EXPLANATORY MEMORANDUM TO

THE PORT EXAMINATION CODES OF PRACTICE AND NATIONAL SECURITY DETERMINATIONS GUIDANCE REGULATIONS 2020

2020 No. 795

1. Introduction

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

2. Purpose of the instrument

2.1 The instrument brings into force a revised code of practice regarding functions carried out under Schedules 7 (port and border controls) and 8 (detention) to the Terrorism Act 2000 ("the 2000 Act"); a code of practice regarding functions carried out under Schedule 3 (border security) to the Counter-Terrorism and Border Security Act 2019 ("the 2019 Act"); and proposed revisions to guidance under the Protection of Freedoms Act 2012 ("the 2012 Act") concerning the retention of biometric data. The codes of practice relate to powers exercisable at UK ports and the Northern Ireland border area to stop, question, search and detain persons to determine whether they are or have been engaged in (in the case of Schedule 7 to the 2000 Act) terrorism or (in the case of Schedule 3 to the 2019 Act) hostile activity. The guidance under the 2012 Act relates to the making of "national security determinations" ("NSDs") to authorise the retention of biometric data for national security purposes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Security Rt. Hon. James Brokenshire MP has made the following statement regarding Human Rights:

"In my view the provisions of the Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 Under paragraph 6 of Schedule 14 to the 2000 Act, the Secretary of State shall issue, and may revise, codes of practice about the exercise by officers of functions conferred on them by virtue of that Act. A code of practice about the exercise by officers of functions exercised under Schedule 7 to the 2000 Act was last issued on 25 March 2015 and was brought into force by the Terrorism Act 2000 (Code of Practice for Examining Officers and Review Officers) Order 2015 (S.I. 906/2015). The instrument is bringing into force a revised version of that code, which is issued by the Secretary of State in accordance with paragraph 6(4) of Schedule 14 to the 2000 Act, following amendments made to the 2000 Act by the 2019 Act.

6.2 Under paragraph 56 of Schedule 3 to the 2019 Act, the Secretary of State must issue codes of practice about training to be undertaken by constables, immigration officers and customs officers who are to act as examining officers or exercise other functions under Schedule 3; the exercise by such persons of functions conferred on them by virtue of Schedule 3; the video recording (with sound) of interviews by constables of persons detained under Part 1 of Schedule 3 at a police station; and reviews under Part 3 of Schedule 3. The instrument is bringing into force a code of practice issued by the Secretary of State in accordance with paragraph 56(1) of Schedule 3 to the 2019 Act.

6.3 Under section 22 of the 2012 Act the Secretary of State must issue, and may revise, guidance about the making or renewing of NSDs under a number of powers which are specified at section 20(2)(a) of that Act. Previous guidance was laid before Parliament on 24 June 2013 and was brought into force on 4 February 2014 by the Protection of Freedoms Act 2012 (Guidance on the Making or Renewing of National Security Determinations) Order 2014 (S.I. 198/2014). The instrument brings into force proposed revisions to the guidance which reflect amendments made to the legislation specified at section 20(2)(a) of the 2012 Act by Schedule 2 to the 2019 Act.

7. Policy background

What is being done and why?

7.1 The powers under Schedule 7 to the 2000 Act allow an examining officer at UK ports and the Northern Ireland border area to stop, question, search and detain a person to determine whether they appear to be a person who is, or has been, involved in the commission, preparation or instigation of acts of terrorism. The powers under Schedule 3 to the 2019 Act mirror the Schedule 7 powers but allow examination and detention for the purposes of determining whether a person is involved in hostile activity.

7.2 Schedule 14 to the 2000 Act and Schedule 3 to the 2019 Act require codes of practice to be issued about the exercise of the functions conferred by those Acts in relation to the powers of examining and review officers under Schedules 7 and 8 to the 2000 Act and Schedule 3 to the 2019 Act respectively.

7.3 There is an existing code of practice for examining and review officers which was brought into force in March 2015 which relates to the exercise by examining officers of their functions under Schedule 7; the exercise of review officers of their functions under Schedule 8 in relation to detentions under Schedule 7; the training and procedure for designation of examining officers; and the training of review officers.

7.4 The existing code acts as a guide to those police officers and members of law enforcement authorities able to exercise Schedule 7 powers by providing information on the processes and safeguards governing the use of those powers, including examples of best practice. For example, the code includes considerations an examining officer may make when deciding to select a person to examine and clarifies that selecting a person based on their protected characteristics alone is unlawful. It also provides examples of situations which may lead an examining officer to detain a person who has been examined.

7.5 The instrument brings into force a revised version of the existing code ("the Schedule 7 Code"). The revisions are necessitated by amendments made to the 2000 Act by the 2019 Act. The safeguards in respect of the use of Schedule 7 powers set out in the Schedule 7 Code include: prohibiting questioning which would compel a person to reveal a source of journalistic information or information subject to legal privilege, without prior independent or judicial authorisation or (in urgent cases) immediate after-the-event authorisation; restrictions on search powers in relation to "protected material" (defined to include confidential journalistic information, sources of journalistic information and items subject to legal privilege) and other categories of "excluded material" and "special procedure material" (within the meaning of the Police and Criminal Evidence Act 1984); and detailed guidance in relation to the use of the power to detain a person.

7.6 The Schedule 7 Code reflects three amendments made by the 2019 Act to the 2000 Act: the first, clarifying that the six-hour examination clock can be paused at any point where a person detained under Schedule 7 is being transported to hospital or receiving hospital treatment; the second, reflecting that there is a bar on the use of oral answers given in examination being used in evidence in subsequent criminal proceedings; and the third, reflecting a new power in Schedule 8 that allows a senior officer, in certain limited circumstances, to direct that a person detained under Schedule 7 must choose a different lawyer when exercising their right under detention.

7.7 The instrument also brings into force a new code of practice for examining and review officers under Schedule 3 to the 2019 Act ("the Schedule 3 Code"), which relates to the training to be undertaken by constables, immigration officers and customs officers who are to act as examining officers or exercise other functions under Schedule 3; the exercise by such persons of functions conferred on them by virtue of Schedule 3; the video recording (with sound) of interviews by constables of persons detained under Part 1 of Schedule 3 at a police station; and reviews under Part 3 of Schedule 3. The Schedule 3 Code will be brought into force at the same time Schedule 3 itself is brought into force.

7.8 The Schedule 3 powers mirror the Schedule 7 powers described above, and the provisions of the Schedule 3 Code mirror those of the Schedule 7 Code. There are two primary differences, however. First, the Schedule 3 powers allow an examining officer to stop, question, search and detain a person to determine whether they appear to be a person who is, or has been, engaged in hostile activity. Hostile activity is defined in the 2019 Act as the commission, preparation or instigation of a hostile act that is or may be carried out for or on behalf of, or otherwise in the interests of, a State other than the United Kingdom. An act is a 'hostile act' if it threatens national security, threatens the economic well-being of the UK in a way that is relevant to national security, or is an act of serious crime. These powers were announced in

response to the Salisbury attack in March 2018 to strengthen UK defences against hostile state activity. Annex C of the Schedule 3 Code includes further information about the various types of hostile activity about which the Government is concerned.

7.9 The second difference relates to powers which are new to Schedule 3 and allow for the retention, use and destruction of an article which is given to an examining officer or found during a search. This may include an article that includes or consists of "confidential material" (defined to protect a range of material, including confidential journalistic material and legally privileged information). Schedule 3 powers are different to Schedule 7 powers in that they allow an examining officer to retain an article while the officer believes that it could be used in connection with the carrying out of a hostile act or while the officer believes that it is necessary to do so for the purpose of preventing death or significant injury. The officer may use similar powers to make and retain copies of an article, including where the article or copies include or consist of confidential material. The Schedule 3 Code sets out the safeguards in relation to the way in which these powers are used, which include independent judicial oversight by the Investigatory Powers Commissioner.

7.10 Finally, the instrument brings into force proposed revisions to guidance issued under section 22 of the 2012 Act. This Act introduced a statutory framework for the retention and deletion of fingerprints and DNA profiles by the police, by amending a range of existing legislation under which such biometric data may be obtained. The 2012 Act's overriding principle is that biometric data should not normally be retained indefinitely in a case where its subject has not been convicted of any crime, subject to certain exceptions where a limited period of retention is permissible. These exceptions are firstly where the person has been arrested or charged with (but not convicted of) a serious violent, sexual or terrorist offence, and secondly, where a statutory authorisation has been made on the grounds that retention is necessary for a specified purpose.

7.11 One such form of authorisation is an NSD, which can be made where retention is necessary for the purpose of national security. The maximum length of an NSD, following amendments to the 2012 Act by the 2019 Act, is five years, but an NSD can be renewed beyond that point if the legal test continues to be met.

7.12 Guidance on the making or renewing of NSDs was issued on 4 February 2014, and sets out the available powers to make NSDs, which are found in a range of different legislation and which apply to the whole of the UK. The guidance reflects the fact that NSDs can be made or renewed by a Chief Officer of a police force in England and Wales, the Chief Constable of the Police Service of Scotland, the Chief Constable of the Police Service of Northern Ireland, and any other responsible officer of a law enforcement authority other than a police force who is empowered to make or renew NSDs. The guidance sets out the legal test of necessity and proportionality, and provides information on how a Chief Officer, Chief Constable or other responsible officer should apply that test and the factors to consider. It also provides procedural guidance on matters such as information reporting requirements, and how police forces and other relevant law enforcement authorities should engage the independent Biometrics Commissioner. The Biometrics Commissioner is responsible for reviewing and approving every NSD made or renewed. The proposed revisions to the guidance brought into force by the instrument amend the guidance which was issued on 4 February 2014.

7.13 The 2019 Act amended the powers to make NSDs in two ways, and the proposed revisions to the guidance brought into force by the instrument reflect these changes. Firstly, the maximum length of an NSD was increased from two to five years. At the Biometrics Commissioner's suggestion, the proposed revisions to the guidance also make clear that Chief Officers, Chief Constables and other responsible officers should consider making an NSD for a shorter period than the statutory minimum, if they are not satisfied that retention for the full period would be necessary and proportionate in all the circumstances of the case.

7.14 Secondly, the proposed revisions reflect that the legislation has been amended to provide that any Chief Officer of a police force in England and Wales may make an NSD in relation to biometric data held by any police force in England and Wales. The proposed revisions to the guidance therefore replace references to "the responsible Chief Officer" with references to "a Chief Officer".

7.15 The proposed revisions to the guidance make one further substantive change to the February 2014 version of the guidance, which is not a consequence of the 2019 Act. In most cases where a suspected terrorist is arrested but is not ultimately convicted, there is an automatic three-year retention period (whether or not they are charged) before their biometric data must be deleted, or an NSD made if proportionate to authorise its ongoing retention. In a small number of cases an individual who is the subject of a terrorism investigation may be arrested on suspicion of a non-terrorism offence, for example if they are involved in wider criminality. If they are convicted their biometric data may be retained indefinitely, but if they are acquitted or the proceedings discontinued the data must be deleted unless its retention is necessary and proportionate for the purpose of national security, in which case it may be appropriate to make an NSD to authorise retention.

7.16 The February 2014 guidance, however, was worded in such a way as to suggest that biometric data should be deleted immediately in these circumstances, before it had been possible for the police to prepare and consider an application for an NSD. As a result, the police have been making NSDs to ensure that biometric data is not lost in such cases, where it may be clear that retention of the data is necessary and proportionate but it is not yet clear that an NSD will be needed in order to secure its retention (because the investigation or the criminal proceedings have not yet been discontinued and the suspect could still be convicted). The Biometrics Commissioner recommended a change to the guidance to make clear that in these circumstances the data should be deleted within a reasonable period rather than immediately in order to allow for an NSD to be considered if appropriate. The proposed revisions to the guidance reflect this and specify that in a case where an application for an NSD is being considered a reasonable period may be up to six months.

7.17 The proposed revisions to the guidance laid before Parliament on 8 June 2020 appear as amendments to the February 2014 guidance (which was laid before Parliament in June 2013). For reading clarity a copy of the guidance without the revisions highlighted is annexed to this Explanatory Memorandum.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 A public consultation on the Schedule 7 Code and the Schedule 3 Code was carried out between 25 February and 5 April 2019. The response to the consultation was published on 8 June 2020 and is available at https://www.gov.uk/government/consultations/codes-of-practice-for-officers-detaining-individuals-at-ports.

10.2 In total, there were 8 responses to the consultation. Of those responses, 3 were from public authorities, 2 from organisations representing the media and 3 were from oversight bodies. An additional response was received after the formal consultation period had closed from the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, who was not in post during the public consultation period. Mr Hall's submission was received on 4 September 2019 and was also considered as part of the consultation response.

10.3 Significant feedback was received in response to the consultation and consequently a number of changes have been made to the Schedule 7 Code and the Schedule 3 Code in relation to a number of issues, including (among other things): the Schedule 3 retention of articles process and timeframes; handling of protected material and journalistic sources; availability of and access to information; complaints and record keeping; and training and materials given to officers. Further detail is set out in the published consultation response.

10.4 There is no public consultation requirement in relation to the NSD guidance. However, the Secretary of State is required by the 2012 Act to consult the Biometrics Commissioner and the Lord Advocate in the course of preparing or revising the guidance. The Biometrics Commissioner has been consulted and was content with the proposed revisions to the guidance, subject to some minor amendments to the drafting which were incorporated into the proposed revisions laid before Parliament. The Lord Advocate has also been consulted and was content with the proposed revisions, subject to some amendments to ensure the law of Scotland was reflected accurately, which have been incorporated into the proposed revisions laid before Parliament.

11. Guidance

11.1 The Schedule 7 Code, the Schedule 3 Code and the proposed revisions to the guidance brought into force by the instrument contain guidance, including about the effect of the codes of practice as set out above. The codes of practice and the guidance are publicly available at https://www.gov.uk/government/consultations/codes-of-practice-for-officers-detaining-individuals-at-ports and https://www.gov.uk/government/publications/national-security-determinations.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument. This is because a full impact assessment was prepared in relation to the 2019 Act, which covered the changes made to the Schedule 7 powers, the creation of the Schedule 3 powers, and

amendments to the legislation under which NSDs are made that are reflected in the proposed revisions to the guidance. The Impact Assessment is publicly available at https://publications.parliament.uk/pa/bills/lbill/2017-2019/0131/18131-IA.pdf.

13. Regulating small business

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

14. Monitoring & review

14.1 Section 36 of the Terrorism Act 2006 requires the Independent Reviewer of Terrorism Legislation to provide the Home Secretary with an annual report on the exercise of Schedule 7 powers. Paragraph 62 of Schedule 3 to the 2019 Act requires the Investigatory Powers Commissioner to provide the Home Secretary with an annual report on the exercise of Schedule 3 powers. Section 20 of the 2012 Act requires the Biometrics Commissioner to review every NSD made, and to keep under review the uses to which material retained pursuant to an NSD is put, and it provides a power for the Biometrics Commissioner to order the deletion of such material if he considers that its retention is not necessary. Section 21 of the 2012 Act requires the Biometrics Commissioner to provide an annual report to the Secretary of State and requires the Secretary of State to publish that report and lay it before Parliament.

15. Contact

15.1 The Borders and Aviation Security Unit at the Home Office can answer any queries regarding the instrument and can be contacted at the Home Office, 5th Floor, Peel Building, 2 Marsham Street, London, SW1P 4DF, email: Schedule3and7codes@homeoffice.gov.uk

15.2 The Deputy Director for the Borders and Aviation Security Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt. Hon. James Brokenshire MP, Minister of State for Security at the Home Office can confirm that this Explanatory Memorandum meets the required standard.