



Home Office

Immigration and Nationality Directorate

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FIRST DRAFT OF GUIDANCE FOR SECTION 2 OF THE ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004.

I would like to thank you for all responses to the draft instructions on section 2. Responses were received from Anti-Slavery International, the Refugee Women's Resource Project at Asylum Aid, the Law Society, the Article 31 Working Group of the Asylum Rights Campaign, the UNHCR and the Refugee Children's Consortium.

We have considered the comments of all of the organisations that replied and have acted upon them where appropriate. A number of common themes emerged and I hope we have addressed them fully in this letter. As you are aware the offence comes into force on 22nd September and a copy of the instructions is attached for your convenience.

The Structure and Development of the Instructions.

I would like to assure you that the development of the operational strategy for and implementation of section 2 has been an ongoing process led by the Project Board, as has the production of the instructions. The Asylum and Appeals Policy Directorate, Enforcement Policy Unit, Legal Adviser's Branch, Heathrow, Gatwick, Dover, Croydon Asylum Screening Unit, the Regions and the Crown Prosecution Service (CPS) have all input into the instructions. In addition, the Project Board has been in contact with the Department for Constitutional Affairs (DCA), the Magistrates' Association and the Association of Chief Police Officers (ACPO).

A Home Office Circular about section 2 was sent out to relevant bodies on 7th September 2004. This is also available at www.circulars.homeoffice.gov.uk (circular number 55/2004).

Due to the nature of the section 2 offence it is necessary to cross reference to other Asylum Policy Instructions (APIs) and the Operational Enforcement Manual (OEM). In light of comments we have endeavoured to make the links to this information clearer. It usually provides for greater consistency to cross-refer to existing documents rather than to paraphrase them in a different document.

Reference to PACE and the PACE Codes of Practice can be found in section 5 of the instructions. A reference to the OEM which contains instructions for the UK Immigration Service on interviewing under PACE is also provided here.

It is not appropriate to include reference to the Code for Crown Prosecutors in the instructions for immigration officers. It will always be for the CPS to decide if the case meets the evidential test and, if so, whether it is in the public interest to prosecute.

The Burden of Proof.

Where a person seeks to rely on a defence for failing to produce a valid immigration document the burden of proving this, on the balance of probabilities, rests with the defendant. This is stated in paragraph 2.2.1 of the instructions.

The Level of Vulnerability faced by People fleeing Persecution.

Whilst a trafficked person under section 4 of the 2004 Act might include a person who has been subjected to deception, that deception must be designed to induce him to provide services, provide another person with benefits or enable another person to acquire benefits. In this context we do not necessarily believe that a reference to deception is relevant to whether a person has destroyed or disposed of his document. However, where a person either asks a person (the applicant) to hand his passport over or asks that the passport is destroyed, the questions of whether it was reasonable to follow that request may depend on the state of mind of that applicant and the relationship the applicant has with the person making the request.

Concerns were expressed that some women will not have control of their own document, because it will be in the possession of a male family member. The section 2 offence provides for situations where the destruction or disposal of a document is beyond the control of the defendant or when a person never had an immigration document, and this is reflected in the instructions.

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 and investigating officers will try to ascertain whether the person had a document, whether this document was in their control, whether the document was destroyed or disposed of, to what extent the person was involved in this destruction or disposal and the circumstances under which the destruction or disposal took place.

Children.

The Immigration Rules define a child as a person who is under 18 or who, in the absence of documentary evidence, appears to be under 18. The Immigration and Nationality Directorate (IND) recognises an unaccompanied minor as a person who is under 18 or who, in the absence of documentary evidence establishing age, appears to be under that age, and who is applying for asylum in his/her own right; and is without family members or guardians to turn to in his/her country.

Any age dispute cases will be dealt with according to published IND policy. A reference to the chapter in the OEM which contains instructions on how to treat unaccompanied asylum seeking children has been added to the relevant paragraph of the instructions.

If a case gets to a stage where a caution is given and an arrest made, PACE will be adhered to. PACE requires an "appropriate adult" to be present at the interview of a juvenile (anyone who