

Convictions for failure to produce documents under Section 2 of the Asylum and Immigration (Treatment of claimants) Act 2004 – asylum seekers may have right of appeal

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Lord Chief Justice judgement R v Soe Thet 19th October 2006¹

The Lord Chief Justice ruled that a conviction for the offence of failing to produce a passport at an immigration interview, or on arrival at a port of entry in the UK, under Section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 does not apply if the defendant travelled to the UK with a false passport or without a passport.

This is because the correct interpretation of Section 2(4)(e) is that an immigration document refers only to a genuine, in force passport. If you can prove that you travelled to the UK without at any stage having such a document then you have an absolute defence.

This ruling implies that almost all of the people who have been convicted since the Act came into force in 2004 may have been incorrectly convicted. Only if they used a genuine passport for part of the journey and then failed to produce it would they have been properly convicted.

Background: As part of its policy to increase the rate of removal of failed asylum seekers the government decided to pass legislation to prosecute people who destroyed immigration documents on arrival. It thus inserted Section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 making it an offence “if at a leave or asylum interview he does not have with him an immigration document”. The relevant section for this judgement reads:

“2 (4) It is a defence for a person charged with an offence under subsection (e) to prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document”.

The Lord Chief Justice described the Section as “ill drafted but not ambiguous”.

¹ Other Refugee Council publications are available at www.refugeecouncil.org.uk

² Registered charity no. 1014576 Registered company no. 2727514 Registered address: 240-250 Ferndale Road London SW9 8BB

Nigel Leskin, of Birnberg Peirce, Solicitors who acted in the case commented:

“Both immigration and criminal law practitioners have had serious criticisms of this Act since it was introduced. It had an effect of criminalising genuine asylum seekers who often can only leave their own country using a false passport for which they have had to pay an agent. Due to the power the agent has over them, they usually have to return the passport to the agent or destroy the passport on arrival in the United Kingdom. Not only did the previous interpretation of the Act mean that such actions amounted to a criminal offence for which they spent time in prison, but the Act goes on to state that this conviction is to be used against them in their asylum application. This ruling is therefore most welcome.”

What to do if you think you may be affected:

Get legal advice. This judgement means that it is likely that many of the successful prosecutions since this Act came into force may have been unlawful. If people are still serving sentences they may have a right of appeal. It is possible that those wrongfully imprisoned may have a claim for damages.

Even people who pleaded guilty may be able to appeal. If they pleaded having been advised that there was no defence open to them, and it turns out that that advice was incorrect, they can appeal the conviction.

Two firms in London have indicated a willingness to advise on such cases: they are

Birnberg Peirce: contact Nigel Leskin at NigellLeskin@birnbergpeirce.co.uk or on 0207 911 0166 or on mobile 07973 375754; via Birnberg Peirce Blackberry device

Wilson and Co: contact Simon Pugh at sp@wilsons-solicitors.org.uk or on 0208 885 7913