on the UKBA country information considered by the Secretary of State when assessing whether the States listed in this Order met the test for designation. The IAGCI was established by the Chief Inspector of UK Border Agency to make recommendations to him about the content of material produced by the UK Border Agency's Country of Origin Information Service.

8.2 The IAGCI commissioned and considered expert reviews of the country information for the Republic of Kosovo and the Republic of Korea. On 22 October 2009, the Chair of the IAGCI confirmed that it had completed its review and was satisfied with the country information for these states. The review papers will be posted on the Chief Inspector's website at: http://www.ociukba.homeoffice.gov.uk/independent-advisory-group/

9. Guidance

9.1 Kosovo and Korea will be included in the list of countries for which claims from whose nationals should be considered for certification under section 94 of the NIA Act 2002, details of which are contained in Asylum Policy Instructions/ Handling claims. This information is also published on the UK Border Agency web site.

9.2 In addition we shall notify the UKBA units responsible for the Fast Track process and for Appeals. We shall provide guidance to the Foreign & Commonwealth Office to inform the UK embassies in Kosovo and South Korea.

10. Impact

10.1 The impact on business, charities or voluntary bodies is expected to be negligible if there is any impact at all on these sectors.

10.2 The impact on the public sector is not expected to be significant.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The initial impact from the first countries to be designated under the 2002 Act was that intake from these nationalities fell by 94% in the first year. These countries later became members of the EU and the NSA designation ended; however we have consistently seen intake fall for those countries designated under the 2002 Act by between 50 and 30 %; except in the period June 2007 to March 2009 when it increased by 27%, but this was in the context of an overall increase in asylum intake of 95%.

12.2 The inclusion of a state not only helps to discourage unfounded claims for asylum, but also prevents unsuccessful asylum seekers from attempting to frustrate their removal from the UK by unnecessarily prolonging the appeals process. This impacts upon the public purse by a reduction in support provided to asylum seekers and boosts public confidence in the overall asylum system.

12.3 Kosovo was previously designated in 2003 before its independence from Serbia, and claims have been certified under the provisions of the 2002 Act. Consequently we would anticipate the impact of this Order to be a fall in intake of Kosovan and Korean nationals by under 10%.

12.4 The Immigration Research and Statistics team within Home Office Statistics collates and verifies immigration statistics on a quarterly basis, which are published on the UK Border Agency web site. This team monitors and collates information on asylum intake, removals and appeals; also cases handled through the Fast Track process. Data is compiled by countries of nationality, including for Kosovo and South Korea.

12.5 In 2004 and 2005 reports on the NSA process were published by the independent Certification Monitor and these are still available on the UK Border Agency web site. This role has been incorporated into the work of the independent Chief Inspector of the UK Border Agency – see paragraph 8 above.

13. Contact

Phil Douglas at UK Border Agency, Home Office, Tel: 020 8760 2458 or e-mail phil.douglas3@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.