EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (CLAIMANT'S CREDIBILITY) REGULATIONS 2004

2004 No.3263

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

2. Description

2.1 These Regulations provide for the manner in which a person may be notified of an immigration decision for the purposes of section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the time at which a person will be treated as having received the notification. Section 8 of the 2004 Act provides that the credibility of a person who makes an asylum or human rights claim after being notified of another immigration decision will be treated as damaged, unless the claim relies wholly on matters arising after the notification.

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

3.1 None

4. Legislative background

4.1 This is the first use of the power to make Regulations conferred on the Secretary of State by section 8(7), (10) and (11) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Section 8(5) of the 2004 Act provides that one of the specified behaviours that a deciding authority must take into account as damaging credibility when determining whether to believe a statement made by or on behalf of a person who makes an asylum or human rights claim is that they failed to make an asylum or human rights claim before being notified of an immigration decision. These Regulations are necessary because the term " notified" was not defined in section 8 but rather, section 8(7) provides that notified" means "notified in such manner as may be specified by regulations made by the Secretary of State".

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

7.1 The administration of immigration law and policy is an unusual branch of government in that a small but significant minority of those subject to immigration control have an incentive to create delay, mislead and conceal information in order to extend their stays in the UK for as long as possible. The system of processing asylum and human rights claims is particularly prone to this kind of abuse, because such claims usually present an absolute bar to the claimant's removal from the UK until all appeal rights have been exhausted. In addition, many asylum and human rights claimants are forced by circumstances to rely on their own statements to prove their cases. It can be very hard for them to acquire other evidence. This is fully accepted by those working in this area. However, it does mean that the system is open to exploitation and abuse by those who do not feel themselves bound to tell the truth. This is why the personal credibility of each claimant is so important when determining their asylum or human rights claims.

7.2 The policy objective of section 8 of the 2004 Act was to deter and reduce the scope for abuse and promote consistency in the treatment of those who perpetrate it. The provision imposes an obligation on decision-makers (the Secretary of State, Immigration Officers and the statutory appellate bodies) to have regard to any behaviour on the part of the claimant that they believe is likely to mislead, conceal information or obstruct or delay the taking of a decision. Decision-makers must take such behaviour into account as damaging when assessing the credibility of a person who has made an asylum or human rights claim. The extent to which credibility is damaged will be for the decision-maker to decide on the facts of the individual case.

7.3 Section 8 specifies certain types of behaviour that must always be regarded as damaging to the claimant's credibility. Section 8(5) provides that a failure to make an asylum or human rights claim before being notified of an immigration decision (unless the claim relies wholly on matters arising after the decision) is one of these. As a matter of policy, it is considered that there is no legitimate reason for a person with a well-founded claim to hold that claim back until they have received a decision on another immigration matter.

7.4 The question of at what point a person is considered “notified” of an immigration decision is also important in the context of calculating time limits for appealing immigration decisions. Consequently, there are already Regulations in place which make provision for this in the case of immigration decisions that carry a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002. These are the Immigration (Notices) Regulations 2003 (S.I. 2003/658). Some of the “immigration decisions” specified in section 8(7) of the 2004 Act are also appealable decisions under section 82 of the Nationality, Immigration and Asylum Act 2002.

7.5 The service of notices of immigration decisions under the Immigration (Notices) Regulations 2003 (S.I. 2003/658) is necessarily a formal process, since rights of appeal are involved. The aim of those Regulations is to ensure that applicants are given sufficient information in sufficient time to draft

grounds of appeal. However, these Regulations must cover all immigration decisions, not just those that carry the right of appeal. They must include those immigration decisions that are first notified other than in writing, such as orally. If, for instance, an Immigration Officer interviewing an applicant at a port explains the contents of a notice of decision, the applicant should not be able to avoid the application of section 8 of the 2004 Act simply by claiming asylum before the notice is physically handed over. It would defeat the purpose of section 8(5) if a claimant could avoid the consequences of claiming after he had been notified of another immigration decision simply because notice in the form required by the Immigration (Notices) Regulations 2003 (S.I 2003/658) was required before section 8(5) applied. Therefore, a notice which does not comply with all the provisions of the Immigration (Notices) Regulations 2003 (S.I. 2003/658) may, nevertheless, still amount to notice for the purposes of section 8 of the 2004 Act if it complies with the provisions of these Regulations.

7.6 Where notice of an immigration decision is given by post, a question that often arises is when that notice should be treated as received. In the case of a notice sent by ordinary post, a deeming provision is necessary. The Immigration (Notices) Regulations 2003 provide that a notice is deemed to have been received on the second day after posting, and this instrument adopts the same period. Where a notice is sent by postal service in which delivery is recorded, the date of delivery can be checked. The instrument therefore provides that the recorded date of delivery shall be treated as the date of receipt or the second day after posting (not counting the day of posting), whichever is the earlier.

7.7 All presumptions of service are rebuttable. A presumption as to receipt could be rebutted, for example, where a claimant had evidence that they were away from home on holiday at the relevant time. In that instance, section 8(5) of the 2004 Act would not apply if he or she made their asylum or human rights claim before they returned home and read the written notice of another immigration decision which had been taken in respect of them.

8. Impact

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

9. Contact

9.1 John Ponsford at the Home Office Tel: 020 8760 8655 or email: John.Ponsford@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.