



Home Office

# Prosecution under section 2: failure to produce immigration document

**Version 4.0**

This guidance is based on section 2 of the Immigration and Asylum (Treatment of Claimants) Act 2004.

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# About this guidance

This guidance tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about the offence a person commits under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#), if they do not have a valid passport or equivalent travel document at a leave to enter or asylum interview.

It tells you:

- how to interpret the act and what the offence is under section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004
- who the offence relates to
- when documents can be provided so an offence is not committed
- defences available to a suspected offender
- what is not considered a reasonable excuse
- about contact with the Crown Prosecution Service

This guidance relates specifically to Criminal and Financial Investigation (CFI) team work. You must only follow the instructions in this guidance when you are dealing with a section 2 prosecution.

The Home Office has a duty to safeguard vulnerable people and promote the welfare of children for more information see: [Vulnerable people and children](#).

Criminal Investigators in Immigration Enforcement must be aware of their obligations under the General Data Protection Regulation (GDPR) and the complementary Law Enforcement Directive (LED) and the domestic legislation via the Data Protection Act 2018 see: [Data protection changes \(GDPR and Data Protection Act 2018\)](#).

## Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors, then email CFI Operational Guidance Team.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

## Publication

Below is information on when this version of the guidance was published:

- version **4.0**
- published for Home Office staff on **20 May 2020**

## Changes from last version of this guidance

- updated links
- housekeeping changes

### Related content

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# The offence under section 2

This section tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about the offence under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#).

This offence is aimed at discouraging people from destroying or disposing of their immigration documents on their way to the UK, particularly so they could:

- hide their identity, age or nationality
- increase their chances of making a successful application
- make it more difficult to consider their application or remove them from the UK

A person commits an offence if they:

- attend a leave to enter or asylum interview and do not have with them an immigration document which:
  - is valid
  - establishes their identity and nationality or citizenship to a satisfactory level
- claim to be travelling or living with a dependent child and do not produce an immigration document relating to that child which meets the same requirements

## Powers of arrest under the Police and Criminal Evidence Act 1984 (PACE)

If you are an immigration officer working on a Criminal and Financial Investigation (CFI) team in England and Wales you have a power of arrest under section 24 of the [Police and Criminal Evidence Act 1984](#) if you have reasonable grounds to suspect a person has committed a section 2 offence.

You must only use this power if you have received the relevant training and been given a letter of authority to use these powers. Otherwise you must continue to use your powers under the immigration acts.

For more information see: Criminal investigation guidance to the PACE (1984) Order 2013

## Powers of arrest under the Immigration Act 1971

A constable or immigration officer can arrest a person without a warrant if they reasonably suspect an offence has been committed under section 2.

You must use this power of arrest if you work in Northern Ireland because you do not yet have powers to arrest under PACE or other legislation.

You must treat an offence committed under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#) as a 'relevant offence' under [Part III of the Immigration Act 1971](#).

## **Powers of arrest under the Criminal Justice (Scotland) Act 2016**

Immigration officers in Scotland have a power of arrest under section 1 of the [Criminal Justice \(Scotland\) Act 2016](#) as a result of the [Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 Schedule 3](#).

You must only use this power if you have received the relevant training and been given a letter of authority to use these powers. Otherwise you must continue to use your powers under the immigration acts.

## **The penalty if found guilty**

Section 2 offences are 'either way' offences (they can be tried in either a magistrates' court or a Crown court).

If found guilty of an offence the penalty is:

- (if convicted on indictment (in a Crown court)) up to 2 years in prison, a fine or both
- (on summary conviction (in a magistrates' court)) up to 6 months in prison, a fine or both

## **Definition of immigration document**

Under [section 2](#) an immigration document is a passport or document which can be used for the same purposes as a passport which is not a UK document.

## **Documents for European Economic Area (EEA) nationals**

EEA nationals are those with a right of residence in the UK which can be enforced under European Union (EU) law and are exempt from immigration control..

In addition to passports they may hold other documents which are immigration documents for the purposes of [section 2](#), for example:

- national identity cards
- EU family permits and residence cards

If such a person arrives in the UK without a document, it is possible they could be required to attend a leave to enter or asylum interview and to produce an immigration document at that interview.

However, once they show they are an EEA national rights they will have a statutory defence available to them under [section 2](#).

For more information, see [Defences against prosecution under section 2](#)

## False documents

A false immigration document is one which:

- pretends to be or is intended to look like a passport, and is used:
  - when it is not valid
  - for a reason it was not issued for
  - by, or in relation to, a person who it was not issued to or for

### Related content

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# When a person does not commit an offence under section 2

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about when a person does not commit an offence under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#), even if they do not produce an immigration document at a leave to enter or asylum interview.

A person does not commit an offence under [section 2](#) if they do not produce an immigration document at a leave to enter or asylum interview, if they meet each of these conditions:

- the interview takes place after they have entered the UK
- they produce the document required under [section 2](#) within 3 days of the date of the interview
- they give the document to an immigration officer or the Secretary of State which will be an immigration officer or officer working for the Home Office on behalf of the Secretary of State

This means the defence is only available to someone who makes an application in the UK (in country), for example, at a public enquiry office (PEO) such as Croydon PEO.

This defence is not available if a person fails to provide an immigration document when they first arrive in the UK and seek entry at the port where they arrive (often referred to as 'on entry' cases).

See [section 2](#) of the act to read the exact wording.

## Related content

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# Defences against prosecution under section 2

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about defences available to a person who does not produce an immigration document at a leave to enter or asylum interview.

If a person is charged with an offence under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#) they have a defence if they can:

- prove they are a:
  - national of the European Economic Area (EEA) (defence under section 2(4)(a)) - for a list of EEA nationalities, see Agreement on the European Economic Area, (signed 2 May 1992)
  - family member of an EEA national and are exercising a right (often called 'treaty rights') under the community treaties in relation to entry to or residence in the UK (defence under section 2(4)(b))
- prove they have a reasonable excuse for not possessing an immigration document (defence under [section 2](#) (4)(c))
- produce a false immigration document and prove they used that document as an immigration document for all purposes connected with their journey to the UK (defence under [section 2](#) (4)(d))
- prove they travelled to the UK without having an immigration document in their possession at any stage since they started their journey (defence under [section 2](#) (4)(e))

The same defences are available to a person charged with an offence in relation to a dependent child. The person must prove one of these defences applies to the child.

If a person is charged with an offence relating to an interview which takes place after they have entered the UK (not an offence identified when they arrive at a port and seek entry), the defence of 'reasonable excuse' is not available to them.

They may still have a defence, however, if they can prove they had a 'reasonable excuse' for not providing an immigration document within 3 days of their interview.

For more information about 'reasonable excuse' see: [Reasonable excuse](#)

## Related content

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# Reasonable excuse

This section tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about 'reasonable excuse' when dealing with a potential prosecution under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#).

## Examples of what is not a 'reasonable excuse'

Deliberately destroying or disposing of their immigration document is not a 'reasonable excuse' unless the person can show:

- the document was destroyed or disposed of for a reasonable cause
- they had no control over the destruction or disposal

A reasonable cause is not to:

- delay the:
  - handling or resolution of an application or claim
  - taking of a decision
- increase the chance of a successful application or claim
- do as they have been told or advised by a person who offers advice about immigration to the UK, or who facilitates immigration into the UK (unless they can show it would be unreasonable for them not to do as they were told)

## Examples of reasonable excuse

The situation	Potential reasonable excuse
An applicant has not produced a genuine document.	They do not have a genuine document because either: <ul style="list-style-type: none"><li>• they could not get one due to the political situation in their country of origin (<a href="#">The judgement</a>)</li><li>• there were no issuing facilities in their country of origin</li><li>• their genuine travel document was stolen or destroyed whilst travelling to the UK and it was not their fault (for example, they travelled as part of a group and someone else had control of the passports)</li><li>• they did as they were told by someone else, for example, they destroyed their document, and the only reason they did this was because they were acting under duress (where unlawful pressure</li></ul>

The situation	Potential reasonable excuse
	<p>was put on them to make them do something they would not normally do)</p> <ul style="list-style-type: none"> <li>they never had a genuine document and, can show they did not hold a document at any stage of their journey, for example they were hidden in the back of a lorry for the entire journey</li> </ul>
An applicant did not produce a document within 3 days of an in country (after entering the UK) interview	<p>There was:</p> <ul style="list-style-type: none"> <li>a medical or family emergency they can prove</li> <li>transport problems, for example, an accident, which can be confirmed</li> </ul>
The applicant was a minor or a vulnerable adult.	See: <a href="#">Vulnerable people</a>

This is not an exhaustive list and you may identify other 'reasonable excuses'.

The case owner for an application made in the UK (in-country application) may allow extra time to produce a document depending on the reason for the delay. If the person does not produce their document within the time allowed you can consider prosecution in the usual way

## Vulnerable people

You must treat each case individually, but these are some things to consider (you may identify others as well).

The person	What you must consider
<p>Minors.</p> <p>In most cases minors are likely to have a 'reasonable excuse' because it is 'reasonable' to expect a minor to do as they are told by an adult. 'Reasonable excuse' therefore tends to be more credible for a minor</p>	<ul style="list-style-type: none"> <li>some countries do not issue immigration documents to minors</li> <li>they may be afraid to challenge an adult, and so do as they are told</li> <li>they have different levels of understanding to adults and may not realise they need an immigration document to travel</li> <li>they have different levels of maturity and experience</li> </ul>
Age dispute cases.	<ul style="list-style-type: none"> <li>you cannot consider prosecution until a Merton compliant age assessment has been completed (Merton was a court ruling on best practice for age assessments)</li> <li>even if an adult assessment is</li> </ul>

The person	What you must consider
	<p>made it is open to challenge by the defence</p> <ul style="list-style-type: none"> <li>• if you decide to prosecute it is always best to have some actual evidence to support an adult age assessment</li> </ul> <p>See links below for the process that must be followed when an asylum seeker claims to be an unaccompanied child and their claimed age is doubted by the Home Office.</p> <ul style="list-style-type: none"> <li>• Assessing age</li> <li>• Assessing-age flowchart</li> </ul>
For people with a disability or learning difficulty.	<ul style="list-style-type: none"> <li>• they may: <ul style="list-style-type: none"> <li>○ rely on others to tell them what to do</li> <li>○ not understand what is required when they travel</li> </ul> </li> </ul>

## Court judgment: R v Soe Thet (2006)

There are some court judgments which have affected what is considered a reasonable excuse. The case of [Soe Thet](#) was significant.

Thet travelled to the UK using a false document which he returned to an agent after arriving. He made an in the UK (in country) application and did not provide an immigration document at any point. He was prosecuted and sentenced to 3 months in prison.

On appeal he claimed he had never been in possession of a genuine travel document. He satisfied the court it had been impossible for him to get one as he was a former political prisoner. He could not therefore produce a genuine document.

The judge found this to be a 'reasonable excuse' and that he had a defence.

This defence only applies to genuine documents and the individual must be able to show their country of nationality.

## Crown Prosecution Service (CPS) guidance on section 2

CPS guidance on prosecuting [CPS guidance -not having a travel document at a leave or asylum interview -section 2](#) takes into account the 'Thet' ruling and gives examples of 'reasonable excuse'.

**Related content**  
[Contents](#)

# Referrals of section 2 cases to the criminal investigation team

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about what the referral package for a potential prosecution under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#) must contain.

You may receive:

- calls from officers requesting general advice on what to do in cases where they think there is a potential prosecution under [section 2](#)
- full referrals which require you to consider whether the criminal investigation team will adopt a referral for investigation

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# Referral package

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about what the referral package for a potential prosecution under section 2 of the Immigration and Asylum (Treatment of Claimants) Act 2004 must contain.

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**Related content**

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# What to do if you take a referral or adopt a section 2 case

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about what to do if they receive a referral for a potential prosecution under section 2 of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#).

You must consider all potential prosecutions under [section 2](#) which are referred to you.

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