



# Asylum and Immigration Act 2004: An update

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## Introduction

The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 received Royal Assent on 22 July 2004. This is the fifth major piece of asylum legislation in 11 years. This briefing tells you how the Government is implementing the sections of the Act, which affect refugees and asylum seekers.

Readers can find more information about the Act and the Refugee Council's concerns in our briefing called *Asylum and Immigration Act 2004: Main changes and issues of concern (September 2004)*. This is available on the Refugee Council website at: [www.refugeecouncil.org.uk/publications](http://www.refugeecouncil.org.uk/publications)

## Implementation summary

<b>Section</b>	<b>Description</b>	<b>Implementation summary</b>
2	Entering the UK without a passport	This provision came into force on 22 <sup>nd</sup> September 2004 and has led to an alarming high number of prosecutions.
8	Credibility of asylum applicants	This provision came into force on 1 <sup>st</sup> October 2004. The Home Office has yet to publish its own guidance for its casework staff and the outcome is not yet clear.
9	Withdrawal of basic support for families	This provision came into force on 1 <sup>st</sup> December 2004. The Government is piloting this in three local authority areas and will evaluate them before it rolls the scheme out nationally.
10	Unsuccessful asylum seekers: Accommodation	Regulations on how Section 10 will operate are likely to come into force on 31 <sup>st</sup> March 2005.
11	Accommodation for asylum seekers: Local connection	This provision came into force on 4 <sup>th</sup> January 2005. The impact is still unclear.
12	Refugees: Backdating of benefits	Not due to come into force until the refugee integration loans scheme is in place - likely to be in spring 2005.
13	Integration loan	The Government will publish more details about this in its national refugee integration strategy in Spring 2005.
26	Unification of appeal system	These provisions will come into force on 1 <sup>st</sup> April 2005. Appeals not heard by 4 <sup>th</sup> April 2005 will fall under the new system.
33 & Schedule 3	Removing asylum seekers to 'safe third countries'	Section 33 and Schedule 3 of the Asylum and Immigration Act 2004 came into force on 1 <sup>st</sup> October 2004.
35	Co-operation with deportation or removal procedures	Came into force on 22 <sup>nd</sup> September 2004. We are so far not aware of any prosecutions.
36	Electronic monitoring	This provision came into force on 1 <sup>st</sup> October 2004. The Home Office is currently piloting a range of schemes including tagging, voice-recognition and tracking.

# Content of the Act

## 1. Entering the UK without a passport

⇒ **Section 2** of the Asylum and Immigration Act 2004

These provisions came into force on 22<sup>nd</sup> September 2004. The Home Office has produced written guidance for their staff (see Asylum Policy Instructions at [www.ind.homeoffice.gov.uk](http://www.ind.homeoffice.gov.uk) (Laws and policy > Policy Instructions)).

Under Section 2, people commit a criminal offence if they cannot explain to the authorities why they do not have a valid identity document with them as they apply for asylum or leave to enter/remain. With this Section, the Government is trying to clamp down on the perceived problem of asylum seekers deliberately destroying or throwing away travel documents so that the authorities will find it difficult to remove them.

Under Section 2, an immigration officer or police constable may charge applicants with the offence, if they fail to produce documentation at their interview, or within three days of the interview, and cannot give any good reason as to why they didn't, such as the following:

- They can prove that they are an EEA national or a family member of an EEA national.
- They can prove that they have good reason for not having a identity document.
- They can show a false document and prove that they used this to travel to the UK.
- They can prove that they travelled to the UK without a document.

It is up to the asylum applicant to prove their case against the charges. A Section 2 offence carries a prison sentence of up to two years. People also commit a criminal offence under Section 35 of the Act if they do not co-operate with the authorities to obtain new identity documents. Section 35 has also come into force (see Section 35, *Co-operation with deportation or removal procedures*).

So far, 172 people have been arrested and charged under Section 2 of the 2004 Act. Of these, 161 were arrested at ports of entry and 11 in country. 86 people have been convicted under Section 2, all pleaded guilty and have received prison sentences of two to four months. There are 32 cases still with the courts where people have pleaded 'not guilty'.

Some lawyers have questioned the legality of Section 2 procedures. The authorities base their decisions to prosecute on what asylum applicants say during their initial screening interview. Interview questions are clearly designed to test possible defences to a Section 2 charge. Asylum applicants can only see a solicitor after they have had their screening interview and been charged under Section 2. Solicitors

argue that evidence collected in this way, without a legal representative being present cannot be admitted in court, is contrary to Article 6 of the European Convention on Human Rights (ECHR, entitlement to due process).

Refugee organisations maintain that this legislation does not account for the fact that asylum seekers often completely depend on their agents for guidance and information, and may, therefore, unwittingly follow their instructions to destroy documentation.

## 2. Credibility of asylum applicants

⇒ **Section 8** of the Asylum and Immigration Act 2004

This Section came into force on 1<sup>st</sup> October 2004. The Home Office has yet to issue formal guidance on enforcing it.

If people applying for asylum or leave to stay on human rights grounds fail to show a passport on request, use a false document, or change or destroy a travel document without good reason, the authorities will judge them not to be credible. A person's credibility is also at stake if he or she does not answer questions put to them by the authorities deciding on their case, or if they do not apply for asylum or leave to stay in a safe third country.

Refugee advocates remain concerned about how this Section can affect the protection of refugees. It effectively allows the Home Office to decide on an asylum case based on information about how the applicant came to the UK rather than about the merits of the individual case. This contravenes the spirit of the 1951 Refugee Convention, which clearly states that an asylum seeker should not be penalised for how they travelled to or entered a country.

Section 8 also fails to take account of the fact that acutely traumatised people, especially victims of torture or rape, are generally unwilling or reluctant to discuss their experiences. This contradicts the UNHCR handbook for asylum caseworkers, the Immigration Appellate Authority's guidance and the Home Office's own asylum policy instructions on gender issues in asylum claims, all of which clearly state that caseworkers must take this into account when interviewing asylum applicants.

## 3. Withdrawal of basic support for families

⇒ **Section 9** of the Asylum and Immigration Act 2004

Section 9 came into force on 1<sup>st</sup> December 2004.

Section 9 extends the provisions in Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002. The Government can now withdraw asylum support from unsuccessful asylum-seeking families with dependant children if they

cannot explain why they have not taken any practical steps to leave the UK voluntarily. The authorities will interview families affected to find out if losing support would breach their human rights. The Immigration Service has said that the process will take at least eight weeks.

The Government is currently piloting the implementation of Section 9 in Manchester, Leeds/Bradford and North London with 116 families. When a family has got a final negative asylum decision, they will need to regularly report to a local enforcement office and satisfy immigration officials that they are taking sufficient steps to return home. The authorities can help families without travel documents to get new documentation.

The family will be called to an interview with an immigration officer. The interview will focus on steps the family is taking to comply with removal, as well as their support needs. The National Asylum Support Service (NASS) will then decide whether they should stop support. If NASS decides not to stop support, they will continue to support the family but review it regularly. If NASS decides to stop support, it will do so 14 days after the family has received the decision letter. Applicants can appeal to the Asylum Support Adjudicator, but NASS will stop support regardless of whether the hearing has taken place.

NASS cannot stop support if it breaches of Article 3 (inhumane or degrading treatment as defined by the case of *Limbuela*) or 8 (the right to a family life) of the European Convention on Human Rights (ECHR).

The Home Office keeps the local authorities informed right from the start of this process. Local authorities can also make their own human rights assessment. Under Section 17 of the Children Act 1989, local authorities have a duty to provide support to destitute children. They may find it necessary to accommodate the whole family to avoid a breach of the child's right to a family life under Article 8 of the ECHR. But if they feel there is no risk of breaching Article 8, they may separate the family by taking the children into care under Section 17. As soon as a family demonstrates that they are making efforts to return, NASS will consider reinstating support. At the time of writing, we were not aware of NASS stopping support from any families under Section 9.

The pilot is due to end in March 2005. The Government will review the process and invite NGOs and local authorities to feed back, and aim to roll it out nationally in late 2005. The evaluation will look at the way both the Immigration Service and NASS make decisions, costs and the experience of the families involved.

#### 4. Unsuccessful asylum seekers: Accommodation

⇒ **Section 10** of the Asylum and Immigration Act 2004

Section 10 came into force on 25<sup>th</sup> February 2005 and will be implemented on 31<sup>st</sup> March 2005. A pilot is due to start after April.

Regulations outlining how Section 10 will be implemented are now with Parliament. Both the House of Commons and the House of Lords will debate them. Subject to approval by Parliament, they will take effect on 31<sup>st</sup> March.

Under Section 10, asylum seekers at the end of the asylum process will only have access to support under Section 4 of the Immigration and Asylum Act 1999 ('hard case' support), if they carry out 'community activities'. Section 4 support is discretionary and given to people who have had a negative asylum decision, exhausted all their appeal rights and are willing but unable to return to their country. Section 4 support is currently available in 20 cities across the UK including Manchester, London Birmingham, Sheffield and Liverpool.

The Home Office has only broadly defined community activities as "activities that appear to the Secretary of State to be beneficial to the public or a section of the public". Asylum seekers carrying out community activities cannot get paid but can have their expenses reimbursed. They will not be asked to work more than 35 hours a week, although working hours are likely to vary from project to project. The Home Office is currently considering expressions of interest from organisations willing to participate in pilots of the new Section 10 scheme.

The scheme is compulsory, although if people cannot work, for example because they are ill, they will not have to. The Secretary of State should consider each application for Section 4 support on a case-by-case basis to decide whether the applicant should carry out community activities. If the Secretary of State has reason to believe that the person has failed, without reasonable excuse, to perform these activities, he may stop Section 4 support. Individuals whose support is stopped in this way can appeal to the Asylum Support Adjudicator.

The Refugee Council is concerned about the compulsory nature of the proposed scheme and believes that the Home Office should instead consider building on voluntary initiatives. Ultimately, we believe that the best way to enable people to contribute to their communities is to allow them to work.

## 5. Accommodation for asylum seekers: Local connection

⇒ **Section 11** of the Asylum and Immigration Act 2004

Section 11 came into force on 4<sup>th</sup> January 2004.

Homeless asylum seekers granted leave to remain have to prove that they have a 'local connection' to the local authority where they wish to apply for housing. Preceding housing legislation and legal precedents provided that a dispersal area did not constitute a 'local connection' for the purposes of applying for public housing and, therefore, asylum seekers granted leave to remain whilst in dispersal accommodation were not required to stay there.

However, Section 11 sets out that an asylum seeker will now have a local connection to the area where s/he was last supported. This means that people wishing to apply for housing in an area other than the one in which they were last supported (normally the dispersal area) will have to show that they have a stronger local connection to that area. This could, for example, be an area where they work or where close family members have lived for more than five years. Being housed in an accommodation centre will not count as a local connection.

## 6. Refugees: backdating of benefits

⇒ **Section 12** of the Asylum and Immigration Act 2004

Under Section 12, recognised Convention refugees will no longer be able to claim backdated payments of income support equal to the difference between the NASS subsistence allowance and income support.

This measure will not come into force until the new refugee integration loan system is in place to replace the backdated support payments (see below).

## 7. Integration loan

⇒ **Section 13** of the Asylum and Immigration Act 2004

This provision is expected to come into force in summer 2005, when appropriate systems are in place to administer the scheme.

Section 13 enables the Secretary of State to provide integration loans to people recognised as refugees. The integration loan is to replace the right to apply for backdated benefits (see 6. Refugee: backdating of benefits). However, unlike backdated support payments, refugees will have to pay back integration loans. The Home Office plans to use funds freed up by abolishing backdated support payments

to finance this new scheme. The loan will not replace the Social Fund, although recovery of the loan will probably use the same mechanisms as the Social Fund.

The Government has published more details on this in its national refugee integration strategy, *Integration Matters*. This is available on the IND website at: [www.ind.homeoffice.gov.uk](http://www.ind.homeoffice.gov.uk) (Refugee integration).

## 8. Unification of appeal system

⇒ **Section 26** of the Asylum and Immigration Act 2004

The Asylum and Immigration Tribunal (AIT) will start work on 4<sup>th</sup> April 2005.

Section 26 abolishes the current two-tier asylum appeals system and replaces it with a single tier tribunal called the Asylum and Immigration Tribunal (AIT), with a single tribunal judge usually deciding on cases.

If Immigration Appeal Tribunal (IAT) cases are not heard by 4<sup>th</sup> April 2005, the new AIT will hear them. Most appeals listed for hearing after 9<sup>th</sup> March 2005 will be adjourned to become part of the AIT's early workload.

If appellants are dissatisfied with the judge's decision, they may apply to the AIT for the case to be reconsidered on the grounds that the judge made an error of law. They have to apply within five days of receiving the decision. If the AIT grants the reconsideration order, it will list the case for a reconsideration hearing with the AIT. If the AIT agrees that there has been an error of law, it will make a new decision. This may be to allow or dismiss the appeal. Evidence may need to be heard again for the AIT to reach a fresh decision. If the AIT dismisses the case after a reconsideration hearing, the appellant can appeal further to the Court of Appeal.

If the AIT refuses to make the initial order for reconsideration, the appellant can apply directly to the High Court. The High Court may order the AIT to reconsider its original decision.

Legal professionals have raised fresh concerns about the amount of time allowed for people to submit reconsideration applications (within five days of an AIT refusal). The new legal help (formerly legal aid) provisions apparently severely restrict access to the reconsideration process. Legal help will only be paid retrospectively when the case has been completed and on the basis of a very stringent merits test. There will be no guarantee that any legal work in relation to a reconsideration application and hearing will be funded. The high risk of this work not being funded is likely to make many legal representatives reluctant to take on reconsideration cases.

In December 2004, the Department of Constitutional Affairs held a consultation exercise both on the new procedural rules and on related legal aid arrangements. The Refugee Council's responses to these are on our website at: [www.refugeecouncil.org.uk/publications/pub007.htm](http://www.refugeecouncil.org.uk/publications/pub007.htm)

## 9. Removing asylum seekers to 'safe third countries'

⇒ **Section 33** and Schedule 3 of the Asylum and Immigration Act 2004

Section 33 and Schedule 3 came into force on 1<sup>st</sup> October 2004.

The immigration authorities can already remove people from the UK to a third country without considering their asylum applications. Section 33 extends this by setting out further situations where the authorities can remove applicant without considering their asylum application.

The Section gives the Home Office four sets of circumstances under which a person may be removed without consideration of their asylum application. It also gives the Home Office more powers to declare a country 'safe' for the purposes of removing applicants (see Refugee Council briefing, *Asylum and Immigration Act 2004: Main changes and issued of concern, September 2004*). Safe countries currently include the European Economic Area (EEA) countries, but the Home Office can now add other countries to the list including countries that have not signed the 1951 Refugee Convention.

In 2004, six per cent of asylum applications were refused on safe third country grounds. This is likely to rise under the new powers created by Section 33 and Schedule 3.

## 10. Co-operation with deportation or removal procedures

⇒ **Section 35** of the Asylum and Immigration Act 2004

Section 35 came into force on 22<sup>nd</sup> September 2004.

Section 35 makes it a criminal offence to refuse to co-operate with the authorities to obtain new travel and identity documents. This is also called the 're-documentation process'. The offence carries a prison sentence of up to two years and/or removal from the UK.

We are not aware of any prosecutions under Section 35 to date. Future guidance will set out steps that people will have to take to satisfy the Home Office that they are co-operating with deportation or removal procedures, and prosecution may follow any failure to comply. The Immigration and Nationality Directorate must make each request in writing when asking someone to take such specified action:

- They must state what the person is being asked to do (for example attend a documentation interview).
- They must state that why they are being asked to do it (for example, it will enable a travel document to be obtained and that will facilitate removal).

- They must state that failure to take the required action without a reasonable excuse is a criminal offence carrying a prison sentence of up to two years.

We expect the Home Office guidance include details on how this affects children. However, the Home Office has said that it will not enforce the removal of unaccompanied children, unless it is satisfied that they will be met on arrival in their country and that adequate care arrangements are in place.

## 11. Electronic monitoring

⇒ **Section 36** of the Asylum and Immigration Act 2004

Section 36 came into force on 1<sup>st</sup> October 2004.

This section allows electronic tagging, tracking and the use of voice recognition technology to monitor people subject to immigration control, including asylum seekers. Pilots using voice recognition, tagging and tracking started in England, Wales, and Scotland in October 2004.

250 asylum seekers whom the Home Office considered to be at low risk of absconding at the start of the asylum process were selected for voice recognition reporting. This allows them to report by telephone instead reporting in person to a reporting centre or police station. The Home Office also had plans to apply tagging to people released from immigration detention on bail or temporary admission/release, and satellite tracking to people with an 'adverse' immigration history but who cannot be removed to their countries of origin.

Under the new provisions, each case should be subject to a risk assessment in order to identify people suitable for electronic monitoring. The assessment will be based on a range of factors including the likelihood of compliance, a person's immigration history and personal circumstances. Monitoring should only be imposed with the consent of the individual concerned.

The pilots are due to come to an end on 31<sup>st</sup> March 2005, when they will be evaluated before a decision on whether to roll them out nationally is made.

Such monitoring systems pose a potential threat to civil liberties. There are other concerns. Monitoring systems have so far only been used in criminal cases. Applying them to asylum seekers encourages the public to link criminal activity with seeking asylum, stigmatising asylum seekers even further.