

MISCELLANY

Transfer of immigration controls

1 When the Immigration Act 1971 (“the 1971 Act”) was adopted by the UK Parliament, it was extended to both Bailiwicks in the customary way by Orders-in-Council.¹ The Immigration (Jersey) Order 1972, and the corresponding Guernsey Order, brought into effect in the Islands the relevant provisions of the 1971 Act. Those provisions were subsequently amended (and in some cases repealed) by the extension of certain provisions of the Immigration Act 1988,² the Immigration and Asylum Act 1999,³ the Immigration, Asylum and Nationality Act 2006,⁴ and the Immigration Act 2014,⁵ all of which were again extended by Orders-in-Council.

2 The Channel Islands are of course part of the Common Travel Area (CTA), and the various Orders ensure that the rules applicable in the Channel Islands, and the powers of immigration officers, are integrated with those of the United Kingdom and the Isle of Man so as to ensure the integrity of the CTA. The power to make deportation orders, exercisable in the UK by the Secretary of State, has been exercised until very recently by the Lieutenant Governors of their respective Crown Dependency.

3 The Immigration (Jersey) (Amendment) Order 2017 (“the 2017 Order”), which came into force on 10 November 2017, made significant amendments to the operation of the Immigration Acts in Jersey by transferring certain powers of the Lieutenant Governor to the Minister for Home Affairs. When the different Immigration Acts were extended, the powers exercisable in the UK by the Home Secretary were originally vested in the Lieutenant Governor or the Defence Committee (now the Minister for Home Affairs). The principal powers exercisable by the Lieutenant Governor were the power to give directions as to the practice to be followed in the administration of the

¹ <https://www.jerseylaw.je/laws/enacted/Pages/OinC-33-1972.aspx>; <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=107169&p=0>.

² Immigration (Jersey) Order 1993; Immigration (Guernsey) Order 1993.

³ Immigration and Asylum Act 1999 (Jersey) Order 2003; Immigration and Asylum Act 1999 (Guernsey) Order 2003.

⁴ Immigration (Jersey) Order 2012; Immigration (Guernsey) Order 2012.

⁵ Immigration (Jersey) Order 2015; Immigration (Guernsey) Order 2015.

1971 Act, in particular for regulating the entry of non-patrials⁶ into the Bailiwick, and the power to order deportation in cases where deportation was deemed to be conducive to the public good. Those powers have now been transferred to the Minister for Home Affairs. The rationale for the transfer was said to be to provide some democratic accountability for the exercise of important powers in relation to the rights of individuals.

4 After the enactment of the 2017 Order, some doubt was expressed as to whether it had effectively transferred the prerogative powers formerly vested in the Lieutenant Governor. In UK immigration law there is a distinction between prerogative powers vested in the Crown and statutory powers exercisable under the 1971 Act. The power to order the deportation of a person already in the country is a statutory power under the 1971 Act. On the other hand, the power to prevent a non-patrial from entering the country is a prerogative power, and a decision to exclude a foreign national is one that must be made personally by the Home Secretary. Such a decision is made if the Home Secretary is persuaded that such exclusion would be conducive to the public good. The exclusion decision itself is constituted by a direction to officials requiring refusal of any application for entry clearance or entry to the UK.⁷

5 It is clear on the face of the 2017 Order that the statutory power to order deportation has been transferred from the Lieutenant Governor to the Minister for Home Affairs.⁸ But what of the prerogative power to exclude a foreign national from Jersey?

6 Section 1(3) of the 1971 Act, as extended, provides that—

“arrival in and departure from the Bailiwick of Jersey on a local journey from [other parts of the CTA] shall not be subject to control under this Act . . .”

Section 1(4A) empowers the Minister, however, to—

“give directions as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the Bailiwick of persons not having the right of abode [in Jersey] . . .”

This provision must be read in conjunction with s 9(4), as extended which states—

⁶ *I.e.* persons not possessing the right of abode in the UK.

⁷ See para 320(6) of the UK Immigration Rules.

⁸ See s 5 of the 1971 Act, as extended.

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“Section 1(3) above shall not be taken to affect the operation of a deportation order, and . . . a person who is not a British citizen may not by virtue of section 1(3) enter the Bailiwick of Jersey without leave on a local journey from a place in the [CTA] if either—

- (a) he is on arrival in the Bailiwick of Jersey given written notice by an immigration officer stating that the Minister having issued directions for him not to be given entry to the Bailiwick of Jersey on the ground that his exclusion is conducive to the public good as being in the interests of national security, he is accordingly refused leave to enter the Bailiwick of Jersey; or . . .”

7 This is clearly a reference, not to directions given under a power in the Act itself, but to directions in exercise of a prerogative power to make an exclusion decision. That prerogative power has also been transferred to the Minister for Home Affairs. That raises another interesting point. If this prerogative power of the Crown is being exercised in Jersey by the Minister of Home Affairs, does this mean that the Government of Jersey is HM Government of Jersey? That nomenclature has long been used by Gibraltar, but Ministers there are appointed by the Governor, Her Majesty’s personal representative in that overseas territory. Ministers in Jersey are appointed by the States Assembly.⁹

8 In summary, the Lieutenant Governor of Jersey retains powers in relation to the granting of citizenship under s 43 of the British Nationality Act 1981, but has no remaining functions under the Immigration Acts.

⁹ See art 19 of States of Jersey Law 2005. Of course, there is a party political system in Gibraltar, with Her Majesty’s Government being balanced by HM Loyal Opposition.