EXPLANATORY MEMORANDUM TO

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

2010 No. [DRAFT]

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 to assist the Joint Committee on Human Rights.

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 Human Rights

3.1 This is 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 made under section 10 of the Human Rights Act 1998 in order to abolish the Certificate of Approval scheme following the judgments of the domestic courts in *R (oao Baiai and others) v Secretary of State for the Home Department.*

4.2 Following the procedure set out in the 1998 Act the Home Office laid a proposal for a draft Remedial Order before Parliament for an initial period of 60 days. During that period the Home Office received no representations on the merits of the draft Remedial Order. The Joint Committee on Human Rights received two sets of representations, from the Immigration Law Practitioners Association and the Equality and Human Rights Commission respectively. Those representations were supportive of the government's approach in seeking to abolish the scheme by way of Remedial Order and they proposed no changes to the Order itself.

4.3 The Joint Committee on Human Rights published a report on the proposed Remedial Order on 16 November. The Committee considered that the draft Remedial Order could be amended to provide for the repeal of article 6 of the Immigration and Asylum and Nationality Act 2006 (Commencement No 6) Order 2007 and the equivalent savings clauses for the Isle of Man in Immigration (Isle of Man) Order 2008. Subject to this minor technical concern, the Committee recommended that the draft Order should be laid before both Houses for their consideration as proposed.

4.4 The Home Office noted and accepts the Committee's view. The draft Remedial Order now reflects the Committee's suggested amendments and is to be laid before Parliament for a further period of 60 days.

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 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

7.1 The policy background to the draft Order is set out in the explanatory memorandum to the proposed draft order laid in Parliament in July 2010.

- Consolidation

7.2 Not applicable.

8. Consultation outcome

8.1 The UK Border Agency held a targeted consultation before laying the proposed draft Order in July 2010. 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 was also consulted and consent was sought and obtained to use the Remedial Order to abolish the scheme in the Isle of Man. Those consulted were content with the Order. Given the minor nature of the amendments made to the proposed draft Order, the Home Office has not conducted a further formal consultation on the draft Order. Those consulted previously have, however, been notified of the content of the report by the Joint Committee on Human Rights and will continue to be kept informed about the progress of the draft Order.

9. Guidance

9.1 Information on the changes made will be available to migrants and UK Border Agency staff through updates to websites and guidance, and will 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

13.1 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.

STATEMENT

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

SUMMARY OF REPRESENTATIONS

The Home Office has received no direct representations on its proposed draft remedial order. Two representations on the proposed order were received by the Joint Committee on Human Rights – from the Immigration Law Practitioners Association and the Equality and Human Rights Commission.

Immigration Law Practitioners Association (ILPA)

ILPA wholeheartedly welcomes the remedial order and the repeal of the Certificate of Approval scheme and agrees that it removes the incompatibility with the ECHR.

ILPA has also raised general concerns about the Home Office making immigration law without adequate regard to compatibility with the Convention.

They cite two recent examples of this namely:-

1) the recent introduction of English language requirements for individuals applying for visas to the United Kingdom to be with their settled partners
2) published proposals to increase the fees charged for many immigration applications, including raising the fees for different marriage visas.

The Home Office takes its Human Rights obligations seriously and Convention rights are taken into account in making key policy decisions. Ultimately only a Court can determine whether a policy breaches the ECHR.

ILPA was concerned that it could be difficult to provide evidence of financial hardship particularly several years later for those applying for repayment of the certificate of approval fee. In our view anyone able to meet the financial hardship test by providing satisfactory evidence would qualify. It is reasonable for the Secretary of State to only repay the fee where that evidence can be presented.

The Equality and Human Rights Commission

The Commission welcomes the Remedial Order repealing the Certificate of Approval scheme and agrees that the order does remove the incompatibility identified by the courts.

The Commission observes that the unlawful discrimination inherent in the Certificate of Approval scheme was still operating, albeit with some minor changes, in a way that continued to breach articles 9 and 12 whether taken alone or with Article 14. This is not correct. The House of Lords has limited their declaration of incompatibility regarding the scheme to a breach of Article 14 (read with Article 12) and they have not found that the scheme is in breach of Article 9 or Article 12 taken alone.

However, they await information from the Government on any proposals it intends to introduce to replace the discontinued scheme.

The Commission are critical of a number of matters including the failure to act upon the commitments given by the then government before the Court of Appeal in May 2007 to remove the discriminatory effects of the legislation; the failure to put in place a reduced fee and measures for waiver of the fee and a system of appeal against a decision not to waive the fee; and continuing to require that affected persons apply to the Secretary of State for permission to marry when the scheme remains disproportionate. The current Government is acting swiftly to abolish the scheme and no one currently pays a fee to obtain a Certificate of Approval.

Impact of representations on the remedial order

These two organisations are supportive of the Government's approach in abolishing the Certificate of Approval scheme by way of remedial order. Their representations did not suggest any amendments to the order itself. The Government has therefore made no changes to the proposed remedial order as a result of these representations.