

CARRIERS' LIABILITY ACT, 2002

Principal Act

Act. No. 2002-14	<i>Commencement</i>	19.12.2002
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ARRANGEMENT OF SECTIONS

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AN ACT TO SUPPLEMENT THE LAW OF GIBRALTAR RELATING TO THE CLANDESTINE ENTRY OF PERSONS INTO GIBRALTAR, AND MATTERS CONNECTED THERETO.

PART I PRELIMINARY

Title.

1. This Act may be cited as the Carriers' Liability Act 2002.

Interpretation.

2. In this Act—

"aircraft" includes hovercraft;

"captain" means the master of a ship or commander of an aircraft;

"concealed" includes being concealed in any freight, stores or other thing carried in or on the vehicle, ship or aircraft concerned;

"detached trailer" means a trailer, semi-trailer, caravan or any other thing which is designed or adapted for towing by a vehicle but which has been detached for transport—

- (a) in or on the vehicle concerned; or
- (b) in the ship or aircraft concerned (whether separately or in or on a vehicle);

"equipment", in relation to an aircraft, includes—

- (a) any certificate of registration, maintenance or airworthiness of the aircraft;
- (b) any log book relating to the use of the aircraft; and
- (c) any similar document;

"immigration control" shall be construed in accordance with the Immigration Control Act;

"operating weight", in relation to an aircraft, means the maximum total weight of the aircraft and its contents at which the aircraft may take off anywhere in the world, in the most favourable circumstances, in

accordance with the certificate of airworthiness in force in respect of the aircraft;

"owner" includes—

- (a) in relation to a ship or aircraft, the agent, charterer or operator of the ship or aircraft; and
- (b) in relation to a road passenger vehicle, the operator of the vehicle; and

in relation to a transporter which is the subject of a hire-purchase agreement, includes the person in possession of it under that agreement;

"penalty notice" has the meaning given in section 6(2);

“representative”, in relation to a person, means an employee or agent of his;

“road passenger vehicle” means a vehicle which is—

- (a) adapted to carry more than eight passengers and is being used for carrying passengers for hire or reward; or
- (b) which is not so adapted but is being used for carrying passengers for hire or reward at separate fares in the course of a business of carrying passengers;

"senior officer" means such public officers as the Government may from time to time appoint or designate for the purposes of this Act;

"ship" includes every description of vessel used in navigation;

"small aircraft" means an aircraft which has an operating weight of less than 5,700 kilograms;

"small ship" means a ship which has a gross tonnage of less than 500 tonnes;

"transporter" means a vehicle, ship or aircraft together with—

- (a) its equipment; and
- (b) any stores for use in connection with its operation;

"vehicle" includes a trailer, semi-trailer, caravan or other thing which is designed or adapted to be towed by another vehicle.

PART 2 LIABILITY OF CARRIERS TO PENALTY NOTICES

Creation of liability in principle.

3(1) The person (or persons) responsible for:

- (a) a clandestine entrant; or
- (b) a passenger arriving in Gibraltar without proper documents, shall, subject to sub-sections (4) and (5) incur a penalty of the maximum permissible at level 4, and an additional penalty of that amount in respect of each such clandestine entrant or passenger.

(2) A person is a clandestine entrant for the purposes of section 3(1)(a) if—

- (a) he arrives in Gibraltar concealed in a vehicle, ship or aircraft,
- (b) he passes, or attempts to pass, through immigration control concealed in a vehicle, or
- (c) he arrives in the Gibraltar on a ship or aircraft, having embarked
 - (i) concealed in a vehicle; and
 - (ii) at a time when the ship or aircraft was outside Gibraltar, and claims, or indicates that he intends to seek, asylum in Gibraltar or evades, or attempts to evade, immigration control.

(3) A person is a passenger arriving without proper documents for the purposes of section 3(1)(b) if, being a person requiring leave to enter Gibraltar, arrives in Gibraltar by ship, aircraft, or road passenger vehicle and, on being required to do so by an immigration officer, fails to produce—

- (a) a valid passport with photograph or some other recognised document satisfactorily establishing his identity and nationality or citizenship; and
- (b) if he requires a visa, a valid visa of the required kind.

(4) The Government may make regulations by notice in the Gazette varying the penalty payable under subsection (1) and in doing so may prescribe different amounts by way of penalty for those persons responsible for clandestine entrants and those responsible for passengers without proper documentation.

(5) Any penalty incurred under this section may be mitigated on the basis set out in Schedule to this Act.

(6) The Government may issue a code of practice to be followed by any person operating a system for preventing the carriage of clandestine entrants and/or passengers without proper documentation.

Definition of Person Responsible for Clandestine Entrants.

4(1) Subject to the following provisions of this Section, each of the following is a person responsible in respect of a clandestine entrant to whom section 3(2)(a) applies –

- (a) if the transporter concerned is a ship or aircraft, the owner or captain;
- (b) if it is a vehicle (but not a detached trailer), the owner, hirer or driver of the vehicle; or
- (c) if it is a detached trailer, the owner, hirer or operator of the trailer.

(2) Each of the following is a person responsible in respect of a clandestine entrant to whom section 3(2)(b) or (c) applies–

- (a) if the transporter is a detached trailer, the owner, hirer or operator of the trailer;
- (b) if it is not, the owner, hirer or driver of the vehicle.

(3) A person (“the carrier”) shall not be responsible for the clandestine entrant if he can show that either–

- (a) he, an employee of his who was directly responsible for allowing the clandestine entrant to be concealed, or any other person responsible for that entrant, was acting under duress;
- (b) or–

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- (i) he did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed in the transporter;
 - (ii) an effective system for preventing the carriage of clandestine entrants was in operation in relation to the transporter; and
 - (iii) that on the occasion in question the person or persons responsible for operating that system did so properly.
- (c) In determining for the purposes of this section whether a particular system is effective, regard is to be had to any code of practice issued by the Government under section 3(6).

(4) In determining whether any person is a responsible person for the purposes of this section, and subject to the defences in sub-section (3), it is immaterial whether any responsible person knew or suspected that—

- (a) a clandestine entrant was concealed in the transporter;
- (b) there were one or more other persons concealed with the clandestine entrant in the same transporter.

Definition of Person Responsible for passengers without proper documentation.

5(1) Subject to the further provisions of this section, the person responsible in respect of a passenger without proper documentation shall be the owner of the ship, aircraft or road passenger vehicle.

(2) A person (“the carrier”) shall not be responsible for the passenger without proper documentation if he can show that the passenger concerned did produce the required document or documents to him or his representative when embarking—

- (a) on the ship or aircraft for the voyage or flight to Gibraltar; or
- (b) on the vehicle for the journey to Gibraltar.

(3) The carrier shall not be responsible if he, an employee of his who was directly responsible for allowing the passenger to embark without proper documents, or any other person responsible for that passenger, was acting under duress.

(4) The owner of a road passenger vehicle shall not be responsible in respect of a passenger, if he shows that—

- (a) neither he nor his representative were permitted, under the law applicable to the place where the passenger embarked on the journey to Gibraltar, to require the passenger to produce to him when embarking the required document or documents;
- (b) he had in place satisfactory arrangements (including, where appropriate, arrangements with other persons) designed to ensure that he did not carry passengers who did not, or might not, have documents of the required kind;
- (c) all such steps as were practicable were taken in accordance with the arrangements to establish whether the passenger had the required document or documents; and
- (d) all such steps as were practicable were taken in accordance with the arrangements to prevent the passenger's arrival in Gibraltar where—
 - (i) the passenger refused to produce the required document or documents to a person acting in accordance with the arrangements; or
 - (ii) for other reasons it appeared to that person that the passenger did not, or might not, have the required document or documents.

(5) For the purposes of subsections (3) and (4), a document—

- (a) is to be regarded as being what it purports to be unless its falsity is reasonably apparent; and
- (b) is to be regarded as relating to the person producing it unless it is reasonably apparent that it relates to another person.

(6) In determining whether subsections (3) or (4) above apply to prevent a carrier being a person responsible, regard is to be had where appropriate to any code of practice issued by the Government under section 3(6).

(7) For the purposes of this section a person requires a visa if under the visa requirements from time to time in force in Gibraltar he requires a visa for entry into Gibraltar or to transit through Gibraltar.

PART III

PROCEDURE FOR IMPOSING A PENALTY AND APPEAL

Penalty Notices.

6(1) If the Senior Officer decides that a person is liable to one or more penalties under section 3, it must notify the person in writing of its decision.

(2) A notice under subsection (1) (a "penalty notice") must—

- (a) state the Government's reasons for deciding that the person is liable to the penalty (or penalties);
- (b) state the amount of the penalty (or penalties) to which the person is liable;
- (c) state such mitigation of the penalty as has been granted by a Senior Officer pursuant to section 3(5);
- (d) specify the date before which, and the manner in which, the penalty (or penalties) must be paid; and
- (e) include an explanation of —
 - (i) the steps that the person must take if he objects to the penalty;
 - (ii) the steps that the Government may take under this Part to recover any unpaid penalty; and
 - (iii) the factors relevant to mitigating the penalty pursuant to section 3(5).

(3) The Government may specify any date under subsection (2)(c) on or after the date of service of the notice.

(4) Payment of the full amount of a penalty by one or more of the persons responsible in respect of that penalty shall discharge the liability of each of the persons responsible.

(5) Notwithstanding that all persons liable to pay pursuant to a penalty notice are jointly and severally liable for the penalty or penalties, no person's liability shall be affected by any of the following—

- (a) any agreement to compromise, settle or compound any relevant penalty liability or liabilities between Government and any other person or persons;

- (b) any agreement by the Government to withdraw, wholly or in part, a relevant penalty notice served on any other person or persons, including allowing mitigation under section 3(5);
- (c) any failure or omission howsoever caused to serve a relevant penalty notice on a person other than himself; and
- (d) any of the above insofar as they might relate to a person's liability under sections 61 and 63(a) of the Immigration Control Act.

(6) The penalty shall be payable on demand to the Government, and shall be recoverable by it as a civil debt.

(7) Any liability under this section shall be concurrent with any liability under sections 61 and 63(a) of the Immigration Control Act insofar as the liabilities are in respect of:

- (a) the same person; and
- (b) the same passage to Gibraltar,

and, insofar as the liabilities are concurrent, a payment towards one liability shall equally be a payment towards the other.

(8) The Government may by notice in the Gazette make regulations to provide, in relation to detached trailers, for a penalty notice which is served in such manner as may be prescribed to have effect as a penalty notice properly served on the responsible person or persons concerned under this section.

(9) Subject to the exercise of any rights of appeal provided for by this Act, the penalties specified in a penalty notice shall be final and conclusive for all purposes.

(10) The Government may at any time prior to the final determination of an appeal amend the penalty notice in order to reduce the amount payable by reason of allowing mitigation of the penalty under section 3(5) where a Senior Officer has decided that such mitigation could be granted.

Right of Appeal.

7(1) If a person on whom a penalty notice is served alleges that he is not liable for one or more, or all, of the penalties specified in the penalty notice, or that he should be granted mitigation of the penalty under section 3(5), he

may appeal against the penalty notice to a judge of the Supreme Court within 30 days of the date of service on him of the penalty notice.

(2) The appeal under subsection (1) ("a notice of appeal") must give reasons for the appeal. Grounds of appeal other than those specified in the notice of appeal shall not be considered save with leave of the judge.

(3) The judge shall discharge a penalty specified in the penalty notice, if the appellant shows in regard to that penalty that on a balance of probabilities—

- (a) none of sections 4(1), (2) or 5(1) apply to him; or
- (b) notwithstanding that one or more of sections 4(1),(2) or 5(1) do apply to him in relation to penalties specified on the penalty notice, he is not a person responsible for a designated unlawful entrant, or
- (c) he shall vary it if he to the extent that it is shown that mitigation of the penalty should be granted, but he shall otherwise dismiss the appeal with regard to that penalty.

(4) The bringing of an appeal shall not relieve any person, pending the determination of the appeal, from any liability to pay a penalty under this Act.

(5) The appellant can withdraw the appeal by giving written notice to the court at any time to its determination by the judge, and in such circumstances, he may not renew his appeal thereafter.

(6) Where any person agrees with the Government in writing the level of mitigation appropriate to a penalty notice issued against him, he may repudiate such agreement within 14 days and have the same appeal rights as on the day on the agreement, but otherwise such agreement shall be a final determination of the penalty notice.

PART IV

POWER TO DETAIN AND SELL RELEVANT TRANSPORTERS

Power to detain transporters etc.

8(1)

- (a) In this section and all further provisions dealing with the detention of vehicles, their sale and the distribution of assets, a reference to penalty notices and sums payable under them shall include—

- (i) proceedings under section 63(a) of the Immigration Control Act where such proceedings relate to an unlawful entrance into Gibraltar, including where appropriate where such proceedings are likely to be commenced; and
 - (ii) any fines imposed under such proceedings.
 - (b) Where such proceedings under section 63(a) of the Immigration Control Act are ongoing or are likely to be commenced, a reference to sums payable under a penalty notice shall be construed as the maximum fine that might be imposed under that section on the person concerned according to the circumstances as they appear to a Senior Officer.
 - (c) Nothing in this part of the Act shall be used in respect of section 63(a) of the Immigration Act save in respect of fines which are either due or may become due under that section.
- (2) If a penalty notice has been given under section 6 or it is likely that such a notice will be issued, a Senior Officer may detain any relevant—
- (a) vehicle,
 - (b) small ship, or
 - (c) small aircraft,
- until all outstanding penalties to which the notice relates, and any expenses reasonably incurred by the Government in connection with the detention, have been paid.
- (3) That power—
- (a) may be exercised only if, in the opinion of the Senior Officer concerned, there is a significant risk that the penalty likely to be determined (or one or more of the penalties) will not be paid before the end of the prescribed period if the transporter is not detained; and
 - (b) may not be exercised if alternative security which the Government considers is satisfactory, has been given.
- (4) If a transporter is detained under this section, the owner, consignor or any other person who has an interest in any freight or other thing carried in

or on the transporter may remove it, or arrange for it to be removed, at such time and in such way as is reasonable.

(5) The detention of a transporter under this section is lawful even though it is subsequently established that the penalty notice on which the detention was based was ill-founded in respect of all or any of the penalties to which it related.

(6) Subsection (5) does not apply if the penalty notice was issued unreasonably.

Effect of detention.

9(1) This section applies if a transporter is detained under section 8.

(2) The person to whom the penalty notice was addressed, or the owner or any other person claiming an interest in the transporter, may apply to a judge of the Supreme Court for the transporter to be released.

(3) The judge may release the transporter if he considers that—

- (a) satisfactory security has been tendered in place of the transporter for the payment of the penalty alleged to be due and connected expenses;
- (b) there is no significant risk that the penalty (or one or more of the penalties) and any connected expenses will not be paid; or
- (c) there is a significant doubt as to whether the penalty is payable and the applicant has a compelling need to have the transporter released.

(4) The owner concerned and the Government shall have the same rights of appeal against an order of the judge under this section as exist in regard to appeals under section 7 in respect of a penalty notice.

(5) If the judge has not ordered the release of the transporter, the Government may, subject to section 11, sell it if the penalty in question and connected expenses are not paid before the end of the period of 84 days beginning with the date on which the detention began.

(6) “Connected expenses” means expenses reasonably incurred by the Government in connection with the detention.

Determination of Connected Expenses.

10(1) A judge of the Supreme Court may order the owner of a transporter detained under section 6 to pay the Government such connected expenses as it sees fit at—

- (a) the hearing of any appeal under section 6;
- (b) the hearing of the owner's application under section 9(2);
- (c) upon any application by the Government for the sale of the transporter under section 11; or
- (d) upon application on 7 days notice by the Government to the court following the release of the transporter from detention.

(2) The judge may make an order for connected expenses at any of the hearings listed at subsection (1)(a)-(c) notwithstanding that the substantive hearing is adjourned.

(3) The owner concerned and the Government shall have the same rights of appeal as exist in regard to the penalty notice.

(4) The "connected expenses" determined under this section are a debt due to the Government and payable on demand.

(5) Nothing in this section shall affect the ability of the Government and the owner of the transporter to agree the amount of connected expenses payable.

Sale of the transporter.

11(1) The sale of a transporter liable to be sold under section 9(5) requires the leave of the court.

- (2) The judge shall not give his leave except on proof—
- (a) that the penalty or charge is or was due;
 - (b) that the person liable to pay it or any connected expenses has failed to do so;
 - (c) that the transporter which the Government seeks leave to sell is liable to sale; and
 - (d) all reasonable steps have been taken for:

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- (i) bringing the proposed sale to the notice of persons whose interests may be affected by a decision of the court to grant leave; and
 - (ii) for affording to any such person an opportunity of becoming a party to the proceedings.
- (3) If leave for sale is given, the Government must secure that the transporter is sold for the best price that can reasonably be obtained.
- (4) Failure to comply with the requirement of subsection (3) or any condition attached to the leave granted by the court for any sale—
- (a) is actionable against the Government at the suit of any person suffering loss in consequence of the sale; but
 - (b) no sale shall be void or voidable by reason of such failure.
- (5) Any proceeds of sale arising from a sale under this section must be applied—
- (a) in making prescribed payments; and
 - (b) in accordance with such regulations as to priority of payments as the Government may make by notice published in the Gazette.
- (6) The regulations issued pursuant to subsection (5)(b) may, in particular, provide for proceeds of sale to be applied in payment—
- (a) of import duty,
 - (b) of expenses incurred by the Government,
 - (c) of any penalty or charge which the judge has found to be due,
 - (d) in the case of the sale of an aircraft, of any charges due under the law from time to time in force thereof,
 - (e) of any surplus to or among the person or persons whose interests in the transporter have been divested as a result of the sale,
- and may prescribe the order of payment.

PART V

POWER TO MAKE SUBSIDIARY LEGISLATION**Regulation of court procedure.**

12(1) The Government may make regulations by notice in the Gazette in regard to any matter relating to the applications and appeals that can be made pursuant to this Act, and in particular—

- (a) the use of oral evidence;
- (b) any requirements to seek leave to appeal;
- (c) the right of any party to require a witness's attendance before court;
- (d) the determination of an appeal by a higher court, or the remittance of an appeal to a judge of the supreme court; and

(2) Such regulations as are made from time to time in respect of any appeal from the decision of the judge shall not:

- (a) provide for any appeal other than on a point of law;
- (b) permit any appeal beyond the Court of Appeal;
- (c) permit the extension of any applicable time limits for making the appeal or applying for leave to appeal, as the case may be; or
- (d) provide for different appeal rights as between the Government and the original appellant or appellants.

(3) The Chief Justice may make rules of court for the following purposes –

- (a) such forms as are to be used by the parties to the applications and appeals;
- (b) timetables for producing evidence and the form of such evidence;
- (c) subject to the provisions of subsection (1) and (2) above, any other matter of court procedure.

Functions vested in the Government.

13. All functions vested under this Act in the Government shall be exercised by such Department and by such Minister as the Chief Minister prescribes by notice published in the Gazette.

PART VI FURTHER PROVISIONS

Return of unauthorised persons.

14(1) This section applies to a person who is responsible for a clandestine entrant or a passenger without proper documentation (“the unauthorised person”), or would be responsible but for the defences allowed by virtue of sections 4 and 5.

(2) Where the unauthorised person may lawfully be refused entry into Gibraltar, the Principal Immigration Officer may direct any person to whom subsection (1) applies to receive the person for whom he is responsible on board the transporter concerned, and afford him a passage to—

- (a) the state from which that unauthorised person was transported to Gibraltar;
- (b) any state which issued any travel document on which that unauthorised person travelled to Gibraltar; or
- (c) any other state to which that unauthorised person is guaranteed entry.

(3) Where the Principal Immigration Officer makes a direction under subsection (2) he shall also direct that the person shall afford the unauthorised person proper accommodation and maintenance during the voyage, flight or journey.

(4) The Principal Immigration Officer may, if he thinks fit, apply any money or property of an unauthorised person to payment of the whole or any part of the expenses of or incidental to the voyage, flight or journey from Gibraltar and the maintenance until departure of that person; except in so far as they are so defrayed and such expenses shall be payable out of the Consolidated Fund, but without prejudice to any right of the Government to recover any sums so paid from any person liable to repay them; and except that no such expenses shall be paid to any person who is the subject of a penalty notice in respect of the relevant unauthorised person where that penalty notice has either not been appealed or such appeal has not been successful.

(5) If a person who receives a direction under this section refuses to comply with any requirement of it, he is guilty of an offence against this section and may be arrested forthwith without a warrant.

(6) A person guilty of an offence against this section is liable on summary conviction to a fine on level 5 in respect of each unauthorised person to whom the offence applies.

(7) A direction made under this section shall be made as soon as practicable by the Principal Immigration Officer.

(8) This section is without prejudice to the provisions of sections 58, 59 and 60 of the Immigration Control Act, and the Principal Immigration Officer may make use of such powers of arrest and detention provided for by that Act in order to facilitate the removal of an unauthorised person under this section.

Amendments to the Immigration Control Act.

15(1) In section 61 of the Immigration Control Act for "Her Majesty" substitute "the Government".

(2) Section 63 of the Immigration Control Act is amended as follows:

(a) the existing section will become subsection (1); and

(b) after the existing section insert:

“(2) Nothing in subsection (1)(b) applies to anything done in relation to a person who—

(a) has been detained under any provisions of law;
or

(b) has been granted temporary admission to remain in Gibraltar prior to the determination of their application for a permit or certificate to remain within Gibraltar.

(3) Nothing in subsection (1)(b) applies to anything done by a person otherwise than for gain.

(4) Nothing in subsection (1)(b) applies to anything done to assist an asylum claimant by a person in the course of his employment by a bona fide organisation, if the purposes

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of that organisation include assistance to persons in the position of the asylum claimant.

- (5) "Asylum claimant" means a person who intends to make a claim that it would be contrary to Gibraltar's obligations under any international agreement or treaty extended to Gibraltar for him to be removed from, or required to leave, Gibraltar.

- (3) After section 63 of the Immigration Control Act, insert—

“63A(1) A person who for gain, aids, abets, counsels or procures any person not being a national of a member state of the European Communities to enter or reside within the territory of any country listed from time to time in Schedule 3 contrary to that country's law on the entry and residence of such a person, is guilty of an offence and is liable on summary conviction to imprisonment for three months or to a fine on level 4 on the standard scale.

(2) An agreement formed wholly or partly within Gibraltar to commit an offence under subsection (1) shall be guilty of a conspiracy under section 11 of the Criminal Offences Act 1960 notwithstanding that offence might not be triable in Gibraltar.”

SCHEDULE 1

Grounds for mitigation of penalties

1. The starting point is that 100% of the penalty should be paid, and that figure is reduced by an amount which depends upon whether the carrier disclosed all relevant details of the matter, the extent to which he co-operated over the whole period of the enquiry and the gravity of the offence. The level of mitigation will be decided by a Senior Officer and incorporated into the penalty notice, and may also be granted on appeal to the Supreme Court. The reductions are as follows:

Disclosure - A reduction of up to 15% (or even 25% for voluntary disclosure where there was no fear of early discovery by the authorities).

2. If the carrier made a full and voluntary disclosure at the time when the authorities first made enquiries, he will receive a considerable reduction in the amount of the penalty. If he denied until the last possible moment that there was anything wrong, or any reason to believe that something might be wrong, he will receive little or no reduction for disclosure.

3. Between these two extremes a wide variety of circumstances is possible. The Senior Officer will have to consider how much information the carrier gave, how soon, and how that contributed towards settling the investigation.

Co-operation - A reduction of up to 20%.

4. If the carrier supplied information promptly, attended interviews, answered questions honestly and accurately, gave all the relevant facts and information that might assist in future inquiries or preventative measures, he will then receive the maximum reduction for co-operation.

5. He will receive no reduction at all if he delayed supplying information, gave untrue answers to questions, did nothing until formal action was taken against him and generally obstructed the course of the enquiry.

6. Between these extremes there is a wide range of possible circumstances and the Senior Officer has to compare the extent of co-operation with the co-operation he believes possible.

Gravity - A reduction of up to 30%.

7. The carrier's actions may have amounted to, or be a part of, a premeditated and well-organised immigration racket or something much less serious. The Senior Officer has to take into account what the carrier did, how he did it, how long it went on and the amount of organisation and

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money involved. The less serious the offence, the bigger the reduction of penalty will be. However, insofar as the gravity of the offence is marked by the penalty being automatically linked to the number of illegal immigrants transported, this head of mitigation will not be available.