

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

## **Section XX (Clause 2): Entering United Kingdom without passport, &c.**

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## 1. Introduction.

1.1 Section 2 (1) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 states that a person shall be guilty of an offence if at a leave or asylum interview (as defined in subsection (12), see **Annex A**) he does not have with him an immigration document as defined<sup>1</sup>, for example a passport, which is in force and which satisfactorily establishes his identity and nationality or citizenship. Likewise a person commits an offence under subsection (2) if at a leave or asylum interview he does not have with him, in respect of any dependent child with whom he claims to be travelling or living, an immigration document which is in force and which satisfactorily establishes the child's identity and nationality or citizenship.

1.2 The person does not commit an offence under subsection (1) or (2) if the interview referred to in that subsection takes place after the person has entered the United Kingdom and within a period of three days beginning with the date of that interview the person provides to an immigration officer or the Secretary of State a document of the kind referred to in that subsection. He does commit the offence if he fails, without a defence listed in subsection (4) or (5) as appropriate (see **Annex A**), to do this.

1.3 It is a defence to a charge under subsection (1) for the defendant 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<sup>2</sup> 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.

1.4 It is a defence to a charge under subsection (2) for the defendant 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 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) 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.

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<sup>1</sup> An "immigration document" means (a) a passport, and (b) a document which relates to a national of a State other than the United Kingdom and which is designed to serve the same purpose as a passport.

<sup>2</sup> For the purposes of this section –

- (a) a document which purports to be, or is designed to look like, an immigration document, is a false immigration document, and
- (b) an immigration document is a false immigration document if and in so far as it is used –
  - (i) outside the period for which it is expressed to be valid,
  - (ii) contrary to provision for its use made by the person issuing it, or
  - (iii) by or in respect of a person other than the person to or for whom it was issued.

1.5 In relation to both subsections (1) and (2) the fact that a document was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it where the destruction or disposal was intended to delay the handling or resolution of a claim or application or the taking of a decision, or to increase the chances of success of a claim or application. Likewise, destroying or disposing of a document on the instructions of a facilitator may not be relied on as an excuse for not being in possession of it unless the person can show that it would be unreasonable to have expected non-compliance in the particular circumstances of his case.

1.6 If an immigration officer or a police constable has a reasonable suspicion that an individual has committed a subsection (1) or (2) offence then he may arrest the individual without a warrant. Immigration officers and police constables also have various other powers of search and entry common to other immigration-type offences<sup>3</sup>. The subsection (1) and (2) 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.

1.7 See **Annex A** for a complete version of Section XX (2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

## **2. The Subsection (1) Offence.**

### **2.1 The Purpose of the Offence.**

2.1.1 This offence applies in respect of any person who attends an interview at which he seeks leave to enter or remain in the United Kingdom or claims 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.

2.1.2 The offence is intended to discourage persons from destroying or disposing of their immigration documents en route to the United Kingdom. In particular, to discourage them from doing so in order to conceal their identity, age or nationality in an attempt to increase the chances of success of a claim or application or to make consideration of their claim or application more difficult and/or to thwart removal.

2.1.3 It is not the intention of the offence to penalise those who did not ever have 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.

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<sup>3</sup> An offence under this section shall be treated as (a) a relevant offence for the purposes of sections 28B and 28D of the Immigration Act 1971 (c.77) (search, entry and arrest), and (b) an offence under Part III of that Act (criminal proceedings) for the purposes of sections 28(4), 28E, 28G and 28H (search after arrest, &c.) of that Act.

## 2.2 Burden of Proof.

2.2.1 It is for the prosecution to prove in the usual way that a section (1) offence has been committed, i.e. that the person does not have an immigration document which is in force and which satisfactorily establishes his identity and nationality or citizenship. And a person is presumed not to have a document with him if he fails to produce it to an immigration officer or an official of the Secretary of State on request (see subsection (8)). However, where in these circumstances a person claims to have a defence for failing to produce a valid immigration document then the burden of proving this, on the balance of probabilities, rests with him.

## 2.3 Defences.

### 2.3.1 The Reasonable Excuse.

Where the defence of reasonable excuse is relied upon, inevitably each case will vary and the factor in deciding whether or not to proceed to prosecution will depend on whether the defence is likely to be made out. It is for the CPS to decide whether to prosecute, a decision based on whether there is a reasonable prospect of a successful prosecution (i.e. whether there is sufficient evidence) and whether it is in the public interest to prosecute. Subsection (7) states that it is not a reasonable excuse for a person to say that the reason he or she is not in possession of a document is because it was deliberately destroyed or disposed of unless this destruction or disposal is shown to be; (i) for a reasonable cause or (ii) beyond the control of the person charged with the offence.

As a matter of law, “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.**

The specific details of what constitutes a “reasonable excuse” are not set out in statute, but “reasonable excuse” may include:

#### Offences on arrival.

- Where it is claimed that the document was destroyed or disposed of, there may be exceptional situations where it is unreasonable to expect non-compliance with the instructions or advice of a person who offers advice about, or facilitates, immigration into the United Kingdom (for example this may be the case for some unaccompanied minors, or for someone with a mental disability). (See 2.3.1.3).
- 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.

- An individual may be able to rely on the defence of reasonable excuse if, for example, there was a document, but coercion was used to take the document away from him. If the individual seeks to rely on this reasonable excuse, he will have to show that this was indeed the case (see section 2.2 Burden of Proof above for details).
- Where the document has been lost or stolen and the individual can substantiate such a claim.

#### In-country offences where a document is not produced within 3 days.

The three defences above apply to in-country cases as they do to port cases, but in addition there might be further defences available relating to a person's explanation for not providing an immigration document within three days. For example:

- The person needed emergency medical care and the individual can substantiate such a claim.
- There was a family emergency and the individual can substantiate such a claim.
- Problems with transport preventing the person returning with the document (e.g. a rail strike, accident or road closure due to accident or weather conditions) can substantiate such a claim.

#### Vulnerable people.

##### 2.3.1.1 Subsection (7)(b)(iii).

The purpose of Section XX (Clause 2) is primarily to discourage people from deliberately disposing of or destroying their passports or those of any dependent children with whom they claim to be travelling or living. People who destroy or dispose of passports often do so in order to frustrate immigration control (for example by enhancing their asylum claim by concealing their true nationality) and delay, or even prevent, removal.

Subsection (7) precludes a person from relying on the destruction or disposal of his immigration document as a reasonable excuse for not having it at his leave or asylum interview unless he can show that the destruction or disposal was for a reasonable cause or beyond his control. A reasonable cause does not include destruction or disposal to comply 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 would be unreasonable to expect non compliance with those instructions or advice.

##### 2.3.1.2 Unaccompanied minors.

The current age of criminal liability in England, Wales and Northern Ireland is 10 years. Therefore, as a matter of law, unaccompanied minors of 10 years or more could be found guilty of the offence in England, Wales and Northern Ireland. In Scotland, the age of criminal responsibility is 8 years. However, there will clearly be a number of particular considerations for cases involving minors. These are set out in more detail below.

It is important in cases involving children who say they have destroyed or disposed of their passport at the behest of another person to take account of subsection (7)(b)(iii) (see **Annex A**), where in the circumstances of the case, it may be unreasonable to expect non-compliance with the instructions or advice of that person.

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.

Children have different levels of maturity, which might relate to age or other factors, and this need to be taken into account in assessing the merits of a child's defence. Unaccompanied minors who have committed the offence would need to be considered on a case by case basis, which should be referred to a chief immigration officer and the local prosecution unit as necessary.

#### 2.3.1.3 People with disabilities.

Each case where a person with learning difficulties or a disability has committed the offence should be considered on its own merits. The offence targets those who destroy or dispose of their immigration documents en route to the United Kingdom and we would expect most people to understand the purpose of and need for an immigration document.

The offence is designed to change behaviour, and encourage people to be honest and cooperate. However, 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.

### **2.3.2 False documents**

It is a defence for a person to produce a false immigration document, as defined in subsection (13), and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom.

A person who claims to have travelled on a false document but who cannot produce it will not be able to rely on this particular defence.

### **2.3.3 Never having had an immigration document.**

It is a defence for a person to prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document. If a person were to raise this defence, we would expect them to be able to show why he did not possess such a document and how he or she managed to travel to the United Kingdom without a document.

This may involve a situation where, for example, there was a document, which the person facilitating the individual's travel to the United Kingdom retained, without the individual ever having had a chance to take possession of the document. If the individual seeks to rely on this reasonable excuse, he will have to show that this was indeed the case (see section 2.2 Burden of Proof above for details).

## **2.4 Procedures.**

### **2.4.1 Where it is suspected that a person has committed the subsection (1) offence at a port.**

2.4.1.1 It is possible that, at a port, an undocumented person could be detected by an immigration officer, a surveillance officer or a security officer. This could take place not only at any immigration desk but also airside, in the case of airports, or during a document check during disembarkation. In cases where this becomes a leave or asylum interview, as defined by subsection (12), and it is a surveillance officer or security officer who detects the undocumented person, he should present the person to primary immigration control.

When someone seeking leave to enter or asylum without an immigration document is detected, the immigration officer should follow the designated administrative procedure to obtain biodata and to establish whether there appears to be a satisfactory defence to the subsection (1) offence. The immigration officer should refer to the chief immigration officer at this point.

If, on the basis of questions asked during this designated administrative procedure, 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, the person should be arrested and cautioned by an arrest-trained immigration officer or police constable before any further questions are put to him about the possible commission of an offence. The PACE Codes of Practice must be followed accordingly (see section 4).

Internal instructions will be issued to advise of the exact procedure if it is suspected that a person has committed a subsection (1) offence and it is considered likely that he does not have a defence. These are necessary because while some ports, for example Heathrow and Gatwick, have prosecution units, other ports do not, and so there is a need for locally specific instructions on how to proceed with some aspects dealing with suspected offences.

2.4.1.2 When a person is found to be undocumented and questioned in accordance with PACE, this should not automatically result in charge. The case should be referred to the CPS only where **all** the following criteria apply:

- the person has been requested to produce his passport (or other travel document used to travel to the United Kingdom) and has failed to do so or has done so and the document is either not in force and/or does not satisfactorily establish his identity and nationality/citizenship; and
- he is unable to show that he is an EEA national, or the member of the family of an EEA national exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom; and

- he does not otherwise have a reasonable excuse for not being in possession of a valid immigration document (within the meaning of subsection (4), see 2.3); and
- he has not produced a false document, or if he has he has not been able to prove he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom; and
- he has not proved that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.

#### **2.4.2 Where it is suspected that a person has committed the subsection (1) offence in country.**

2.4.2.1 Where a person without an immigration document is detected and it becomes a leave or asylum interview detection will occur at an Asylum Screening Unit (ASU), Public Enquiry Office (PEO), or at or by a Local Enforcement Office (LEO). In the case of an ASU or a PEO, it is most likely to be an administrative officer (AO) or executive officer (EO) who detects the undocumented person.

The officer should follow the designated administrative procedure to obtain biodata, noting that the person does not commit an offence if within a period of three days beginning with the date of the interview he provides an immigration document to an immigration officer or to the Secretary of State (see internal instructions on how to proceed).

The officer should follow further administrative procedure to enquire whether it is likely that the person has a satisfactory defence to the offence and should refer to the designated manager (see internal instructions) at this point.

If, on the basis of questions asked, it is considered that an offence under subsection (1) has been committed and it appears unlikely that the person has a defence, the person should be arrested and cautioned by an arrest-trained immigration officer or police constable before any further questions are put to him about the possible commission of an offence. The PACE Codes of Practice must be followed accordingly (see section 4).

Internal instructions will be issued to advise of the exact procedure if it is suspected that a person has committed a subsection (1) offence and it is considered likely that he does not have a defence. These are necessary because some procedure will differ between ASUs and LEOs, and so there is a need for locally specific instructions on how to proceed with some aspects of dealing with suspected offences.

2.4.2.2 When a person is found to be undocumented and questioned in accordance with PACE, this should not automatically result in charge. The case should be referred to the CPS only where **all** the following criteria apply:

- the person has been requested to produce his passport (or other travel document used to travel to the United Kingdom) and has failed to do so or has done so and the document is neither in force and/or does not satisfactorily establish his identity and nationality/citizenship; and
- the person has failed to provide a document within a period of three days beginning with the date of the leave or asylum interview and does not have a reasonable excuse for not providing a document in accordance with subsection (3) and/or he does not

otherwise have a reasonable excuse for not being in possession of a valid immigration document (see 2.3); and

- he is unable to show that he is an EEA national, or the member of the family of an EEA national exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom; and
- he has not produced a false document, or if he has he has not been able to prove he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom; and
- he has not proved, to the satisfaction of the Immigration Officer, that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.

## **2.5 Relationship between a leave or asylum application and criminal proceedings in respect of a subsection (1) offence.**

Where it is suspected that a person has committed a subsection (1) offence, and it seems likely that the person does not have a satisfactory defence, arrest will take place before an initial decision is made on the person's application for leave or asylum. However, the person's leave or asylum application will be processed in tandem with any criminal proceedings and will not be put on hold until the resolution of such criminal proceedings.

## **3 The Subsection (2) Offence.**

### **3.1 Purpose of the offence.**

3.1.1 This offence applies in respect of any person who does not have with him, at a leave or asylum interview, in respect of any dependent child with whom he claims to be travelling or living, an immigration document.

3.1.2 The offence is intended to discourage persons from destroying or disposing of the immigration documents of any dependent child with whom they are travelling or living in order to conceal the identity, age or nationality of that child in an attempt to increase the chances of success of either their own claim or application that of the child, or both, or to make consideration of the claim or application more difficult and/or to thwart removal.

3.1.3 It is not the intention of the offence to penalise those who never had possession of an immigration document in respect of the child during the course of their journey to the United Kingdom, or those who use a false immigration document (e.g. a false passport) for all purposes in connection with the child's journey and who produce that document on arrival.

### **3.2 Burden of Proof.**

3.2.1 It is for the prosecution to prove in the usual way that a section (2) offence has been committed, i.e. that the person does not have an immigration document which is in force and which satisfactorily establishes his identity and nationality/citizenship in respect of any dependent child with whom he claims to be travelling/living. And, a person is presumed not to have a document with him in respect of that child if he fails to produce it to an immigration officer or an official of the Secretary of State on request

(see subsection (8)). However, where in these circumstances a person claims to have a defence for failing to produce a valid immigration document in respect of the child then the burden of proving this, on the balance of probabilities, rests with him.

### **3.3 Defences.**

#### **3.3.1 The Reasonable Excuse.**

3.3.1.1 Where the defence of reasonable excuse is relied upon, inevitably each case will vary and the factor in deciding whether or not to proceed to prosecution will depend on whether the defence is likely to be made out. It is for the CPS to decide whether to prosecute, a decision based on whether there is a reasonable prospect of a successful prosecution (i.e. whether there is sufficient evidence) and whether it is in the public interest to prosecute. Subsection (7) states that it is not a reasonable excuse for a person to say that the reason he is not in possession of a document of the kind specified in subsection (2) is because it was deliberately destroyed or disposed of unless this destruction or disposal is shown to be; (i) for a reasonable cause or (ii) beyond the control of the person charged with the offence.

As a matter of law, “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.**

The specific details of what constitutes a “reasonable excuse” are not set out in statute, but “reasonable excuse” may include:

#### Offences on arrival.

- Where it is claimed that the document was destroyed or disposed of, there may be exceptional situations where it is unreasonable to expect non-compliance with the instructions or advice of a person who offers advice about, or facilitates, immigration into the United Kingdom (for example this may be the case for some unaccompanied minors, or for someone with a mental disability). (See 3.3.1.3).
- 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.
- An individual may be able to rely on the defence of reasonable excuse if, for example, there was a document, but coercion was used to take the document away from him. If the individual seeks to rely on this reasonable excuse, he will have to show that this was indeed the case (see section 2.2 Burden of Proof above for details).

- Where the document has been lost or stolen and the individual can substantiate such a claim.

In-country offences where a document is not produced within 3 days.

The three defences above apply to in-country cases as they do to port cases, but in addition there might be further defences available relating to a person's explanation for not bringing providing an immigration document within three days. For example:

- Where the document has been lost or stolen and the individual can substantiate such a claim.
- The person needed emergency medical care and the individual can substantiate such a claim.
- There was a family emergency and the individual can substantiate such a claim.
- Problems with transport preventing the person returning with the document (e.g. a rail strike, accident or road closure due to accident or weather conditions) and the individual can substantiate such a claim.

Vulnerable people.

3.3.1.1 Subsection (7)(b)(iii).

As section 2.3.1.1 above.

3.3.1.2 Unaccompanied child as a responsible person.

The current age of criminal liability in England, Wales and Northern Ireland is 10 years. As a matter of law, therefore, it is possible that an unaccompanied minor of 10 years or more travelling with other minors who are dependent on him could be found guilty of the offence in England, Wales and Northern Ireland. In Scotland, the age of criminal responsibility is 8 years. However, there will clearly be a number of particular considerations for cases involving minors. These are set out in more detail below.

It is important in cases involving children to take account of subsection (7)(b)(iii) (see **Annex A**), where in the circumstances of the case, it may be unreasonable to expect non-compliance with the instructions or advice of a facilitator.

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. However, we do not want to exclude minors from this offence. It may be the case that the elder child is fully aware of the need for a passport and has purposefully destroyed or disposed of the document.

Children have different levels of maturity, which might relate to age or other factors, and this will need to be taken into account in assessing the merits of a child's defence.

Unaccompanied minors who have committed the offence would need to be considered on a case by case basis, which should be referred to a chief immigration officer and the local prosecution unit as necessary.

#### 3.3.1.3 People with disabilities.

As section 2.3.1.3 above.

### **3.3.2 False documents**

3.3.2.1 It is a defence for a person to produce a false immigration document (see subsection (13)) 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.

A person who claims that the dependent child travelled on a false document but who cannot produce it may still seek to rely on the defence of a reasonable excuse for not being in possession of a valid document or, if applicable, the defence of never having had a valid document (see 7.3 below). However in relying on this defence, the onus will be on the claimant to show that it was indeed false or did not belong to the child, and to explain his reasons for destroying or disposing of it.

### **3.3.3 Never having had an immigration document.**

It is a defence for a person to prove 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. If a person were to raise this defence, we would expect him to be able to show why he did not possess a document of the kind specified in subsection (2) and how he managed to travel to the United Kingdom with a child but without a document for the child.

This may involve a situation where, for example, there was a document, which the person facilitating the individual's travel to the United Kingdom retained, without the individual ever having had a chance to take possession of the document. If the individual seeks to rely on this reasonable excuse, he will have to show that this was indeed the case (see section 2.2 Burden of Proof above for details).

## **3.4 Procedures**

### **3.4.1 Where it is suspected that a person has committed the subsection (2) offence at a port.**

3.4.1.1 At a port, a person who is accompanying a dependant child but who does not have an immigration document in respect of that child, could be detected by an immigration officer, a surveillance officer or a security officer. This could take place not only at any immigration desk but also airside, in the case of airports, or during a document check during disembarkation. In cases where this becomes a leave or asylum interview and it is a surveillance officer or security officer who detects the undocumented person, he should present the person to primary immigration control.

When a person seeking leave to enter or asylum with an undocumented dependant child is detected, the immigration officer should follow the designated administrative

procedure to obtain biodata and to establish whether there appears to be an satisfactory defence to the subsection (2) offence. The immigration officer should refer to the chief immigration officer at this point.

If, on the basis of questions asked during this initial designated administrative procedure, it is considered that an offence under subsection (2) has been committed and it is considered likely that he does not have a defence, the person should be arrested and cautioned by an arrest-trained immigration officer or police constable before any further questions are put to him about the possible commission of the offence. The PACE Codes of Practice must be followed accordingly (see section 4).

Internal instructions will be issued to advise of the exact procedure if it is suspected that a person has committed a subsection (2) offence and it is considered likely that he does not have a defence. These are necessary because while some ports, for example Heathrow and Gatwick, have prosecution units, other ports do not, and so there is a need for locally specific instructions on how to proceed with some aspects of dealing with suspected offences.

3.4.1.2 When a person is found not to have with him an immigration document, in respect of any dependent child with whom he claims to be travelling or living, and has been questioned in accordance with PACE, this should not automatically result in charge. The case should be referred to the CPS only where **all** the following criteria apply:

- the person has been requested to produce a passport (or other travel document used to travel to the United Kingdom) for the child and has failed to do so or has done so and the document is either not in force and/or does not satisfactorily establish his identity and nationality/citizenship; and
- the person has failed to provide a document within a period of three days beginning with the date of the leave or asylum interview and does not have a reasonable excuse for not providing a document in accordance with subsection (3) and/or he does not otherwise have a reasonable excuse for not being in possession of a valid immigration document (see 2.3); and
- he is unable to show the child is an EEA national, or the member of the family of an EEA national exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom; and
- he has not produced a false document, or if he has he has not been able to prove he used that document as an immigration document for all purposes in connection with the child's journey to the United Kingdom; and
- he has not proved, to the satisfaction of the Immigration Officer, 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.

### **3.4.2 Where it is suspected that a person has committed the subsection (2) offence in country.**

3.4.2.1 Where a person is detected who does not have with him an immigration document in respect of child with whom he claims to be travelling or living and it becomes a leave or asylum interview detection will occur at an ASU, PEO or LEO. At an ASU or PEO it is most likely to be an AO or EO who detects the person and his dependant child.

The officer should follow the designated administrative procedure to obtain biodata, noting that the person does not commit an offence if within a period of three days beginning with the date of the interview he provides an immigration document to an immigration officer or to the Secretary of State (see internal instructions on how to proceed).

The officer should follow further administrative procedure to enquire whether it is likely that the person has a satisfactory defence to the offence and should refer to the designated manager (see internal instructions) at this point.

If, on the basis of questions, it is considered that an offence under subsection (2) has been committed and it appears unlikely that the person has a defence, the person should be arrested and cautioned by an arrest-trained immigration officer or police constable before any further questions are put to him about possible commission of an offence. The PACE Codes of Practice must be followed accordingly (see section 4).

Internal instructions will be issued to advise of the exact procedure if it is suspected that a person has committed a subsection (2) offence and it is considered likely that he does not have a defence. These are necessary because while some procedure will differ between ASUs and LEOs and so there is a need for locally specific instructions on how to proceed with some aspects of dealing with suspected offences.

3.4.2.2 When a person is found not to have with him an immigration document, in respect of any dependent child with whom he claims to be travelling or living, and has been questioned in accordance with PACE, this should not automatically result in charge. The case should be referred to the CPS only where **all** the following criteria apply:

- the person has been requested to produce a passport (or other travel document used to travel to the United Kingdom) for the child and has failed to do so or has done so and the document is either not in force and/or does not satisfactorily establish his identity and nationality/citizenship; and
- he is unable to show that the child is an EEA national, or the member of the family of an EEA national exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom; and
- the person does not otherwise have a reasonable excuse for not being in possession of a valid immigration document (within the meaning of subsection (4), see 3.3 below) in respect of the child; and
- he has not produced a false document, or if he has he has not been able to prove he used that document as an immigration document for all purposes in connection with the child's journey to the United Kingdom; and
- he has not proved, to the satisfaction of the Immigration Officer, 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.

### **3.5 Relationship between a leave or asylum application and criminal proceedings in respect of a subsection (2) offence.**

Where it is suspected that a person has committed a subsection (2) offence, and it seems likely that the person does not have a satisfactory defence, arrest will take place before an initial decision is made on the person's application for leave or asylum. However, the person's leave or asylum application will be processed in tandem with any criminal

proceedings and will not be put on hold until the resolution of such criminal proceedings.

#### **4. Police and Criminal Evidence Act 1984 (PACE) and PACE Codes of Practice.**

4.1 Instructions for interviewing under PACE can be found in chapters 49 and 50 of the UK Immigration Service Operational Enforcement Manual.

PACE applies in England and Wales only. The Police and Criminal Evidence (Northern Ireland) Order 1989 applies in Northern Ireland.

4.2 Section 145 of the Immigration and Asylum Act 1999 states that immigration officers exercising certain specified powers (including the power of arrest) must have regard to such provisions of the PACE Code of Practice as may be specified in a direction given by the Secretary of State. The specified powers and provisions of the PACE Codes of Practice are laid out in the Immigration (PACE Codes of Practice) Direction 2000 and the Immigration (PACE Codes of Practice No 2 and Amendment) Direction 2000. Neither section 145 of the Immigration and Asylum Act 1999 nor the directions apply in Scotland, because PACE does not apply there. Therefore, in conjunction with the Crown Office, the Immigration Service has drawn up the Immigration Arrest (Scotland) Codes of Practice. These codes specify that immigration officers exercising their powers in Scotland must have regard, not only to the provisions of the PACE codes of practice, but shall also work within the boundaries of those powers and restrictions as described in sections 13 to 15 of the Criminal Procedure (Scotland) Act 1995.

#### **5. Section 31 of the Immigration and Asylum Act 1999 and Article 31 of the 1951 Refugee Convention.**

5.1 The offences in section XX (Clause 2) are not listed in section 31 of the Immigration and Asylum Act 1999, but there are safeguards which ensure the offences are consistent with a proper interpretation of the protection afforded to certain refugees by section 31 and Article 31 of the 1951 Refugee Convention. For instance:

- (1) It is a defence for a person to prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.
- (2) It is 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.
- (3) It is a defence for a person to prove that he has a reasonable excuse for not being in possession of an immigration document.
- (4) Allowances for those situations where it is not unreasonable to expect non-compliance with the instructions or advice of a facilitator.

5.2 Guidance on dealing with Section 31/Article 31 can be found in the API – **Article 31 of the 1951 UN Convention and Section 31 of the Immigration and Asylum Act 1999.**

**ANNEX A: Section XX (2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.**