

# NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 7: Offences**

##### **Substance**

##### ***Section 143: Assisting unlawful immigration, &c.***

358. Under section 25(1) of the 1971 Act it is an offence for someone to be knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the UK of an illegal entrant or (if done for gain) an asylum-seeker. It is also an offence knowingly to assist a person to obtain leave to remain in the United Kingdom by deception. The maximum penalty for these offences is 10 years imprisonment and/or an unlimited fine. Where someone is convicted on indictment of an offence of assisting entry, the court can order the forfeiture of any ship, aircraft or vehicle used to commit the offence. (In the case of ships and aircraft this power is limited to vessels below a certain tonnage and aircraft below a certain operating weight (see section 25(7) of the 1971 Act).) The offence of assisting entry includes acts done outside the United Kingdom by a British citizen, a British Dependant Territories citizen, a British Overseas citizen, a British subject or a British protected person.
359. Under section 25(2) of the 1971 Act it is an offence to “harbour” an illegal entrant, a person who stays longer than allowed by their leave or a person who fails to observe another condition of their leave. The maximum penalty for this offence is 6 months imprisonment and/or a fine of £5,000.
360. **Section 143** repeals section 25 of the 1971 Act and replaces it with four new sections (sections 25, 25A and 25B and 25C). Section 25 makes it an offence knowingly to facilitate someone to breach the laws of *any* Member State, not just the United Kingdom. This is a measure required to enable the United Kingdom to comply with Article 27 of the Schengen Convention, and will also assist compliance with a European Directive defining the facilitation of unauthorised entry, transit and residence and its associated Framework Decision, which will replace that Article. The maximum penalty for the offence has been increased to 14 years’ imprisonment or an unlimited fine or both. There is no longer a separate offence of “harbouring”. This conduct is now included as part of the general offence.
361. United Kingdom courts continue to have jurisdiction over acts of “assistance” given by certain classes of person outside the United Kingdom. The list has been expanded to include British Nationals (Overseas). “British National (Overseas)” is a form of British Nationality created by the Hong Kong Act 1985. Until 1997, British Nationals (Overseas) were also British Dependent Territories citizens and could be prosecuted for “assistance” given outside the United Kingdom on this basis. When they ceased to

be British Dependent Territories citizens, they could no longer be prosecuted for such assistance. Their inclusion restores the pre-July 1997 position.

362. New Section 25A reproduces the offence which is presently section 25(1)(b) of the 1971 Act (namely, helping an asylum-seeker to enter the United Kingdom where this is done for gain). New section 25B makes it an offence to assist entry to the United Kingdom by a European citizen in breach of a deportation or exclusion order. New section 25C confers the same powers on courts to order the forfeiture of ships, aircraft and vehicles as exist presently, but extends the definition of an illegal entrant to include passengers trafficked contrary to the new offence in section 145 of this Act.

#### ***Section 144: Section 143: consequential amendments***

363. This amends and renumbers the current section 25A of the 1971 Act which allows a vehicle, ship or aircraft which may be liable to forfeiture to be detained following a person's arrest, and makes consequential amendments to immigration officers' powers of arrest, search and entry. Amendments in Schedule 7 replace the references in Schedules 2, 4 and 5 to the Proceeds of Crime Act 2002 to an offence under the present section 25(1) with references to offences under the new sections 25, 25A and 25B.

#### ***Section 145: Traffic in prostitution***

364. **Section 145** creates a criminal offence of trafficking people into, or out of, the United Kingdom for the purpose of controlling them in prostitution. A person commits the offence if he arranges for a person to enter or leave the United Kingdom and he intends to control them in prostitution there or elsewhere, or he believes another person is likely to control them in prostitution anywhere in the world. The offence is also committed if a person arranges travel within the United Kingdom if he believes that the passenger has been brought into the United Kingdom in order to be controlled in prostitution there or elsewhere and he intends to control them in prostitution, or believes another person is likely to do so, anywhere in the world. Controlling someone in prostitution means exercising control, direction or influence over a prostitute's movements in a way that shows he is aiding, abetting or compelling prostitution.
365. The offence is triable either summarily or on indictment. The maximum penalty on indictment is 14 years imprisonment, or an unlimited fine, or both.
366. Traffic in prostitution is designated a lifestyle offence under the Proceeds of Crime Act 2002 by paragraph 31 of Schedule 7 to this Act. The effect of this is that, where the court is considering making a confiscation order, it must assume that all the defendant's assets derive from his criminal conduct, unless he can prove otherwise. Because of the territorial restriction of the offence, it is not included in the list of Scheduled offences in Scotland.

#### ***Section 146: Section 145: supplementary***

368. This section provides that the offence under section 145 applies to any act done in or out of any part of the United Kingdom. It creates extra-territorial effect as the provision applies to trafficking outside the United Kingdom when it is committed by specified categories of British national, and applies the forfeiture and detention provisions in respect of vehicles used to commit the offence which apply to the facilitation offences under the **new section 25** inserted by section 143. It also applies to a company incorporated anywhere in the United Kingdom. Section 163(2) provides that sections 145 and 146 extend only to England, Wales and Northern Ireland.
369. Subsection (4) provides that the trafficking offence shall be included in the schedule of offences against a child listed in Schedule 4 of the Criminal Justice and Court Services Act 2000. This means that those convicted of this offence against a person aged under 18 and who are sentenced to imprisonment or detention of twelve months or more will be

disqualified from work with children in the future, whether in a paid or unpaid capacity. Breach of such a disqualification order is a criminal offence.

370. [Schedule 7](#) adds an offence under section 145 to the list of Scheduled offences for the purposes of the Proceeds of Crime Act 2002. Because of the territorial restriction of the offence, it is not included in the list of Scheduled offences in Scotland.

### ***Section 147: Employment***

371. [Section 147](#) amends section 8 of the Asylum and Immigration Act 1996 "the 1996 Act") and modifies the existing law on illegal working. Under section 8 of the 1996 Act it is an offence to employ a person aged 16 or over who is subject to immigration control unless:

That person has current and valid permission to be in the United Kingdom and that permission does not prevent him or her from taking the job in question;

The person comes into a category where such employment is otherwise allowed (e.g. asylum-seekers who have been given permission to work, student nurses admitted under the terms of the Immigration Rules who may enter into contracts of employment without any additional permission being required).

372. A statutory defence is provided in section 8(2) of the 1971 Act. The employer needs to prove that they have taken two steps in order to establish this defence. First, the employer must have had produced to him a document which appeared to him to relate to the worker in question and to be of a description specified in an order by the Secretary of State. The current order is the [Immigration \(Restrictions on Employment\) Order 1996 SI 1996/3225](#). Second, the employer must have retained the document or a copy of it.
373. Subsection (2) inserts two new subsections in the 1996 Act in place of section 8(2) of the 1996 Act. Under subsection (2) it will be a defence for a person charged with an offence under section 8 to prove that he complied with any relevant requirement of an order made by the Secretary of State under subsection (2A). Subsection (2A) expands the type of document that an employer could be required to see under such an order. In practice this could mean that, to establish a defence, an employer must demonstrate that he has seen two documents of particular types, and to produce copies of these when required.
374. Subsection (4) provides new ancillary powers of entry, search and arrest in relation to the section 8 offence. Immigration officers will have powers of entry to arrest by warrant, entry and search of premises by warrant in order to obtain relevant evidence, entry and search of premises after arrest, search of arrested persons and search of persons in police custody.

### ***Section 148: Registration Card***

375. [Section 148](#) inserts section 26A into the 1971 Act which creates a number of new offences relating to the creation, possession and use of false or altered registration cards.
376. Subsections (1) and (2) define a registration card as a card containing information about a person issued by the Secretary of State in connection with a claim for asylum. A "claim for asylum" is a claim made for asylum or for protection under Article 3 of the European Convention on Human Rights. A card may issued to the asylum claimant themselves or to a spouse or dependant of that claimant.
377. The offences are contained in subsection (3). These include making a false card, altering a genuine card with intent to deceive (or to enable someone else to deceive), possessing a false or altered card without reasonable excuse, using a false card, and using an altered genuine card with intent to deceive. There are also offences relating to equipment designed to be used in making or altering cards.

378. The maximum custodial sentence for the offences involving “possession” of a false or altered card or an article designed to make one is two years following conviction on indictment. The maximum custodial sentence for the other offences (including making, altering and using the card) is ten years imprisonment.
379. Subsections (7) and (8) provide that the Secretary of State may amend the definition of a card by order.

### ***Section 149: Immigration Stamp***

380. **Section 149** creates an offence of possession of an immigration stamp, whether genuine or a replica, without a reasonable excuse. The offence relates to stamps used by immigration officers or officers acting on behalf of the Secretary of State to endorse documents, when exercising their powers under the Immigration Acts. It is punishable by a maximum custodial sentence of two years, a fine or both.

### ***Section 150: Sections 148 and 149: consequential amendments***

381. This section contains ancillary powers in relation to the immigration stamp and registration card offences. Immigration officers or police constables can arrest someone suspected of having committed these offences without a warrant. They can also enter premises by warrant in order to search for and arrest a person suspected of committing one of these offences. Finally they can enter premises by warrant in order to search for evidence relevant to these offences.

### ***Section 151: False information***

382. It is an offence (under section 26(1)(c) of the 1971 Act) to make a false return statement or representation to an immigration officer or other person lawfully acting in the execution of a relevant enactment. Section 151 amends the definition of relevant enactment to include the provisions contained in this Act (apart from Part 5).

## **Procedure**

### ***Section 152: Arrest by immigration officer***

383. At present, the employment offence in section 8 of the Asylum and Immigration Act 1996 does not carry the power of arrest. To date the only way that it has been possible to make arrests by relying on police powers in the Police and Criminal Evidence Act 1984 (“PACE”).
384. However, these powers only apply to constables and do not allow immigration officers to make arrests. Section 152 adds a separate power of arrest by warrant in relation to the section 8 offence. In addition, it remedies an anomaly in relation to offences under section 24(1)(d) of the Immigration Act 1971 – failure to comply with a requirement to report to, attend or submit to a medical examination. There is currently a power under section 28B of the 1971 Act to enter premises under a warrant in order to search for and arrest someone who is liable to be arrested for the section 24(1)(d) offence, but there is currently no free-standing power of arrest. Section 152 provides one.

### ***Sections 153 and 154: Power of entry and to search for evidence***

385. Section 153 gives immigration officers and police officers the power to enter business premises to search for, and, where appropriate, arrest immigration offenders where they have reasonable grounds for believing that such an offender is on the premises. Authorisation to use this power must be given by a senior officer (either an Assistant Director of Immigration or a Chief Superintendent of police) and is valid for a period of seven days beginning on the day it was given.

386. **Section 154** gives immigration officers and police constables powers to search business premises without having to obtain a warrant if a person liable to arrest for an offence under section 24 or section 24(A) of the 1971 Act or paragraph 17 of Schedule 2 to that Act has been found on those premises, **and** the officer reasonably believes that an offence under section 8 of the 1996 Act has been committed and that there are employee records on the premises which are likely to be of substantial value in the investigation of the offence. These powers also allow the constable or immigration officer to seize records of value to the investigation of an immigration employment offence or an offence under section 105 or 106 of the 1999 Act. However, they do not allow items subject to legal privilege to be seized.
387. Separately, section 154 also gives immigration officers a power to obtain a warrant in order to search business premises by warrant where the officer reasonably believes that the employer has provided inaccurate or incomplete information under the compulsory disclosure provisions of section 134 of this Act. Officers will be able to seize and retain employee records (other than items subject to legal privilege) where they suspect that they will be of substantial value to the investigation of an offence under section 137 of this act or under section 105 or 106 of the Immigration and Asylum Act 1999.

***Section 156: Time limit on prosecution***

388. Where an offence is triable only summarily, proceedings have to be brought within 6 months of the offence being committed unless the legislation provides for a longer period. Offences under section 24A and 25 of the 1971 Act will no longer be summary offences. Section 156 amends the sections of the 1971 Act which provide that an extended time limit shall apply in respect of those offences accordingly.