

# ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Offences*

#### **Section 1 : Assisting Unlawful Immigration**

16. **Section 1** amends section 25 of the Immigration Act 1971 which creates an offence of facilitating the commission of a breach of immigration law. “Immigration law” means a law which has effect in a member State and which controls entitlement to enter the State, transit across the State or be in the State.
17. The amendment allows the Secretary of State to make an order prescribing additional States which are to be regarded as “member States” for the purposes of the section if he considers it necessary for the purpose of complying with the United Kingdom’s EU obligations. The nationals of these states are also to be deemed to be citizens of the European Union for the purposes of section 25 of the 1971 Act. This is necessary to comply with the EU Council Directive (2002/90/EC) and EU Council Framework Decision (2002/946/JHA). The Directive and associated Framework Decision require member States to create the offence of assisting a person who is not a national of a member State to enter or reside in a member State contrary to the laws of that member State. This offence must apply in relation to Norway and Iceland as well as the member States.
18. Subsection (2) makes a minor amendment to section 25C of the 1971 Act to make clear that the references to “member State” and “immigration law” in subsection (9)(a) thereof have the same meaning as in section 25.

#### **Section 2 : Entering the UK without a passport, &c.**

19. **Section 2** creates two new criminal offences. If a person is unable to produce an immigration document at a leave or asylum interview in respect of either himself or a child with whom he claims to be living or travelling then he will commit an offence. A person does not commit the offence if the interview takes place after the person has entered the United Kingdom and within the period of three days beginning with the date of that interview the person provides an immigration document to an immigration officer or to the Secretary of State
20. There are various defences to the charges. In respect of a person’s failure to produce his own document it will be a defence for the him to prove that: (a) he is an EEA national, (b) he is a member of the family of an EEA national and he is exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom, (c) he has a reasonable excuse for not being in possession of an immigration document, or (d) he travelled to the United Kingdom without, at any stage since he set out on that journey, having possession of an immigration document. It is also a defence for a person

to produce a false immigration document and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom.

21. In respect of a person's failure to produce a document for a child with whom he claims to be living or travelling it will be a defence for him to prove that: (a) the child is an EEA national, (b) the child is a member of the family of an EEA national and that he is exercising a right under Community Treaties in respect of entry to or residence in the United Kingdom, (c) the person has a reasonable excuse for not being in possession of an immigration document in respect of the child, or (d) that he travelled to the United Kingdom with the child without, at any stage since he set out on the journey, having possession of an immigration document in respect of the child. It is also a defence for a person to produce a false immigration document and to prove that it was used as an immigration document for all purposes in connection with the child's journey to the United Kingdom.
22. The burden of proving the defence on the balance of probabilities rests with the defendant.
23. A person will not be able to rely on the deliberate destruction or disposal of a document as their excuse for not being in possession of it unless it was done for a reasonable cause or was beyond his control. It will not be reasonable cause, however, if the document was destroyed or disposed of with a view to delaying a claim or increasing its chances of success or on the instructions or advice of a facilitator – unless it would have been unreasonable to expect non-compliance.
24. An immigration officer or a police constable who has a reasonable suspicion that an offence under the section has been committed may arrest the person without a warrant. Immigration officers and police constables also have various other powers of search and entry common to other immigration-type offences.
25. The offences may be tried summarily or on indictment. On summary conviction the maximum penalty is six months imprisonment, a fine up to the statutory maximum or both. On conviction on indictment the maximum penalty is two years imprisonment, a fine or both. When section 154 of the Criminal Justice Act 2003 is commenced the sentence that may be passed on summary conviction will increase to twelve months in England and Wales. It is expected that at the same time a similar amendment will be made in respect of Scotland and Northern Ireland.

### ***Section 3 : Immigration documents: forgery***

26. **Section 3** amends section 5 of the Forgery and Counterfeiting Act 1981 so that "immigration documents" become instruments to which section 5 of the 1981 Act applies. "Immigration documents" are cards or stickers (or other instruments) either: (i) designed to be given to persons who have been granted leave to enter or remain in the UK and which carry information about the leave granted (such as duration or entitlement to employment), or (ii) given to persons to confirm rights under the Community Treaties to enter or reside in the UK. Cards and stickers will increasingly be used instead of ink stamps in future. Possession of ink stamps (both genuine and replica), without reasonable excuse, is already an offence under section 26B of the Immigration Act 1971 (as inserted by section 149 of the Nationality Immigration and Asylum Act 2002). As a result of the amendment, the possession of a false card or sticker, or equipment with which such things may be made will be an offence in the circumstances set out in section 5 of the 1981 Act.

### ***Section 4 : Trafficking people for exploitation***

27. **Section 4** introduces new criminal offences of trafficking people into, within or out of the UK for the purpose of exploitation. A person found guilty of an offence under section 4 is liable, on conviction on indictment, to imprisonment for up to fourteen

years, to a fine or to both, or on summary conviction, to imprisonment for up to twelve months, to a fine not exceeding the statutory maximum or to both. A person commits an offence if he arranges for a person to arrive in or depart from the UK and he intends to exploit that person or believes that another person is likely to do so. The offence is also committed if a person arranges travel within the UK by a person if he believes that the person has been brought into the UK to be exploited, and he intends to exploit that person or believes that another person is likely to do so. For the purposes of the offence, a person is exploited if he is:

- the victim of behaviour contravening Article 4 of the ECHR (slavery or forced labour);
- encouraged, required or expected to do something which would mean an offence is committed concerning organ removal;
- subjected to force, threats or deception designed to induce him to provide services or benefits or enable another person to acquire benefits; or
- requested or induced to do something, having been chosen on the grounds that he is ill, disabled, young or related to a person, in circumstances where a person without the illness, disability, youth or family relationship would be likely to refuse or resist.

### **Section 5: Section 4: supplemental**

28. Section 5 is supplemental to section 4.
29. Subsection (1) provides that the offences in subsections (1) to (3) of section 4 apply to anything done: (i) in the United Kingdom; or (ii) outside the United Kingdom by: (a) a person to whom subsection (2) applies (e.g. a British citizen), or (b) a body incorporated under the law of a part of the United Kingdom.
30. Subsection (4) provides that sections 25C and 25D of the Immigration Act 1971 shall apply in relation to an offence under section 4, as they apply in relation to an offence under section 25 of the 1971 Act. Sections 25C and 25D of the 1971 Act provide for the forfeiture and detention respectively of vehicles, ships or aircraft in certain circumstances.
31. Subsection (6) amends the Criminal Justice and Court Services Act 2000 to make each of the offences in section 4 capable of being an “offence against a child” for the purposes of the 2000 Act. Under the 2000 Act, in certain circumstances a court must disqualify a person convicted of such an offence from working with children. Subsection (10) makes a similar provision in relation to Northern Ireland.
32. Subsection (7) adds the offences in section 4 to the list of lifestyle offences in paragraph 4 of Schedule 2 to the Proceeds of Crime Act 2002. This has the effect that a person who has been convicted of an offence under section 4 is held to have a criminal lifestyle for the purposes of the Proceeds of Crime Act 2002. Subsections (8) and (9) make equivalent provision in relation to Scotland and Northern Ireland.
33. Subsection (11) provides that until the commencement of section 154 of the Criminal Justice Act 2003, the reference to twelve months in section 5(5)(b) should be read as if it were a reference to six months. Subsections (12) and (13) also provide that the reference to twelve months in section 5(5)(b) shall be read as a reference to six months in Scotland and Northern Ireland respectively. It is anticipated that at the time section 154 of the Criminal Justice Act 2003 comes into force a similar amendment will be made by the devolved administrations.

### **Section 6: Employment**

34. Subsection (1) amends section 8 of the Asylum and Immigration Act 1996, the principal statutory control on illegal migrant working, to make the offence in that section, which

*These notes refer to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) which received Royal Assent on 22 July 2004*

was previously triable summarily only, triable either way. It is a criminal offence under section 8 of the 1996 Act to employ a person subject to immigration control who has attained the age of 16, if (a) the employee has not been granted leave to enter or remain, or (b) the employee's leave is not valid and subsisting or is subject to a condition precluding him from taking up the employment. As a summary offence, the maximum penalty on conviction was a fine of up to level 5 on the standard scale. By enabling more serious cases to be tried on indictment (following conviction on which there is no limit to the level of fine that can be imposed), this provision effectively increases the maximum penalty which the courts may impose in these cases.

35. Subsection (2) makes a consequential change to the time limit for prosecution of the section 8 offence. The normal rule in relation to offences which are triable summarily only is that proceedings must be instituted within 6 months of the commission of the offence. Section 8(9) of the 1996 Act (inserted by section 147 of the Nationality, Immigration and Asylum Act 2002) applies the extended three year time limit for prosecutions contained in section 28(1) of the Immigration Act 1971 to the section 8 offence. However, it is a general principle of law that there is no time limit for the commencement of criminal proceedings in respect of offences which are triable either way. Subsection (2) therefore disapplies the extended time limit for prosecutions in relation to the section 8 offence.

### ***Section 7: Advice of Director of Public Prosecutions***

36. Section 164 of the Immigration and Asylum Act 1999 amended section 3(2) of the Prosecution of Offences Act 1985 to enable the Director of Public Prosecutions (DPP) to take over the conduct of any criminal proceedings instituted by an immigration officer. Section 7 makes a further amendment to section 3(2) of the 1985 Act to make it the duty of the DPP to give advice to immigration officers on matters relating to criminal offences. This will allow the DPP to give immigration officers advice on criminal offences for which the latter have a power of arrest prior to proceedings being instituted in respect of those offences.