EXPLANATORY MEMORANDUM TO

THE SPECIAL IMMIGRATION APPEALS COMMISSION (PROCEDURE) (AMENDMENT) RULES 2018

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by The Ministry of Justice and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the instrument

2.1 This instrument is to update the Rules governing procedure in cases heard by the Special Immigration Appeals Commission (SIAC) to reflect new bail arrangements in the Immigration Act 2016, which replace the previous framework with a single power of immigration bail.

2.2 The amendments are also to implement section 66 of the Criminal Justice and Courts Act 2015, allowing appellants to apply for a certificate to appeal directly to the Supreme Court against a decision made by SIAC, bypassing - or 'leapfrogging' - the Court of Appeal. For cases which would currently end in the Supreme Court anyway, this measure will result in a final conclusion being reached faster and save time in the Court of Appeal.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Section 8 of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") gives the Lord Chancellor the power to make rules about the procedure to be followed on applications to SIAC for leave to appeal. When it comes into force, section 66 of the Criminal Justice and Courts Act 2015 ("the 2015 Act") will insert a new section 7B into the 1997 Act which will allow a party to apply to SIAC for a certificate to appeal directly to the Supreme Court. Section 66 of the 2015 Act will also amend section 8 of the 1997 Act to extend the Lord Chancellor's power to make rules so that he can make rules about the procedure to be followed on an application to SIAC for the grant of a certificate under section 7B of the 1997 Act. These Rules are made using the extended power before that power comes into force (as permitted by section 13 of the Interpretation Act 1978) because to give section 66 of the 2015 Act full effect when it comes into force it is expedient to have rules governing applications for a certificate under section 7B of the 1997 Act already in place.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 SIAC is a superior court of record established by the 1997 Act, which hears challenges against Home Office decisions: (1) to refuse a human rights and/or protection claim, (2) to deport or exclude a person from the UK, and (3) to refuse an application for citizenship/naturalisation or deprive a person of citizenship, when the decision challenged has been certified by the Home Secretary as being made either on grounds of national security or international relations, or in reliance on evidence which it would not be in the public interest to disclose.

4.2 Procedure rules for SIAC are made by the Lord Chancellor under sections 5 and 8 of the 1997 Act. Section 5(2) to (6) sets out those matters which the Lord Chancellor should have regard to when making rules, and the content of those rules.

4.3 The Amendment Rules are subject to the affirmative resolution procedure as prescribed in sections 5(9) and 8(4) of the 1997 Act.

5. Extent and Territorial Application

5.1 The extent of this instrument is all of the United Kingdom.

5.2 The territorial application of this instrument is to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Undersecretary of State for Justice, Lucy Frazer QC MP has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 This instrument makes technical amendments to the 2003 rules to reflect new bail provisions in the Immigration Act 2016 and to implement section 66 of the Criminal Justice and Courts Act 2015.

7.2 Schedule 10 to the Immigration Act 2016 replaced the previous powers framework of temporary admission, temporary release, release on restrictions, and bail, with a single power of immigration bail. This is so illegal migrants, including foreign national offenders, who are awaiting removal can be released subject to conditions if detention is not appropriate. The new single power introduced the concept of the financial condition to replace recognizances (in England, Wales, and Northern Ireland) and bail bonds (in Scotland). Schedule 10 also created a power for bail to be granted subject to conditions which could be varied by the Secretary of State.

7.3 Schedule 10 to the Immigration Act was commenced on 15 January 2018. The rules currently refer to recognizances and sureties, and contain separate provisions for Scotland. If the rules are not amended they will be inconsistent with the bail provisions in Schedule 10 because they would use outdated terms which have been replaced by new terms in Schedule 10. They would also refer to statutory provisions which have been repealed, and they would not reflect the new power to grant bail subject to conditions which can be varied by the Secretary of State.

7.4 Implementing section 66 of the Criminal Justice and Courts Act 2015 will bring SIAC into line with other courts at the same level by allowing some cases which raise important points of law of general public importance to leapfrog the Court of Appeal and go direct to the Supreme Court.

7.5 The instrument also amends the time limit for making an application for permission to appeal. The time limit is currently 5 days for appellants in detention under the Immigration Acts, or 10 days otherwise. Under the amended rules the time limit for applying for a certificate to appeal direct to the Supreme Court and/or permission to appeal is 14 days, bringing it in line with time limits in the High Court.

7.6 The number of cases affected by this instrument is small. In 2017 SIAC received 14 applications.

Consolidation

7.7 An informally consolidated version of the rules will be updated onto the gov.uk website when the instrument comes into force. They will be found at: https://www.gov.uk/government/publications/special-immigration-appeal-commission-procedure-rules

8. Consultation outcome

8.1 No public consultation was undertaken on this instrument as this is a specialist and technical instrument. However, the Ministry of Justice consulted individually with key stakeholders between the 21 December 2017 and 26 January 2018. The purpose was to consult on the mechanics of how the instrument should implement the requirements of the primary legislation. Consultees included the SIAC Chairperson (Mrs Justice Laing), the Special Advocates Support Office, Government Legal Department, and certain law firms identified as having an interest.

8.2 We received one response from the SIAC Chairperson, which made no comments as she supports the changes.

9. Guidance

9.1 Her Majesty's Courts and Tribunals Service (HMCTS) produces guidance for SIAC which is updated as required to reflect changes to procedure. It is available on the gov.uk website at: https://www.gov.uk/guidance/appeal-to-the-special-immigration-appeals-commission#legislation-and-rules

9.2 The SIAC guidance will be updated to reflect this instrument once it comes into force.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 SIAC deals with a very small number of cases. In 2017 there were 14 new applications and no applications for bail.

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

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Ministry of Justice will keep these Rules continually under review.

13. Contact

13.1 Helen Timpson at the Ministry of Justice. Telephone: 020 3334 2858 or email: helen.timpson@justice.gov.uk can answer any queries regarding the instrument.