

## INFORMATION ON NEW IMMIGRATION OFFENCES FOR CRIMINAL PRACTITIONERS

Offences under sections 2 and 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 came into force on 22<sup>nd</sup> September 2004.

The following is a brief guide to the offences and in particular, to the immigration aspects of the case that criminal practitioners should bear in mind when advising a client charged with one of the offences (or with other immigration offences).

Further information can be obtained by contacting ILPA (Immigration Law Practitioners Association – see below for details) and the guidance to the offences issued by the Home Office for Immigration Officers is available on the ILPA website ([www.ilpa.org.uk](http://www.ilpa.org.uk)).

**Note on credibility:** issues of credibility are vital in immigration proceedings. s8 AI(ToC etc) Act 2004 provides that certain behaviour (e.g. failure to produce a passport without reasonable excuse) will damage a client's credibility in their asylum and human rights claim. Criminal proceedings based on such behaviour (e.g. under s2 AI(ToC etc) Act 2004) **will** have an adverse impact on the asylum or human rights claim. Therefore the outcome of the criminal case will be crucial to the asylum/human rights proceedings - representations to prevent proceedings continuing or clear indication of any defence will be essential (see below at 3) for text of s8).

### 1) The section 2 offence and defences

S2 introduces an either-way criminal offence where “**at a leave or asylum interview**” a person does not have with them an immigration document (i.e. a passport or a document which is designed to serve the same purpose as a passport”), which “**is in force and satisfactorily establishes his identity and nationality or citizenship**”. The offence can also be committed if the person does not have such a document in respect of a dependant child with whom they “claim to be travelling or living”.

The offence may be committed:

- at the port of entry on arrival or
- in-country at an interview. In in-country cases there is a 3 day period to produce the document and the offence is committed only if a person is unable to produce a document **within 3 days** beginning with the date of the interview.

#### Defences:

It is a defence to:

- prove that the person is an EEA national or is a family member of an EEA national exercising Treaty rights in the UK
- prove that he/she has a “**reasonable excuse** for not being in possession of a document of the kind specified”
- produce a false immigration document and prove that he/she used that document for all purposes in connection with his/her journey\*
- prove that he/she travelled to the UK without at any stage since setting out on his/her journey having possession of an immigration document\*

\*The guidance to the offence states “*It is not the intention of the offence to penalise those who never had an immigration document during the course of their journey to the United Kingdom, or those who use a false immigration document (e.g. a false passport) to travel to the United Kingdom and who produce that document on arrival*” (IND guidance, para 2.1.3 ). (But NB there are other offences regarding the use of false immigration documents – and note the Article 31 Refugee Convention protections and the statutory defences in s31 Immigration and Asylum Act 1999 – for more information see contacts below and CP Newsletter issue # 56 p2)

The same defences apply in relation to the offence in respect of a dependant child.

**What constitutes reasonable excuse?**

CPS to assess facts on case by case basis with regard to usual tests on prospects of successful prosecution, evidential sufficiency and public interest.

**Note:**

“The fact that the document was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it or for not providing it (see below) **unless** it is shown that the destruction or disposal was –

- For a reasonable cause or
- Beyond the control of the person charged with the offence” (s2(7)(a))

“reasonable cause” does **not** include:

- delaying the handling or resolution of a claim or application or the taking of a decision,
- increasing the chances of success of a claim or application, or
- complying with the instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom, **unless in the circumstances of the case it is unreasonable to expect non-compliance with the instructions or advice.** (s2(7)(b))

**Examples of reasonable excuse given are:**

The individual is not in control/possession of passport because someone else in “a family group” is holding the document.

“**exceptional situations**” where it is not unreasonable to expect non-compliance with the instructions of someone advising or facilitating immigration into the United Kingdom e.g.” **some unaccompanied minors, or for someone with a mental disability**” (see below)

“Situations where a person can show that he was **threatened or intimidated** to such an extent that he could be reasonably considered to have been forced to have destroyed or disposed of his document”. Facilitator may have threatened/intimidated client in variety of ways – full instructions will be needed.

“the document has been lost or stolen and the individual can substantiate such a claim”.

**In-country cases where the document is not produced within 3 days:**

In addition to the defences listed above, the guidance also states that there might be other explanations for non-production in in-country cases:

- Emergency medical treatment
- Family emergency
- Problems with transport preventing returning with the document

All these reasons will require substantiation and the person will be required to produce the document “as soon as practicably possible”.

**Penalties**

On conviction on indictment – max 2 years\*/fine/both

Summary conviction – max 6 months/fine/both (12 months when s154 CJA 2003 is commenced)

**\*Note:** Potential exclusion from refugee protection altogether under S72 Nationality, Immigration and Asylum Act 2002 – “*If a person found guilty of an offence under section 2 were sentenced to the maximum 2 years’ imprisonment, he could, for the purposes of Article 33(2) of the Refugee Convention, be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK by virtue of section 72 of the Nationality, Immigration and Asylum Act 2002. However, a presumption that a person constitutes a danger to the community is rebuttable*” [letter from Home Office accompanying guidance to Immigration Officers dated 21<sup>st</sup> September 2004].

**Procedure:**

IND has indicated that the pursuit of these offences will be supervised initially (for the first 6 months) by teams at Heathrow, Gatwick and the Asylum Screening Unit, Croydon. The procedure that is envisaged is as follows:

**On-entry/Port cases**

- 1) Where a person is encountered leaving the aircraft by a surveillance officer or presents themselves to the immigration authorities without a document, they will be asked brief questions by an immigration officer as an additional element of the usual screening process\* [IND call this the "initial designated administrative procedure"]. (The usual screening process takes place via the completion of a form to establish identity/method of travel). The aim of these additional questions is apparently to establish whether "***it is considered that an offence under subsection (1) has been committed and it is considered likely that the person does not have a defence, and no other mitigating factors apply, such as those in respect of vulnerable persons***" [IND guidance para 3.5.1]..

**\*Note: these questions are NOT conducted under PACE, there is no right to legal representation but they do relate to potential commission of an offence and clearly go beyond an initial suspicion in respect of the offence. Therefore it is essential that criminal practitioners obtain a copy of this interview. It is assumed that reference to such an interview will NOT be admissible in subsequent proceedings (see below).**

- 2) If the Immigration Officer does not think there is such a defence/mitigating circumstances, reference is made to the Chief Immigration Officer who will discuss the case with the prosecution unit/police with a view to whether arrest should take place.
- 3) If the person is arrested they will be taken to the police station and interviewed under caution and PACE codes will apply.

**Note:**

- criminal practitioners should obtain details of the earlier interview conducted on entry. A copy of the screening form containing the additional questions should be requested (a copy should have been provided to the individual in any event).
- Senior immigration officials have indicated that they are aware that PACE code protections will not apply at the earlier interview (as it is an "*administrative procedure*") and therefore will attempt to keep that interview "brief" and conduct substantive questioning in the police station. The legal difficulties of this approach and lack of protection available to the client will be apparent to criminal practitioners.
- It is essential that advisors explore all potential defences with suspects and ensure that these are placed on record. It is open to the advisor at the police station to make representations as to the continuation of proceedings (in particular see comments below re vulnerability, minors, women asylum seekers).

**In-country cases**

These cases will occur where a person attends the Asylum Screening Unit.

- 1) A screening interview will take place and a record of that interview should be requested. In in-country cases where a person is unable in the first instance to produce a document they will be asked to do so within 3 days.
- 2) If on returning to the ASU they are unable to produce the document (or they indicate at the initial interview that they will be unable to produce the document) they will be asked further questions with a view to potential reference for prosecution (again this record should be requested) and if pursued:-
- 3) An interview would then be conducted at a police station under caution.

Issues to consider:

**Client's status**

This offence applies at either a “leave or asylum interview”. Establish whether the client is an asylum seeker.

If client is an asylum seeker (i.e. the claim is that to remove or require him to leave the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998, as being incompatible with his Convention rights) there are issues of vulnerability since all persons fleeing persecution will be in a heightened state of vulnerability and this should be taken into account when assessing the reasonableness of a persons actions.

If client is not an asylum seeker establish on what basis they are seeking leave. They may be vulnerable or there may be other relevant factors.

## **Minors**

Issues of vulnerability. Note the guidance *“It would be unreasonable to expect the same level of understanding from minors as we do from adults. Not only could some children not be expected to challenge the advice or instructions of a facilitator or another adult with whom they may be travelling, but they may not understand they need a passport or the consequences of destroying or disposing of it en route to the United Kingdom”* [IND guidance para 2.4.1].

Be aware of the issues involved in an assessment of level of maturity and in particular age disputes (for further information on age disputes, see contacts below).

Also issues re PACE code providing for appropriate adult to age 17 but minor defined as under 18 in asylum/immigration proceedings (see IND letter 21/9/04) and consider the vulnerability of young asylum seekers of 17 and over.

## **People with disabilities**

*“In some circumstances persons with learning difficulties or a disability may be particularly dependent on the person who advised them on or facilitated their travel to the United Kingdom. In such circumstances it may be unreasonable to expect non-compliance with instructions or advice”* [IND guidance 2.4.2].

## **Other vulnerable persons**

Be aware of other potentially vulnerable persons e.g. women, trafficking victims and also increased possibility that possession of the document was beyond their control. *“In all cases, not just those involving women and/or children, the individual circumstances of the case (including culture, gender, age, and education) will be taken into consideration..”* (IND letter dated 21/9/04)

Trafficking victims refer to trafficking toolkit - (<http://www.crimereduction.gov.uk/toolkits>). Senior officials state that it is not the intention to run contrary to the policy regarding trafficking i.e. trafficked people should be considered as victims rather than criminalized.

## **Threats etc.**

People dependant on facilitators may often be particularly susceptible to threats/intimidation/coercion.

## **Asylum/Human Rights proceedings**

Be aware of the following:

- **In all circumstances specialist immigration representation is essential. Liaison with immigration representatives will also be essential in respect of defences/representations/mitigation**

- IND intention is to run proceedings “in tandem” – this means that prosecution will **not** be deferred by IND until after the outcome of an asylum claim or vice versa.
- An on-entry client’s new claim for asylum may be processed extremely quickly under fast track procedures. An in-country client may already have an on-going asylum/human rights application.
- Also note “*This will mean that if any relevant information should come to light during the course of the leave or asylum decision-making process, including the initial decision, this information will be passed to the unit which initiated the prosecution*” (IND letter dated 21/9/04)
- The outcome of criminal proceedings will have an impact on the asylum or other claim – conviction will damage credibility (s8 new AI (ToC etc) Act 2004) – see note above and more detailed text at 3) below.

### References:

- Guidance issued to immigration officers on s2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
- Letter from IND 21/9/04

**2) S35** – introduces an offence of non-co-operation with action to obtain an immigration document for the purpose of facilitating the person’s deportation or removal. This is an either way offence (penalties as for s2).

*“The Secretary of State may require a person to take specified action if the Secretary of State thinks that:*

- *the action will or may enable a travel document to be obtained by or for the person and*
- *possession of the travel document will facilitate the persons deportation or removal from the UK” (s35 (1))*

The offence is committed if a person fails without reasonable excuse to comply with the Secretary of State’s requirements regarding the obtaining of a travel document (s35(3)).

The Secretary of State may require a person to:

- provide information or documents to the Secretary of State or to any other person
- obtain information or documents
- provide fingerprints, submit to the taking of a photograph or provide information or submit to a process for recording information about external physical characteristics (including in particular features of the iris or any other part of the eye)
- make or consent to or co-operate with the making of an application to a person for the government of a State other than the United Kingdom
- co-operate with a process designed to enable determination of an application
- complete a form accurately and completely
- attend an interview and answer questions accurately and completely
- make an appointment (s35(2))

IND guidance states “*the above list is not intended to be exclusive. While these are examples of specified actions a person may be most commonly required to take, the **offence is not limited to these actions**. The Secretary of State may require a person to take any specified action so long as he thinks it will or may enable a travel document to be obtained and it will facilitate deportation/removal*”. (IND guidance para 7.1).

*“At an interview under caution, questions should concentrate on the person’s intentions and whether or not he had a reasonable excuse for failing to comply with the actions he was required to take”.* (IND guidance para 7.2)

**Reasonable excuse**

Prosecution will have to prove beyond reasonable doubt that D did not have an excuse or that the excuse was not reasonable.

Examples of reasonable excuses given:

- emergency medical care – therefore unable to attend an interview or appointment or unable to provide information
- transport problems preventing travel to a consulate or embassy

Proof would be required

Power of arrest without warrant for immigration officers. Offence is treated as relevant as regards powers under IAA 1999 to search before and after arrest.

**Note: PACE Code C, 7.4**

*“Notwithstanding the provisions of the consular conventions if the detainee is a political refugee whether for reasons of race, nationality, political opinion or religion or is seeking political asylum consular officers **shall not** be informed of the arrest of one of their nationals or given access or information about them except at the detainees express request”.*

**IND have said that they may invoke s35 to require cooperation with redocumentation before appeal rights are exhausted . This is very problematic in cases of asylum or human rights. A client’s country authorities must not be contacted if there are outstanding proceedings and indeed even if claim is no longer pending, clients will often have concerns for the safety of family and friends in country of origin. This may amount to a reasonable excuse and should be explored fully with the client. In most cases, the client should have an immigration advisor and liaison will be essential.**

**Unaccompanied minors**

In all cases the prosecution of minors for immigration offences should be resisted. It should be assumed that there will be significant issues of vulnerability (see notes on s2 also). It is essential that the young person has access to specialist immigration advice.

Age disputes may arise both during immigration interviews/questioning and in the police station. (refer here to recent age assessment cases) It is essential that an appropriate age assessment is carried out if age is disputed as failure to do so may have a serious impact on decisions to prosecute and the assessment of claim.

Note IND guidance:

- removal would not be enforced against a minor “*unless we were satisfied that the child would be met on arrival in his or her country and that care arrangements were in place thereafter*” and
  - “*If there was evidence that care arrangements were seriously below the standard normally provided in the country concerned or they were so inadequate that the child would face a serious risk of harm if returned, consideration would be given to abandoning enforcement action*”
- ⇒ no application for re-documentation, the offence would not arise.

Reference to a senior caseworker or inspector in the case of an unaccompanied minor is required by the guidance.

**Procedure**

- 1 Where a specified action is required, request to the person must be made in writing detailing what it is they are being asked to do, why and the consequences of failure
- 2 All requests should be detailed on the case file together with any explanation from the person (IND guidance points to CPS relying on evidence in file)
- 3 Requests to attend an interview must be made in writing
- 4 If an explanation is offered it must be investigated
- 5 If a person attends an interview and then refuses to answer questions, they must be cautioned and PACE followed if the officer suspects that an offence has been committed

6 Reference must be made to senior caseworker/inspector if a prosecution is contemplated who will then consult Deputy Director

⇒ the guidance points to the fact that co-operation will not always be required if a country can document the person without it: *“even if a person has previously failed to comply with requirements made by the Secretary of State, removal would usually be preferable to prosecution)”*.

### **3) s8 claimant’s credibility (s8(7),(10),(11) in force 01.10.04 for purpose of allowing Secretary of State to exercise power to make subordinate legislation under S8(7) for implementation of section)**

#### **\*Applies to asylum and human rights claims**

Sets out provisions relating to behaviour to be taken into account as “damaging the claimant’s credibility” by a “deciding authority” (i.e. the Home Office or immigration adjudicator/judge or SIAC) :

S8(1) *“In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or human rights claim, a deciding authority shall take account, as damaging the claimant’s credibility any behaviour to which this section applies”*

S8(2) Any behaviour the deciding authority thinks ***“is designed or likely to conceal information, is designed or likely to mislead or is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant”***.

S8(3) Without prejudice to the generality of S8(2) *“the following types of behavior shall be treated as designed or likely to conceal information or to mislead –*

- a) *failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,*
- b) *the production of a document which is not a valid passport as if it were*
- c) *the destruction, alteration or disposal in each case without reasonable explanation, of a passport*
- d) *the destruction, alteration or disposal in each case without reasonable explanation, of a ticket or other document connected with travel*
- e) *failure without reasonable explanation to answer a question asked by a deciding authority*

s8(4) *“failure to take advantage of a reasonable opportunity to make an asylum claim or a human rights claim while in a safe country”*

s8(5) *“failure to make an asylum claim or a human rights claim before being notified of an immigration decision unless the claim relies wholly on matters arising after the notification”*

**\*Note: be aware of potential difficulties that can arise in immigration cases regarding notification.**

s8(6) failure to make an asylum claim or a human rights claim before being arrested under an immigration provision unless –

- a) *“he had no reasonable opportunity to make the claim before the arrest or*
- b) *the claim relies wholly on matters arising after arrest”*

**ILPA would very much like feedback from criminal practitioners on the implementation of these offences. Rosie Brennan is co-ordinating liaison with criminal practitioners on this offence and other aspects of immigration law in the police station/criminal proceedings and can provide further information for criminal practitioners.**

#### **Contact details:**

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