

## **Chapter 18 – Enforcement instructions and guidance**

Amended instructions for documenting removals and the implementation of section 35 of the Asylum and Immigration (Treatment of claimants etc.) Act 2004 in non-compliant cases

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## 1. Introduction

1.1 The following process has been designed to improve compliance to the documentation process. It applies to all caseworkers in England and Wales, Criminal Casework (CC), Operational teams responsible for documentation interviews and officers in Immigration Compliance and Enforcement Teams (ICE). This document also contains guidance on reasonable excuse and case priorities. This document reflects the Agency's efforts to widen the use of Section 35 for individuals who are not complying with documentation. Staff are encouraged to take a robust line when tackling non-compliance and to take action at as early a stage as possible.

1.2 Section 35 provides that a person may be required to take a specified action if the Secretary of State thinks that the action may enable a travel document to be obtained and that the document will facilitate the person's removal. Section 35 action should only be taken against individuals who are eligible for removal from the UK.

1.3 A person commits an offence if he fails without reasonable excuse to comply with a requirement to take specific action for the documentation process, and, if guilty, may be sentenced to a maximum of 2 years imprisonment and/or fine.

1.4 Non-compliance with such a requirement can be:

- Non attendance at a documentation interview
- Attendance at an ICE interview but refusal to answer questions or complete any part of the documentation process, i.e.
  - Not bringing family members when required to do so

- Not bringing supporting documentation when required to do so
- Refusal to co-operate
- Providing incomplete information
- Non-attendance or refusal to answer questions at Embassy or High Commission interview (either face to face or telephone).
- Providing false information which results in the Embassy or High Commission rejecting the application.

[This list is not exhaustive]

## 2. Escalation process

2.1 Section 35 action can be considered in all cases where the above criteria are met. However, caseowners should consider carefully whether Section 35 action is appropriate where there is bio-data and/or documentary evidence of nationality on the Home Office or Port files, which may be used to obtain a document in the absence of compliance from the individual. Appropriate cases for Section 35 action should go through Senior Caseworkers to the CC Investigations and Documentation Team (IDT) to assess suitability for prosecution.

## 3. Timing of Section 35 action

3.1 Section 35 should be used when individuals have no outstanding appeals and are removable but for the documentation barrier. However, this does not prevent the Home Office from asking individuals to comply with documentation requests after the first adverse decision, and where the time for making an appeal against that decision has passed. In instances where Section 35 action has been initiated and the individual subsequently puts in an in-time or out-of time appeal, Section 35 action should be suspended. But where an individual submits further representations, Section 35 action should continue.

3.2 In strengthening a prosecution under Section 35, action should be taken at the earliest possible stage. Therefore, where possible, the Home Office should try to move non-compliant, eligible individuals into the Section 35 prosecution process from the first instance of non-compliance. Nonetheless, where prosecution action is not taken at an early stage, action can still be taken in response to later instances of non-compliance.

## 4. Issue of IS35 (CC Prosecution Team)

1. The IS35 letter must be used when an individual is requested to take an action that will enable a travel document to be obtained.
2. Such requests can not be made unless the first adverse decision has already been made.
3. IS35s may be sent to the reporting centre/detention centre/prison/home address (if non detained and no reporting restrictions imposed), to be served
4. A photocopy of the IS35 **as issued** should be retained (unsigned CID/word processor generated copies are not acceptable).

## 5. **First documentation interview (by interviewing officer from the CC Prison Operation & Removal Team or by staff at a reporting centre)**

5.1 The consequences of non-compliance with the documentation process must be explained to the individual and a copy of the IS35 handed to them at the start of the documentation interview.

## 6. **Documentation interview process**

**It is very important that if it becomes apparent that the individual will not comply, the interviewing officer should not question the individual about the offence of failing to comply with the documentation process other than to confirm that the individual will not comply and establish the reason for non compliance on the Annex B form.**

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### 6.1 **Completing the Annex B form (documentation interview)**

1. The interviewing officer must complete the details at the top of the Annex B (N.B The Annex B will become an exhibit if the individual fails to comply).
2. The interviewing officer must confirm that the individual understands the interpreter and, if not, request an alternative.
3. The interviewing officer must take 2 copies of the IS 35 to the interview. One copy must be given to the individual. The interviewing officer must read through the second copy of the IS 35 and ensure that it is understood by the individual. All actions the individual is required to take must be explained (i.e. to attend an interview, bring in supporting documents). If the individual has any questions, these and the answers must be noted in Q & A format verbatim.
4. The documentation interview should be conducted and all answers recorded on the bio-data and application forms. It is important that you record exactly what is said by the individual as they have said it (in the first person). Do not paraphrase, abbreviate or add your own words. This interview will also become an exhibit if the individual fails to comply.
5. If the individual refuses to answer any or all questions this must be recorded on the forms.
6. If the individual does not comply, i.e. by refusing to answer questions or complete any part of the documentation package, the interviewing officer should ask the further 3 questions (questions 3-5) on Annex B, and the answers given should be recorded on this form.

The 3 questions are:

- a) I have interviewed you to request your compliance with the documentation process. Are you willing to comply with the documentation process?
  - b) Why will you not comply?
  - c) Have you understood the requirements of the form and procedures (IS35)?
7. The statement “I confirm that this is a true and accurate record of the interview” should be read aloud to the individual.
  8. The individual should be asked to sign, print their name, and date the Annex B in the space provided at the bottom of the form. The interviewing officer and the interpreter should also sign, print their name and date in the spaces provided.
  9. If the individual refuses to sign then write ‘refuses to sign’ in the space for their signature.
  10. The interviewing officer should refer the case to the duty HEO/CIO for advice on whether any excuse for non compliance given at the time of interview is considered to be a reasonable excuse. Guidance on reasonable excuse is given at section 8 below. If it is decided that the individual has not offered a reasonable excuse then the next stage of this process at section 8 below should be followed. If the excuse is accepted as reasonable then the individual should be given one further opportunity to comply. The HEO/CIO should consider balancing being reasonable towards the individual with whether, despite reasonable excuses, e.g. a doctor’s letter, the repeated failure to comply is in itself non-compliance.

## **6.2 Failure to attend a documentation interview**

6.2.1 If the person does not attend the first interview and a reasonable excuse has been offered, the person should be re-invited in for interview as soon as possible. If a person does not offer a reasonable excuse then prosecution – with full evidence of failure to attend - should be pursued without a second chance to comply. The IS35 form must accompany the invitation letter and all actions the individual is required to take should be ticked on the form and copies of these documents as issued placed on file.

6.2.2 If the individual does not attend this second interview and has not offered a reasonable excuse then the next stage of this process should be followed at section 7 below. (IDT) should also consider whether enforcement absconder action is appropriate.

## **7. Non-compliance action (for interviewing officers and CC Prosecution Team )**

7.1 CC Investigations and Documentation Team (IDT) will review evidence of non-compliance at monthly case surgeries held with each Assistant Director’s Command. This team will put forward suitable cases to the CC Prosecution Team as appropriate.

## **7.2 Witness statements**

7.2.1 To support a Section 35 case the CC Prosecution Team must obtain the following witness statements on form MG11 from: the person who sends out the IS35 (C1), the person who conducts the documentation interview, (C2) and the interpreter (C3), (if one was used). A witness statement exhibiting the records from the individual's Home Office file (C4) will also be required. Template witness statements are attached at Annex C 1-4. The witness statements must be obtained by the CC Prosecution Team as soon as possible after the non-compliant interview to ensure accurate and full recollection of what happened.

7.2.2 In the statement the case owner must produce a copy of the IS35 letter as an exhibit. The interviewing officer must produce the Annex B as exhibits. The exhibit number comprises of the officer's initials and exhibits should be consecutively numbered e.g. if Joe Smith is the officer concerned then his exhibits will be labelled JS/1, JS/2 etc. The CC Prison Operations & Removals officer must ensure that the sections on page 2 of the MG11 are completed.

7.2.3 The interpreter must complete a witness statement and sign it. The interviewing officer should sign this statement as a witness (bottom right). Ensure that the sections on page 2 of the MG11 are completed.

7.2.4 The Home Office records may include documents or mention processes which are unfamiliar to the criminal courts. Officers completing witness statements in these circumstances may wish to consider including a short explanation of the purpose of a document or process.

7.2.5 Prior to signing statements the CC Prison Operation & Removals officer may wish to engage with CC Prosecution Team colleagues to ensure that statements contain all the required information.

### **7.3 Second tier interview and referral for prosecution**

7.3.1 If an individual does not comply at interview (either by not attending and not having a reasonable excuse for non compliance, or by refusing to answer questions or to complete any part of the documentation package without having a reasonable excuse) and has had the IS35 letter served and its implications explained, the next interview must be conducted with the presence of a trained investigator. The purpose of this interview is to confirm with the individual whether they will comply with the documentation process and to pursue prosecution action if necessary. This is essentially a second tier interview.

7.3.2 Before referring these cases to the CC Prosecution Team, the checklist (Annex E) must be completed by the CC caseowner. All documents and information should be confirmed as necessary when the CC Prosecution Team case is referred. At this point, the CC Prosecution Team will discuss any necessary evidential requirements.

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7.3.3 The offence will essentially be complete at this stage. The CC Prosecution Team officer will, however, ask the individual again whether they will comply with the documentation process and record these questions and answers in their notebook/IRB. If the individual is non-compliant, the CC Prosecution Team will take appropriate action. Should the individual decide to comply at this stage the officer should continue the interview, complete the bio data form and continue the documentation process.

## 7.4 Points of contact

7.4.1 Points of contact should be established within CC IDT and CC Prosecution Team.

## 7.5 CC Prosecution Team taped interview post-arrest

7.5.1 When establishing the background for failure to comply, the interviewing CC Prosecution Team officer must read the IS35 letter to the suspect and confirm that the suspect understands the contents.

## 8. Guidance on reasonable excuse

8.1 When considering whether an individual has offered a reasonable excuse, the following guidance should be consulted:

8.2 Whilst the burden is on the prosecution to prove that any excuse raised by the defendant is not reasonable, the burden of proof is an evidential one on the defendant; that is, the defendant will need to raise evidence of his cause. Once the defence of 'reasonable excuse' is raised, the burden of **disproving** it is on the Prosecution to the criminal standard. [EPU 09/04 refers]

8.3 CPS guidance is that the legislation is silent on what constitutes 'reasonable excuse'. In the case of **R v Masoud Tabnak [2007]** the Court of Appeal (Criminal Division) found that a failure to co-operate based on a fear of persecution or serious harm under the Refugee Convention and Article 3 of the Human Rights Convention, **could not amount to** a 'reasonable excuse' for not complying with the requirement imposed under section 35(1) of the Act. The Court confirmed the decision of the trial judge that "To allow fear of persecution to amount to a reasonable excuse would frustrate the intended aims and objectives of Parliament." The provision is concerned solely with an inability to comply with the practical requirements defined in section 35(2).

8.4 The fear of persecution or serious harm is a defence which has already been considered by the Asylum and Immigration Tribunal, a specialist Tribunal which is best placed to consider whether the defendant's claim for asylum is genuine or not. Such a ruling is conclusive that a person is not a refugee and precludes a defendant from adducing evidence to raise the question of refugee status in criminal proceedings. If a defendant were allowed to raise fear of persecution as a defence at the Crown Court, it would, in effect, be placing the judge and jury in an appellate function over experienced professionals.

8.5 Examples of what might constitute reasonable excuse include the failure to attend an interview because of a medical appointment or difficulties with transport, or needing time for further information. Any claim which is raised as a 'reasonable excuse' must be substantiated. It is then for the prosecution to prove that the person did not take the appropriate steps to meet the requirement to take specific action and does not have a 'reasonable excuse' for failing to do so.

## 9. Recording S35 cases

## 9.1 Documentation units recording S35 activities on CID

CID must be completed to show that an IS35 has been issued.

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**Restricted – do not disclose – end of section**

## 9.2 Case priorities

The CCD Investigation & Documentation (IDT) and the Prosecution Team will prioritise Section 35 cases in accordance with local and national business objectives. However, where applicable the following priorities will apply:

CCD and other detained cases

Individuals who are the subject of a Deportation Order

Individuals who are reporting and have provided no reasonable excuse for non-compliance

Individuals who are not reporting but have attended an interview and have provided no reasonable excuse for non compliance

NASS Section 4 and Section 9 cases

Within these categories consideration must be given to the documentation process of the individual countries and whether compliance is necessary to secure a travel document. Regional tasking processes should make efforts to support CCD in all referrals involving FNP and to prioritise their cases where possible.

## 9.3 Cases where removal is prevented due to policy or instructions

If policy, instructions or a significant legal judgement prevent removal then casework managers should consider very carefully whether it is appropriate to



take Section 35 action. The primary purpose of Section 35 action is to secure compliance.

#### **9.4 Recording s.35 activities**

CC Prosecution Team:

The NODMMX Database is used by Prosecution Teams to record investigations and their outcomes.

Prosecution Teams should record on NODMMX:

Section 35 referrals made by Documentation Units

The outcome of the referrals/cases.

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**10. Annexes**

**Annex A1 A2 Section 35 process maps**

**Annex B Interview template**

**Annex C1-4 Witness statement templates**

**Annex D Document exhibit label (deleted)**

**Annex E Checklist for referral to IDT & Prosecution Team**

Please address any queries to the Criminal Investigation (CI) Inbox.

**11. Document control**

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