

IMMIGRATION AND ASYLUM ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Carriers' liability

116. Sections 32 to 37 and 39 introduce a new a civil penalty to be imposed on those persons responsible for the transporting of clandestine entrants to the United Kingdom. It is entirely separate from, and in addition to, the provisions under sections 40 to 42, which relate to passengers without proper documents. Section 39 enables the Secretary of State to extend the civil penalty to rail freight wagons by regulation.

Section 32: Penalty for carrying clandestine entrants

117. Subsection (1) defines a clandestine entrant as someone who evades or attempts to evade immigration control, or claims or intends to claim asylum having (a) arrived in the United Kingdom having concealed himself in a vehicle, ship or aircraft; or (b) gone through or tried to go through immigration control concealed in a vehicle; or (c) arrived in the United Kingdom having embarked on a ship or aircraft outside the United Kingdom concealed in a vehicle.
118. Subsection (2) makes those responsible for clandestine entrants liable to a penalty for each person carried in this way. Liability also extends to other persons (eg dependants) who were concealed with the clandestine in the same transporter. Subsection (4) makes provision for the joint and several liability of the persons responsible to be discharged by payment of the penalty by one or more of them.
119. Subsection (5) details who is responsible for clandestine entrants arriving in the United Kingdom concealed in a vehicle (see subsection (1)(a)). Those responsible are the owner or captain of the ship or aircraft if the clandestine is concealed on a ship or aircraft; or the owner, hirer or driver if concealed in a vehicle; or the owner, operator or hirer if concealed in a detached trailer. ("Owner" is given an extended meaning by section 43.) Subsection (6) establishes who is a responsible person in relation to clandestine entrants as defined in subsection (1)(b) and (c). The responsible person will be the owner, hirer and driver of the vehicle or the owner, operator or hirer of the detached trailer. Subsection (7) makes clear that it is irrelevant whether the person responsible for a clandestine entrant knew or suspected that one or more clandestine entrants were concealed in the transport used.
120. Subsections (8) and (9) provide that, where a vehicle is itself carried on a ship or aircraft, those responsible for a clandestine entrant transported in that vehicle are liable only for that person and not for other clandestines who may have been transported at the same time in other vehicles on the ship or aircraft, or in the ship or aircraft itself.
121. Subsection (10) explains that "immigration control" for these purposes includes a United Kingdom immigration control that is operated in a prescribed control zone outside the United Kingdom, such as that at the juxtaposed immigration control in Coquelles. It is proposed that the latter will be prescribed.

Section 33: Code of practice

122. This section provides that having consulted appropriate persons, the Secretary of State must issue a code of practice. This is to set out the measures to be taken by persons (such as road hauliers) in operating a system to prevent clandestine entrants gaining entry to and travelling in their vehicles or other forms of transport. Subsection (4) of section 34 requires that reference be made to the code of practice issued under section 33 in order to determine what constitutes an effective system for preventing the carriage of clandestine entrants.

Section 34: Defences to claim that penalty is due under section 32

123. This section applies to persons (referred to as carriers) who are alleged to be liable to a penalty under section 32.
124. Subsections (2) and (3) provide a carrier with defences against the allegation that he is liable to a penalty. It is a defence if the carrier can show that he or a relevant employee acted under duress (eg that he had been threatened with a gun). Alternatively, he will have a defence where he can show that he did not know and had no reasonable grounds for suspecting that he was carrying a clandestine entrant, that there was an effective system in operation for preventing the carriage of illegal entrants and that the person responsible for operating the system, for example the driver, had done so properly.
125. Subsections (5) and (6) provide for those instances where more than one person is responsible for a clandestine. If one of them has a defence under subsection (3), this will not affect the liability of others. However, should the defence be under subsection (2) (the defence of duress) then the liability of any other responsible person is also discharged.

Section 35: Procedure

126. This section requires that where the Secretary of State has decided that a person is liable for one or more penalties under section 32, he must notify him of this.
127. Subsections (3) and (4) provide that service of a penalty notice on one responsible person has the effect of service on all other persons responsible. However, subsection (5) requires the Secretary of State to take reasonable steps actually to serve the notice on the others, while the penalty remains unpaid. Subsections (6) to (9) provide for persons in receipt of a penalty notice to notify the Secretary of State by means of a "notice of objection" if the penalty is disputed. In these circumstances the Secretary of State must consider and determine whether the penalty is payable. Subsection (9) enables regulations to be made for service of notices in relation to detached trailers.
128. Where the penalty continues to be disputed, or there is a refusal to pay, it is recoverable by an action for debt, in which the Secretary of State will have to prove the penalty is due (subsection (10)).

Section 36: Power to detain vehicles etc in connection with penalties under section 32

129. This section provides power to detain a vehicle and certain ships and aircraft as security until such time as all penalties and expenses connected with detention have been paid.
130. Subsections (1) and (2) enable a senior officer to detain a vehicle, small ship or small aircraft until all penalties and any detention expenses have been paid. This power is only to be used where the officer believes there to be a significant risk that the penalty will not otherwise be paid within the period allowed by the penalty notice. This power may not be exercised if an alternative form of security, which the Secretary of State considers satisfactory, has been given.

131. Subsections (4) and (5) provide that if the Secretary of State has acted reasonably in issuing the penalty notice, the detention of a transporter is not unlawful even if it is later found that the penalty notice was ill-founded. This does not apply where the Secretary of State acted unreasonably in issuing the penalty notice (subsection (5)).

Section 37: Effect of detention

132. Subsection (2) provides for an application to be made to the court by persons with a legitimate interest for the release of a detained transporter.
133. Subsection (3) makes provision for the release of the detained transporter by the court if it decides that adequate security against the penalty and any connected expenses has been offered or that there is no significant risk of the penalty not being paid, or if the court has significant doubt that the penalty is payable and the return of the transporter is vital to the applicant.
134. Subsection (4) enables the Secretary of State to arrange for the sale of the transporter if it has not been released by the court and if the penalty is not paid within 84 days of the first day of detention. The power of sale is subject to Schedule 1.

Section 38: Assisting illegal entry and harbouring

135. Subsection (1) amends section 25(6) of the 1971 Act to enable the court to order the forfeiture of a vehicle where the driver is convicted of an offence under subsection (1) (a) or (b): ie where the driver is knowingly involved in assisting an illegal entrant or (for gain) an asylum claimant to enter the United Kingdom.
136. Subsection (2) inserts a new section, section 25A, in the 1971 Act. This provides that where a person is arrested for an offence under section 25(1) (a) or (b) of the 1971 Act, the ship, aircraft or vehicle employed may be seized by a senior immigration officer or police constable pending a decision to charge (or in Scotland, institute criminal proceedings against) the arrested person and, if charged (or criminal proceedings have been instituted), pending the decision of the court. On conviction, the court may decide to order the forfeiture of the transport involved under (the existing) section 25(6).
137. In order to detain a ship, aircraft or vehicle under section 25A(1), the senior officer or police constable must have reasonable grounds to believe that it could be subject to forfeiture by the court under section 25(6) upon conviction of the person concerned.
138. Under new section 25A(3), where the owner of the ship, aircraft or vehicle detained is not the person arrested for the offence, he may apply to the court for it to be released.
139. Where an application is made under section 25A(3) the court may order the release of the ship, aircraft or vehicle if satisfied that adequate securities are provided and on condition that it is made available to the court if, on conviction of the arrested person, it is ordered to be forfeited.

Section 39: Rail freight

140. **Section 39** makes provision to enable the civil penalty to be extended so as to apply to those responsible for bringing clandestine entrants into the United Kingdom on freight trains.
141. Subsection (1) provides that the Secretary of State can make regulations to so extend the civil penalty. The regulations may apply (with or without modification) any provision in Part II of the Act for the purpose of enabling penalties to be imposed in respect of a clandestine entrant who (a) arrives in the United Kingdom concealed in a rail freight wagon and (b) claims or indicates that he intends to seek asylum or evades, or attempts to evade, the immigration control.

*These notes refer to the Immigration and Asylum Act 1999
(c.33) which received Royal Assent on 11 November 1999*

142. Subsection (2) sets out what issues in particular may be covered by the regulations. These include enabling an additional penalty to be imposed in respect of persons concealed with the clandestine entrant; to make provision as to which person or persons are liable to the civil penalty in respect of a clandestine entrant; to make provision for the detention of any particular rail freight wagon; and to take a power to sell a detained freight wagon.
143. Subsection (3) requires that the Secretary of State must consult the rail freight industry before making regulations under this section.

Section 40: Charges in respect of passengers without proper documents

144. This section replaces, with some amendments, section 1 of the Immigration (Carriers' Liability) Act 1987 (which is to be repealed), which relates to the carriage of inadequately documented passengers on ships, aircraft and trains; the latter by virtue of the [Channel Tunnel \(Carriers' Liability\) Order 1998 SI 1998/1015](#).
145. Subsections (1) and (2) apply where a person requiring leave to enter the United Kingdom arrives by ship, aircraft, road passenger vehicle or train and fails to produce a passport or other document which satisfactorily establishes his identity and nationality, and a visa where required, when asked to do so by an immigration officer. In these circumstances the owner of the transport (the operator in the case of a train) carrying such a passenger is liable to pay to the Secretary of State a charge of £2,000 or such other sum as may be prescribed. The charge relates to each inadequately documented passenger carried.
146. Subsection (4) states that there is to be no liability where the owner (or operator in the case of trains) can show that the required documents were produced to him or his representative when the passenger embarked on his flight, voyage or journey to the United Kingdom. Subsection (5) provides for a further defence against the imposition of a charge under the section for a train operator or the owner of a road passenger vehicle. The defence applies where they can demonstrate that they have in place a satisfactory system for the prevention of carriage of inadequately documented passengers and have done everything practicable to carry it out. This defence reflects the fact that train and road passenger vehicle operators may have difficulties, in some countries, lawfully carrying out the checks required to secure the defence in subsection (4). The defence does not apply where they have no such difficulty.
147. Subsections (7) and (8) state that where the owner of a road passenger vehicle which has arrived in the United Kingdom on a ship or aircraft is liable for a charge in respect of an inadequately documented passenger, the Secretary of State may charge the owner of the vehicle or, alternatively, the owner of the ship or aircraft, but not both.
148. Subsection (11) defines "road passenger vehicle" in the context of this section; it excludes taxis.

Section 41: Visas for transit passengers

149. This section replaces section 1A of the Immigration (Carriers' Liability) Act 1987.
150. Subsection (1) gives the Secretary of State the power to lay an order before Parliament to require transit passengers (ie those people who are travelling through the United Kingdom without entering it on their way to their ultimate destination – eg who remain airside) to hold a transit visa.
151. Subsection (3)(b) states that someone who has the right of abode in the United Kingdom (ie someone who has the right to live in the United Kingdom and who is not subject to immigration control) cannot be required to have a transit visa.

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152. Subsection (3)(c) allows the Secretary of State to provide for an exemption from the requirement to obtain a transit visa for certain categories of person, for example, people possessing a residence permit of an EU Member State.

Section 42: Power to detain vehicles etc in connection with charges under section 40

153. Subsection (1) provides a senior immigration officer with the power to detain as security for payment any transporter used to carry a person who is not properly documented and for whom a carriers' liability charge is incurred. In addition, any other transporter, used on any route to carry passengers by the person liable to the charge, may also be detained. A transporter detained under this section may continue to be detained pending payment of any expenses incurred by the Secretary of State as a result of the detention. Subsection (3) gives the court power to release a detained transporter if satisfactory security is given for the payment of the charge, there is no significant risk that the charge and expenses will not be paid, or if there is significant doubt as to whether the charge will stand, and if it considers that the release of the transporter is vital to the applicant.
154. Subsection (4) states that, if the charge is not paid within the allotted timescale (84 days from the first day of detention) and the court has not ordered its release, the Secretary of State can sell the transporter. Sale of the transporter is subject to the provisions of Schedule 1.
155. Subsection (5) makes the detention of a transporter lawful even if it subsequently turns out the charge is not owed, unless (subsection (6)) the charge was imposed unreasonably.