EXPLANATORY MEMORANDUM TO

THE ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004 (REMEDIAL) ORDER 2010

2010 No. [XXXX]

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 As a result of the judgments of the domestic courts in *R (oao Baiai and others) v Secretary of State for the Home Department*, the Home Office is laying this Remedial Order which seeks to abolish the Certificate of Approval scheme so that those subject to immigration control who seek to marry in the UK and the Isle of Man will have the freedom to give notice of marriage without having first to seek permission of the Secretary of State.

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

3.1 This will be the fourth Remedial Order to be made pursuant to the power in section 10 of the Human Rights Act 1998.

4. Legislative Context

4.1 The Remedial Order is being made using the powers in section 10 of the Human Rights Act 1998. It is being laid to abolish the Certificate of Approval scheme following the judgements of the domestic courts in *R (oao Baiai and others) v Secretary of State for the Home Department* as detailed in section 7 below.

4.2 In the Government's response to the report of the Joint Committee on Human Rights *Enhancing Parliament's role in relation to human rights judgments* published in March 2010 (which is due for publication on 27th July) a commitment is made to lay a draft Remedial Order relating to *R (oao Baiai and others) v Secretary of State for the Home Department* before summer recess. This order now fulfils this commitment.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom. It also applies to the Isle of Man as it also removes the requirement to obtain permission to marry in the Isle of Man.

6. European Convention on Human Rights

The Minister for Immigration has made the following statement regarding Human Rights:

In my view the provisions of the draft Asylum and Immigration (Treatment of Claimants, Etc) Act 2004 (Remedial) Order 2010 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 imposes a requirement on a person in the United Kingdom subject to immigration control to obtain permission from the Secretary of State in order to marry. This requirement applies in England, Wales, Scotland, and Northern Ireland. The requirement was extended to the Isle of Man by an Order in Council (the Immigration (Isle of Man) Order 2008 S.I.2008/680). This requirement is known as the Certificate of Approval scheme. The Certificate of Approval scheme was designed to combat the immigration advantage that could be obtained by a 'sham marriage'. Section 19(1) of that Act creates an exception to the scheme in England and Wales in that such permission is not required in respect of marriage according to the rites of the Church of England or Church in Wales. This exemption also applies to the Isle of Man (by virtue of the Order in Council).

7.2 In 2006 the High Court in *R (oao Baiai and others) v Secretary of State for the Home Department* concluded that section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was disproportionate and constituted an unlawful interference with Article 12 (right to marry) of the ECHR. It also held that the scheme was discriminatory on the grounds of religion and nationality because of the Anglican exemption, and so violated Article 14 of the ECHR. Declarations of incompatibility were therefore made in respect of Article 12 and Article 14.

7.3 The Home Office did not appeal the finding of the High Court in respect of Article 14. Further clarity was however sought by the Home Office including in respect of Article 12 in an appeal to the House of Lords. The House of Lords held that the exemption for Anglican marriages was incompatible with Article 14 (prohibition on discrimination in the exercise of Convention Rights) of the ECHR, read in conjunction with Article 12 (right to marry) and upheld the declaration of incompatibility made by the High Court in relation to section 19(3) of the Act. However, the House of Lords (like the Court of Appeal) amended the declaration of incompatibility made by the High Court to make it clear that the declaration of incompatibility was directed solely at the discrimination between civil and Anglican preliminaries to marriage i.e. the declaration related to section 19(1) of the Act rather than section 19(3).

7.4 The Remedial Order seeks to remedy this incompatibility with the ECHR by abolishing the Certificate of Approval Scheme. It therefore repeals section 19(3) of the Asylum and Immigration (Treatment of Claimants, Etc) Act 2004 and an order in Council – Immigration (Isle of Man) Order 2008 so that the incompatibility ceases. The Order will also end the Certificate of Approval scheme in relation to civil partnerships in order to ensure that the obligation to obtain permission from the Secretary of State under the scheme does not remain in place for civil partnerships when it will not apply to marriages. This will require amendments to the Civil Partnership Act 2004. We have considered whether to use a short Bill to amend the 2004 Act and other relevant primary legislation. However, there is no available space in the current legislative programme for such a Bill and therefore it is necessary to use a remedial order.

7.5 The level of public interest in the policy is likely to be mainly from those subject to immigration control who wish to marry in the UK in a civil ceremony and who are currently required to apply for a Certificate of Approval. The Certificate of Approval scheme has also

been a prominent Government policy with the aim of tackling sham marriages and media attention is likely.

- ***Consolidation***

7.6 Not applicable.

8. Consultation outcome

8.1 The UK Border Agency did not hold a public consultation before laying the remedial order because the previous Government had already announced that the Certificate of Approval Scheme would be abolished. However the UK Border Agency decided to hold a targeted consultation before finalising the remedial order to ensure that colleagues across Government and the devolved administrations with a key interest were consulted on the legislative changes we were proposing and in particular whether the changes we propose would have any unintended consequences. The consultation was targeted at those with specialist knowledge of the legal and practical issues relevant to the abolition of the Certificate of Approval scheme.

8.2 Those consulted had interests in the key areas of marriage law, equalities, immigration and the registrar's perspective. Those consulted included the Ministry of Justice, Government Equalities Office, UK Border Agency, the devolved administrations, the General Register Offices of England and Wales, Scotland and Northern Ireland. The Isle of Man were also consulted and their consent was sought and obtained to use the Remedial Order to abolish the scheme in the Isle of Man. Those consulted also had the opportunity to comment on the wording of the draft Remedial Order and they were content with the Order. This targeted consultation began in March 2010 and continued with some participants until July 2010.

9. Guidance

9.1 Information on these changes will be made available to migrants and UK Border Agency staff, through updates to websites and guidance. Changes will also be communicated to others such as the General Register Office. The Certificate of Approval scheme will continue to operate until the Remedial Order comes into force.

10. Impact

10.1 No impact on the private or voluntary sector is foreseen.

10.2 No impact on the public sector is foreseen.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private, voluntary or public sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Remedial Order seeks to abolish the Certificate of Approval scheme so no monitoring or review is required beyond ensuring that the scheme is brought to an end successfully.

13. Contact

Helen Sayeed at the United Kingdom Border Agency on 0208 760 2533 or email: Helen.Sayeed4@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

Required Information (Paragraph 3 of Schedule 2 to the Human Rights Act 1998).

1. EXPLANATION OF THE INCOMPATIBILITY WHICH THE PROPOSED DRAFT ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004 (REMEDIAL) ORDER SEEKS TO REMOVE INCLUDING PARTICULARS OF THE RELEVANT DECLARATION, FINDING OR ORDER.

The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the Act") contains provisions imposing a requirement on a person in the United Kingdom subject to immigration control to obtain permission from the Secretary of State in order to marry. This requirement applies in England, Wales, Scotland, and Northern Ireland. The requirement was extended to the Isle of Man by Order in Council (The Immigration (Isle of Man) Order 2008 S.I.2008/680). The provision made by the Act is commonly referred to as the Certificate of Approval scheme. Section 19(1) of that Act forms part of the Certificate of Approval scheme as it applies in England and Wales and its effect is that such permission from the Secretary of State is not required in respect of marriage according to the rites of the Church of England or Church in Wales. This exemption currently applies in England and Wales. The exemption also applies to the Isle of Man (by virtue of the Order in Council) but it does not apply in Scotland or Northern Ireland. Provisions comparable to the Certificate of Approval scheme (but not the exemption) also apply to civil partnerships under the Civil Partnership Act 2004.

In the case of *R (oao Baiai and others) v Secretary of State for the Home Department* [2008 UKHL 53], the House of Lords held that this exemption was incompatible with Article 14 (prohibition on discrimination in the exercise of Convention Rights) of the European Convention on Human Rights, read in conjunction with Article 12 (right to marry) and upheld a declaration of incompatibility made at first instance**1** in that case in relation to section 19(3) of the Act. It was held (per Baroness Hale at para 47) that "the declaration of incompatibility made by Silber J and upheld in the Court of Appeal, should be amended to read "section 19(1)" rather than "section 19(3)", to make it clear that it is directed solely at the discrimination between civil and Anglican preliminaries to marriage."

2. REASONS FOR PROCEEDING UNDER SECTION 10 AND FOR MAKING AN ORDER IN THOSE TERMS

i) The use of a Remedial Order

It is generally desirable for amendments to primary legislation to be made by way of a Bill. The Government considers that there are compelling reasons for proceeding under section 10 of the Human Rights Act 1998 to make a Remedial Order rather than by way of primary legislation.

It is considered that there are compelling reasons for using a Remedial Order in order to minimize any further delay before remedying the incompatibility. The decision to use a Remedial Order strikes an appropriate balance between the need to remedy the incompatibility quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed.

The issue addressed by the UK domestic courts is one of discrimination against individuals. The Government takes discrimination seriously and is of the view that instances of this should be remedied swiftly. It would therefore be undesirable for undue

1 [2006] EWHC 823 (Admin)

delay to occur before the incompatibility is remedied. We have considered whether to use a short Bill to amend the 2004 Act and other relevant primary legislation. However, there is no available space in the current legislative programme for such a Bill. In the absence of appropriate primary legislation this Session in which to remedy the incompatibility, the case for a Remedial Order is strengthened.

The Government acknowledges that there has already been some delay in the implementation of this declaration of incompatibility. The UK Border Agency sought to clarify all relevant aspects of the law under challenge in relation to the Certificate of Approval scheme. In order to do this it was necessary to await the House of Lords judgement in 2008. This was justified given that the Lords judgement differed in a number of respects to the first instance judgement. Options for bringing Anglican marriages within the Certificate of Approval scheme were discussed with the Church of England. In addition the UK Border Agency reviewed the effectiveness of the scheme in light of the modifications required as a result of the court judgements.

In recent months the UK Border Agency has consulted widely with the devolved administrations, the General Register Offices, the Ministry of Justice, the Isle of Man and others so that they were fully aware of the proposed changes to legislation. Having completed this consultation we are now in a position to lay the Remedial Order.

ii) The terms of the Order

The proposed draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order seeks to abolish the Certificate of Approval scheme so that those subject to immigration control who seek to marry in the UK and the Isle of Man will have the freedom to give notice of marriage without having first to seek permission of the Secretary of State. This will ensure that the law will no longer be incompatible with Article 14 of the European Convention on Human Rights.

Given the difficulties in finding a satisfactory way of removing the incompatibility and concerns about the effectiveness of the scheme, the Government has decided that the only appropriate course of action in these circumstances is the removal of the Certificate of Approval scheme.

The Certificate of Approval scheme has operated on a UK-wide basis since the Act came into force. It is integral to the scheme to have a system that operates consistently across the UK. Since the proposal is to remove the Certificate of Approval scheme, there is no purpose served in retaining a scheme in Scotland and Northern Ireland. The Remedial Order removes the requirement to obtain permission to marry, as it applies to the Isle of Man by virtue of Order in Council. These provisions are considered to be authorised by paragraph 1 of Schedule 2 to the Human Rights Act 1998. We wish to also end the Certificate of Approval scheme in relation to civil partnerships in order to ensure that the obligation to obtain permission from the Secretary of State under the scheme does not remain in place for civil partnerships when it will not apply to marriages.

iii) Use of the non-urgent procedure

The Government acknowledges that a significant number of people are affected by the incompatibility. However, the significance of rights which are or might be affected by the incompatibility, and the impact of the scheme on individuals, have been carefully considered against the need to legislate in an open and transparent manner that allows appropriate opportunity for debate and discussion. While, for the reasons set out above, there are compelling reasons to proceed by way of Remedial Order, the limited nature of

the burden now imposed by the Certificate of Approval scheme, following steps taken to diminish its impact, mitigates against the use of the urgent Remedial Order process.

The continuing incompatibility does not prevent a person from marrying or founding a family. Those who are subject to the Certificate of Approval scheme can still marry; they simply need to apply for a Certificate of Approval from the Secretary of State. We have alleviated the effect of the incompatibility (pending amendment to primary legislation) by suspending the application fee payable under the Certificate of Approval scheme in April 2009. Those who applied for a Certificate of Approval between 2005 and 2009 may be eligible for the repayment of the fee paid, if they can show that paying the fee caused real financial hardship at the time of payment. The repayments are made as part of an ex-gratia repayment scheme which began on 31 July 2009. Those arrangements have been announced in a publicly accessible way via the UK Border Agency website. This formal ex-gratia repayment scheme comes to an end on 31st July 2010. We have also removed the fee for an application for a Certificate of Approval to marry or enter into a civil partnership from the Immigration and Nationality (Cost Recovery Fees) Regulations 2010 (SI 2010/228).