EXPLANATORY MEMORANDUM TO

THE ASYLUM (FIRST LIST OF SAFE COUNTRIES) (AMENDMENT) 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 This Order adds Switzerland to the list of safe third countries to which an asylum seeker can be removed from the United Kingdom (providing he is not a national or a citizen of that country) without consideration of the merits of his asylum claim.

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

3.1 None.

4. Legislative Context

4.1 Section 33 of, and Schedule 3 to, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 is concerned with situations whereby an asylum seeker can be removed to a safe third country without substantive consideration of his asylum claim. Part 2 of Schedule 3 contains a list of safe countries which are to be treated as safe for the purpose of determining whether a national from outside a safe third country, who has made an asylum or human rights claim in the United Kingdom, may be removed to a safe third country. The list includes all Member States of the European Union (EU) and States in the European Economic Area (EEA), all of which are countries bound by the arrangements for determining responsibility for examining an asylum claim set down in Regulation (EC) No. 343/2003 (the "Dublin II Regulation").

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, Damian Green MP has made the following statement regarding Human Rights:

In my view the provisions of the Asylum (First List of Safe Countries) (Amendment) Order 2010 are compatible with the Convention rights.

7. Policy background

7.1 The purpose of Section 33 of and Schedule 3 to the 2004 Act is to provide a framework for the removal of asylum seekers to safe third countries without substantive consideration of their asylum claims in the United Kingdom. A safe third country is not the country of which the asylum seeker is a national or citizen, but is one where the asylum claim should more properly be considered.

7.2 The legislative intention in Part 2 of Schedule 3 is to reduce the circumstances in which removal of asylum seekers to safe third countries can be frustrated on the basis of unmeritorious claims about treatment in, or removal from, those third countries. States listed in Part 2 are treated as places:

- where an asylum seeker's life and liberty will not be threatened in that country by reason of race, religion, nationality, membership of a particular social group or political opinion; and
- from which the government of that country will not send the asylum seeker to another country other than in accordance with the 1951 Convention (the concept of '*non-refoulement'*).

In other words, there is no scope to challenge removal to the third country on Refugee Convention grounds either before or after removal from the UK.

7.3 Part 2 listed countries are also presumed to be safe in the sense that they are treated as places from which a person will not be removed in contravention of his rights under the European Convention on Human Rights (the "ECHR").

7.4 Part 2 also requires the Secretary of State to certify any other claims that removal will breach an asylum seeker's human rights as clearly unfounded unless he is satisfied that they are not. If a claim is certified, whilst an asylum seeker may appeal against the decision to remove him from the United Kingdom, he may only do so 'out of country'. Human rights claims that are refused but not certified as clearly unfounded may be appealed in country.

7.5 The Secretary of State wishes to exercise her power to add Switzerland to the first list of safe third countries at Part 2 of Schedule 3. Actions to transfer asylum seekers will take place in the context of a specific EU legislative framework – the Dublin II Regulation - and asylum claimants in that state will have access to remedies under the ECHR and relevant domestic provisions. Romania and Bulgaria have previously been added to the list.

8. Consultation outcome

8.1 A public consultation was not carried out for this Order as it was not deemed proportionate with respect to the number of asylum seekers returned to Switzerland since it began participating in the Dublin II Regulation. Since December 2008, only eight asylum seekers have been removed to Switzerland. Extensive research into the treatment of asylum seekers in Switzerland was carried out using objective material and information provided by the Swiss authorities. It has been considered that removing asylum seekers to Switzerland under the Dublin II Regulation will not be a breach of the ECHR and the Secretary of State is satisfied that any asylum seeker returned to Switzerland will be afforded the rights and benefits accorded to all asylum seekers under their domestic law.

9. Guidance

9.1 Guidance for dealing with transfers to a safe third country already exists for case workers and operational staff who return asylum seekers under the Dublin II Regulation. As a result of adding Switzerland to the list of safe countries new internal guidance will be published for the benefit of case owners so that they may use the procedure under Part 2 of Schedule 3 for returning asylum seekers to Switzerland.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal. However, adding Switzerland to the safe third country list will bring the procedure for dealing with transfers to that country under the Dublin II Regulation into line with those applicable to the other States that take part in it. This will simplify the consideration process and reduce the scope for errors.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 This instrument is intended to simplify the process for transferring asylum seekers to Switzerland under the Dublin II Regulation and to reduce the risk of error in the process.

12.2 The instrument will be subjected to internal review within the UK Border Agency to ensure that it has met that aim. It will be evaluated on the basis of the number of removals that have been carried out to Switzerland correctly and caseworkers' perceptions of the efficiency and ease of use of the procedures.

13. Contact

Fourentza Antoniou at the UK Border Agency of the Home Office Tel: 0208 760 2534 or email: Fourentza.Antoniou3@homeoffice.gsi.gov.uk;