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BRIEFING PAPER

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Immigration Bill [Bill 74 of 2015-16]

By Melanie Gower, Doug Pyper, Wendy Wilson

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Contributing Authors:

Doug Pyper, Employment, section 2; section 8
Wendy Wilson, Housing, section 3.1
Louise Butcher, Transport, section 3.2
Tim Edmonds, Bank accounts, section 3.3
Melanie Gower, Immigration, sections 4 – 7; section 9.1
Gabrielle Garton-Grimwood, Passports, section 9.2
Catherine Fairbairn, Civil registration, section 9.3

Summary

The *Immigration Bill 2015 - 16*, Bill 74 of 2015 – 16, is due to have its second reading in the Commons on 13 October. The Bill (as introduced) is in nine parts. The main provisions are as follows:

Part 1 would establish a Director of Labour Market Enforcement, who would be required to produce a Labour Market Enforcement Strategy and report annually to the Home Secretary and Business Secretary. It also creates a new offence of illegal working and seeks to strengthen the sanctions to be applied to employers of illegal workers.

Part 2 would build on existing measures to restrict irregular migrants' access to residential tenancies, driving and bank accounts. It creates four new offences applicable to landlords and letting agents who let properties to migrants who do not have a valid immigration status, and gives landlords new powers to evict tenants who do not have a 'right to rent'. There are new powers to search for and seize driving licences held by irregular migrants and a new offence of driving a vehicle when unlawfully in the UK. The Bill also introduces obligations on banks to carry out immigration status checks on current account holders.

Part 3 would give new immigration enforcement powers, including to search for, seize and retain evidence of 'illegal working' or 'illegal renting', seize evidence of non-immigration criminal offences, and search for and seize nationality documents. Legislative provisions on granting immigration bail or other alternatives to detention would be replaced by a single new status of "immigration bail", and the Home Secretary would be given powers to impose bail conditions, including electronic tagging, where the First-Tier Tribunal does not do so.

Part 4 would extend changes to appeal rights introduced by the *Immigration Act 2014,* in order to enable the Home Secretary to remove from the UK migrants who are appealing against a refusal of a human rights claim before the appeal has been determined, if she certifies that the person's temporary removal would not cause serious irreversible harm or breach the UK's human rights obligations.

Part 5 would reform financial and accommodation arrangements for certain categories of migrant. 'Section 4' support for refused asylum seekers and certain other categories of migrant would be replaced by a new category of support which would be available to destitute refused asylum seekers who face a "genuine obstacle" to leaving the UK.

Part 6 would introduce new powers to create a civil penalty scheme to ensure port operators' and transport carriers' compliance with legal obligations to manage the disembarkation of passengers in the UK. It would also extend some immigration enforcement powers to UK territorial waters, and amend the legislative process for implementing international travel bans.

Part 7 would introduce a duty on public authorities to ensure that all public sector workers in public-facing roles are able to speak fluent English.

Part 8 would introduce an "immigration skills charge", payable by employers who sponsor non-EEA national workers. The money raised would be spent on addressing skills shortages in the UK. This part of the Bill would also change the legislative framework for passport fees and reform the framework for civil registration fees.

Although immigration control is a reserved matter, some of the provisions would have a differential effect across the UK. Annex B to the Bill's Explanatory Notes provides a comprehensive overview of the territorial extent and application of the Bill's provisions.

1. Background

1.1 The Government's immigration policy objectives

The Prime Minister identified the Conservative Government's broad policy objectives in a high-profile speech on immigration delivered on 21 May:

> Now we're on our own in government, we can be stronger. Our 'one nation' approach will be tougher, fairer and faster. That starts next week, with a new Immigration Bill included in the Queen's Speech. That Bill, and the further measures we'll pursue, will focus on 3 big things:
>
> - Dealing with those who shouldn't be here, by rooting out illegal immigrants and boosting deportations.
> - Reforming our immigration and labour market rules, so we reduce the demand for skilled migrant labour and crack down on the exploitation of low-skilled workers.
> - Addressing the spike in EU migration by renegotiating in Europe.[1]

His speech confirmed that the Government continues to aim to reduce net migration from the hundreds of thousands to the tens of thousands. A Ministerial 'Immigration Taskforce', chaired by the Prime Minister, has been established to "hold every part of government to account on our relentless drive to control immigration."

The Government continues to aim to reduce net migration from the hundreds of thousands to the tens of thousands

Net migration was estimated at 330,000 in the year ending March 2015 (the most recent timeframe available).[2] This was around 86,000 higher than at the start of the 2010 – 15 Parliament (in the year ending June 2010), and the highest estimate of net migration in any twelve month period on record. Net migration fell during the first half of the last Parliament following reforms to student, work and family visas: it fell to 154,000 in the year ending September 2012. This was the lowest estimate of net migration in any twelve month period since the year ending December 1998. Since then net migration has steadily increased to its current record level.

1.2 The *Immigration Bill 2015-16*

The *Immigration Bill 2015-16* is due to have its second reading in the Commons on 13 October. The Bill as introduced consists of 56 clauses and 9 Schedules, and would apply to England and Wales, Scotland and Northern Ireland. Annex B to the Bill's Explanatory Notes provides a comprehensive overview of the territorial extent and application of the Bill's provisions.

The long title of the Bill is:

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1 'PM speech on immigration', GOV.UK, 21 May 2015
2 ONS Long-Term International Migration estimates. See Library briefing paper *Migration Statistics* for further information.

> A Bill to make provision about the law on immigration and asylum; to make provision about access to services, facilities, licences and work by reference to immigration status; to make provision about the Director of Labour Market Enforcement; to make provision about language requirements for public sector workers; to make provision about fees for passports and civil registration; and for connected purposes.

The Bill would build on measures introduced in the *Immigration Act 2014*, and implement measures proposed n the Conservative Party's 2015 manifesto and Prime Minister's May 2015 speech on immigration

The Bill would extend some provisions introduced by the *Immigration Act 2014*. The Bill also seeks to implement a number of measures which were outlined in the Conservative Party's 2015 General Election manifesto, and in the Prime Minister's speech on immigration, delivered on 21 May 2015.

The Bill seeks to contribute to the Government's broader objective of reducing net migration and creating a "hostile environment" for people living in the UK without a valid immigration status. The overarching Impact Assessment for the Bill identifies three main themes:

- Dealing with exploitation of low-skilled workers, increasing the consequences for employing 'illegal workers' and strengthening the penalties for working illegally.
- Preventing irregular migrants from accessing services such as privately rented accommodation, bank accounts, and driving licences.
- Making it easier to remove people from the UK if they do not have a valid immigration status, including by extending the use of electronic tagging, restricting appeal rights, and increasing immigration officers' powers.

Other measures in the Bill include changing financial and accommodation entitlements for refused asylum seekers and certain other immigration categories, and introducing an English language fluency requirement for public sector workers.

The overarching Home Office factsheet on the Bill describes how it fits in with broader Government efforts to reduce net migration:

> **How does the Bill help control net migration?**
>
> Measures in the Bill make the UK a less attractive place for illegal migrants and those who seek to exploit them. But it is just one part of our broader strategy for reducing net migration. As the Prime Minister has set out, we will reform our immigration and labour market rules, so we reduce the demand for skilled migrant labour and crack down on the exploitation of low-skilled workers, and we will renegotiate a new relationship with the EU.

A five-week public consultation on reforming asylum support (Part 5 of the Bill) took place between August – September 2015.[3] The Government's Migration Advisory Committee consulted on the idea of an immigration skills charge (clause 46 of the Bill) in summer 2015. A consultation on implementing the charge is expected to be launched whilst the Bill is before Parliament.

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[3] Home Office, *Reforming support for failed asylum seekers and other illegal migrants*, August 2015

At the time of writing, many stakeholders had not yet commented in detail on the Bill's provisions. Some of the initial reactions to the Bill have emphasised that many of the measures will impact on legal migrants and British citizens, as well as irregular migrants, and raised concerns that the Bill will exacerbate discrimination against minority groups. Stakeholders have also drawn attention to the existing complexity and frequency of changes to immigration law and policy which, it is argued, gives little certainty to applicants, legal representatives and the judiciary.[4]

Progress of the Bill

Second reading in the Commons is scheduled for 13 October

The Bill was first announced in the Queen's speech on 27 May 2015. It was introduced to the Commons on 17 September and is due to have its second reading on 13 October.

The Bill as introduced, the accompanying Explanatory Notes, and details of its passage through Parliament are available from the Bill's pages on the Parliament website.

A collection of documents related to the Bill is available from the GOV.UK website page Immigration Bill 2015-16, including:

- An overarching impact assessment
- A delegated powers memorandum
- An ECHR memorandum
- Home Office factsheets

4 'Government publishes Immigration Bill', Gherson Blog, 17 September 2015; 'Immigration Bill 2015 - what you need to know', MRN, 18 September 2015; 'Hostile environment renewed with full force with Immigration Bill 2015', JCWI Blog, 22 September 2015

2. Labour market and illegal working (Part 1 of the Bill)

2.1 Director of Labour Market Enforcement (clauses 1-7)

Certain rights and areas of employment associated with labour market exploitation are the subject of enforcement by government departments. The Bill proposes to create a new 'Director of Labour Market Enforcement' which would oversee this insofar as it relates to:

- the national minimum wage;
- employment agencies; and
- work related to agriculture or the gathering of shellfish.

At present, responsibility for these areas is split between departments:

- HMRC enforces the national minimum wage on behalf of the Department for Business, Innovation and Skills (BIS);
- the Employment Agency Standards Inspectorate within BIS regulates employment agencies; and
- the Gangmasters Licensing Authority oversees those who supply workers to do agricultural work, gather shellfish or undertake related processing/packing work.

The Director would be responsible for setting an overall enforcement strategy in these areas, as the Government believes that "labour market exploitation is an increasingly organised criminal activity and that government regulators … need reform and better coordination".[5]

Although the Director would oversee all labour market enforcement in the aforementioned areas, rather than this being limited to work involving migrant workers, the Government has identified that migrant workers are at particular risk of exploitation:

> because of an increase in organised criminal activity engaging in labour market exploitation, we believe that there is exploitation in the labour market that none of the enforcement bodies is designed to deal with. This kind of worker exploitation often appears to involve migrant workers.[6]

In their 2014 report *Migrants in low-skilled work* the Migration Advisory Committee supported this view, commenting that:

> the combination of non-compliance and insufficient enforcement can lead to instances of severe exploitation, particularly of vulnerable groups such as migrants.[7]

The report records the Committee's research on labour market exploitation of migrant workers:

> We were struck on our visits around the country by the amount of concern that was expressed by virtually everyone we spoke to about the exploitation of migrants in low-skilled jobs.

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5 Bill 74-EN 2015-16 page 4
6 Immigration Bill 2015/16 Factsheet – Labour Market Enforcement, p1
7 Migration Advisory Committee, *Migrants in low-skilled work,* July 2014, p172

> …
>
> The TUC told us that migrants, particularly from lower income EU accession countries, are often likely to take up low-skilled work, partly due to the nature of the labour market but also due to the labour market profile of such migrants.
>
> …
>
> During our visits to places which had experienced relatively high levels of migrants the point that migrant workers are more likely to be exploited than resident workers as they are not aware of their rights and are afraid they may be sacked/evicted/deported if they complain was raised on a number of occasions.
>
> …
>
> At our meeting with the Equality and Human Rights Commission (EHRC) they expressed the view that migrant workers, and especially agency workers, were more likely than resident workers to put up with poor working conditions and bad treatment by employers because they were not aware of their rights, they do not know who to complain to and are scared that if they do complain they could lose their job. The EHRC said it is often better for a migrant to be in the UK with a job, albeit a low-paid one, than in their home country without a job.[8]

The proposals in the Bill follow a commitment in the Conservative Party manifesto to "introduce tougher labour market regulation"[9] and form part of a package of measures targeted at strengthening enforcement, including:

- doubling the penalties for non-payment of the National Minimum Wage and the new National Living Wage
- increasing the enforcement budget
- setting up a new team in HMRC to take forward criminal prosecutions for those who deliberately do not comply
- ensuring that anyone found guilty will be considered for disqualification from being a company director for up to 15 years[10]

The Government also plans to consult on the on the introduction of a new offence of aggravated breach of labour market legislation and the possibility of giving the Gangmasters Licensing Authority additional investigatory powers and a wider remit.[11]

Originally, the Government had announced that a 'labour market enforcement agency' would be established. The Queen's Speech 2015 background briefing notes stated that the *Immigration Bill* would:

> create a new enforcement agency that cracks down on the worst cases of exploitation. Exploiting or coercing people into work is not acceptable. It is not right that unscrupulous employers can exploit workers in our country, luring them here with the promise of a better life, but delivering the exact opposite, and the full

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8 Ibid., pp168-172
9 *Conservative Party Manifesto 2015*, p31
10 'Measures to ensure people receive fair pay announced', GOV.UK, 1 September 2015
11 Ibid.

> force of the State will be applied to them. A new single agency will have the scale and powers to do this.[12]

In his immigration speech during May 2015, the Prime Minister said:

> we will make a crucial change: creating a new enforcement agency that cracks down on the worst cases of exploitation. Responsibilities for this are currently split between 4 different departments. They will be brought into one body – so businesses can't bring in cheap labour that undercuts the wages of local people.[13]

A press release accompanying the speech reiterated this.[14] It is unclear whether the Government plans to create this agency in the future, although the Bill in its present form does not propose to.

The Bill

Clause 1 would require the Secretary of State to appoint a person as the Director of Labour Market Enforcement. It is envisioned that the Director would be appointed by, and report to, both the Home Secretary and the Secretary of State for Business.[15] The Secretary of State must provide the director with such staff, goods, services, accommodation and other resources as the Secretary considers the Director needs for the exercise of his or her functions.

Clause 2 sets out a requirement for the Director to produce a Labour Market Enforcement Strategy. This would be a document that details the Director's assessment of the scale and nature/likely scale and nature of "non-compliance" in the labour market, in the current year, previous year and following two years. For these purposes, non-compliance would be defined in **clause 3** as a breach of a requirement imposed by:

- the *Employment Agencies Act 1973*;
- the *National Minimum Wage Act 1998*;
- the *Gangmasters (Licensing) Act 2004*, or
- any other enactment prescribed by regulations made by the Secretary of State.

Non-compliance would also include offences under any of the above Acts, or certain offences under the *Modern Slavery Act 2015,* namely:

- holding a person in slavery or servitude or requiring them to perform forced or compulsory labour (section 1); or
- human trafficking offences related to the above or otherwise committed in relation to a worker/person seeking work (sections 2 and 4).

The Director's strategy would have to:

- state how labour market enforcement functions should be exercised, and related funding allocated; and
- contain proposals on the education, training and research activities carried out by relevant enforcers, setting out how related funding should be allocated;

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12 Prime Minister's Office, Queen's Speech 2015: background briefing notes, page 36
13 'PM speech on immigration', GOV.UK, 21 May 2015
14 'Prime Minister pledges to control and reduce immigration, GOV.UK, 21 May 2015
15 Home Office, *Immigration Bill 2015/16 Factsheet – Labour Market Enforcement,* p1

- detail the activities the Director proposes to undertake during the year to which the strategy relates; and
- such other matters as the Director considers appropriate.

The Secretary of State may approve a strategy with or without modifications (clause 2(5)).

Clause 4 would require the Director to submit an annual report to the Secretary of State on the strategy and its effect. Clause 4(3) would require the Director to report on any other matter which the Secretary has requested that the Director report on, which must be submitted as soon as reasonably practicable after the request.

Under **clause 5** the Secretary of State would have to lay before Parliament any approved strategy or reports received from the Director. Prior to this the Secretary of State may remove from these reports any material publication of which the Secretary considers would be against the interests of national security, would jeopardise a person's safety or would prejudice investigation/prosecution of criminal offences.

Clause 6 provides for the creation of an "information hub" and states:

> The Director must gather, store, process, analyse and disseminate information relating to non-compliance in the labour market.

Clause 7 would prevent the Director from making recommendations in relation to specific individual cases (although the Director may consider these in coming to general conclusions on an issue).

Comment

There has been relatively little comment on the new Director role. APSCo, a body representing recruitment agencies, welcomed the proposals.[16] A briefing published by the law firm Eversheds said it "remains to be seen … whether increased Government emphasis upon enforcement and a new Director of Labour Market Enforcement" would allay concerns that stronger enforcement alone could "drive already vulnerable workers further into illegality and away from any form of protection".[17] Employment law commentator Richard Dunstan said that the Director proposal in place of the commitment to introduce a labour market enforcement agency "represents something of a policy climbdown".[18]

Although published before the Bill, the aforementioned report from the Migration Advisory Committee lends some support to the proposals. As regards coordination of labour market enforcement the report noted:

> We found that there was a low level of labour market enforcement across low-skilled jobs. Although there was legislation in place, the numbers indicate that untargeted inspections will be rare. The relatively small numbers of successful prosecutions coupled with non-application of the harshest

16 'APSCo welcomes new appointment of Director of Labour Market Enforcement', APSCo website (accessed 29 September 2015)
17 'UK Immigration e-briefing: Government reveals hard line on immigration as new Bill is published', Eversheds website, 29 September 2015 (accessed 29 September 2015)
18 'NMW Enforcement: David Cameron Ramps Up The Rhetoric (But Not Much Else)', Hard Labour blog, 24 September 2015

> penalties could lead employers to conclude that chance favours those willing to avoid their obligations under the legislation. The level of resources put into inspections could result in employers being reasonably sure that there was only a small chance of them being discovered to be in breach of their obligations.
>
> …
>
> While we did see evidence of employment rights being enforced, we question how extensive the enforcement is and whether the resources devoted to enforcement are sufficient.
>
> …
>
> the fact that there are a number of bodies with responsibility for enforcing different aspects of employment rights caused us concern that there might be confusion over respective roles and differing priorities of each of these organisations. These bodies are prohibited by legislation from the widespread sharing of data and we do believe there is a case for increased data sharing among relevant enforcement bodies.
>
> …
>
> It is clear to us that there is a need for more joined-up enforcement response. The Government may wish to consider the option of bringing together under a single umbrella the various enforcement responsibilities in order to better enforce employment rights. At the very least there is clearly scope for existing agencies to re-focus efforts and seek to work more collaboratively to tackle these issues.[19]

2.2 Illegal working (clauses 8-11)

The Conservative Party Manifesto pledged to "crack down further on illegal working".[20] Subsequently, in his immigration speech following the election, the Prime Minister said:

> we'll make illegal working a criminal offence in its own right. That means wages paid to illegal migrants will be seized as proceeds of crime and more businesses will be told when their workers' visas expire, so if you're involved in illegal working – employer or employee – you're breaking the law.[21]

The Bill would implement this commitment, together with a number of related changes, as described in a Home Office fact sheet accompanying the Bill:

- The Bill will make illegal working a criminal offence in its own right, with a maximum custodial sentence of 6 months and/or a fine of the statutory maximum (unlimited in England and Wales). This will allow wages paid to all illegal workers to be recoverable under the Proceeds of Crime Act 2002.
- The Bill will also make it an offence for an employer to employ someone whom they 'know or have reasonable cause to believe' is an illegal worker. The maximum custodial sentence on indictment for an offence of employing an illegal worker will also be increased from two years to five years. These powers will operate alongside and

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19 Migration Advisory Committee, *Migrants in low-skilled work,* July 2014, pp178-179
20 *Conservative Party Manifesto 2015*, p31
21 PM speech on immigration, GOV.UK, 21 May 2015

reinforce the existing system of heavy financial penalties for businesses that negligently employ illegal workers.

- To deal with those employers who continue to flout the law by employing illegal workers and evade sanctions, the Bill will introduce a power to close premises for up to 48 hours. The closure may be cancelled if the employer demonstrates that they have conducted right to work checks where illegal workers have been identified. Where they cannot, the next step is to place the business under special compliance requirements, as directed by the courts. This can include continued closure for a period, followed by reopening subject to the requirement to conduct right to work checks and inspections for compliance.
- Immigration Enforcement often encounters illegal working in off licences or late night refreshment establishments. Applying for, and holding, licences will be conditional on not breaching immigration laws, including employing illegal workers.[22]

Current law

Employers' legal responsibilities to prevent illegal working apply to staff employed on or after 27 January 1997, following the coming into force of the *Asylum and Immigration Act 1996*. The current law is contained in the *Immigration, Asylum and Nationality Act 2006* as amended (which replaced the former scheme under the 1996 Act) and related regulations.

Section 15 of the 2006 Act provides for the imposition of a civil penalty where a person employs an illegal worker. "Illegal worker" is not an expressly defined statutory term, but is used as shorthand to describe workers subject to certain forms of immigration control:

> It is contrary to this section to employ an adult subject to immigration control if—
>
> (a) he has not been granted leave to enter or remain in the United Kingdom, or
>
> (b) his leave to enter or remain in the United Kingdom—
>
> (i) is invalid,
>
> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
>
> (iii) is subject to a condition preventing him from accepting the employment.

When the 2006 Act's system of penalties was introduced in 2008 the maximum penalty was set at £10,000 per illegal worker. This was doubled in 2014 to £20,000 per illegal worker.[23] An employer found to be employing an illegal worker will have a statutory excuse against

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22 Home Office, *Immigration Bill 2015/16 Factsheet – Illegal Working*, September 2015, p2

23 *Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014*, SI 2014/1262

payment of the penalty if it can demonstrate that it has carried out the necessary document checks.[24] If it cannot, it may be liable to a penalty.

In addition to potential civil liability, section 21 of the 2006 Act makes it a criminal offence to employ another "knowing that the employee is" an illegal worker. The maximum penalty on indictment is two years' imprisonment and/or an unlimited fine. An employer who knows that one of its employees does not have the right to work will not have an excuse against payment of a civil penalty (regardless of whether it conducted any document checks).

In addition to employer liability, a person with limited leave to remain may be restricted from entering into employment. Section 3(1)(c)(i) of the *Immigration Act 1971* provides that a person given limited leave to enter or remain in the United Kingdom may be given this leave subject to "a condition restricting his employment or occupation in the United Kingdom". Failure to observe this condition is an offence, punishable on summary conviction (i.e. in the Magistrates' Court) by an unlimited fine or up to six months' imprisonment.[25] There is currently no offence of illegal working for those who require, but do not have, leave to remain, yet engage in paid work.

Recent scrutiny of Home Office enforcement action

Immigration Enforcement is the Home Office directorate responsible for prevention of illegal working operations. The Home Office regularly publicises details of enforcement activities against illegal workers, through news stories and quarterly reports.

In late 2010, the Independent Chief Inspector of Borders and Immigration published a report of an investigation into the enforcement of the civil penalties scheme for illegal working.[26] Among other conclusions, he considered that the government's approach to enforcing the penalties was undermining their deterrent effect:

> At the time of the inspection, the UK Border Agency suggested to Parliament and the public, through high profile press releases and media activity, that it regularly fined employers who flouted the regulations 'up to £10,000'. In practice, we found that the actual amount imposed or collected was far less than this. Employers had only a small chance of paying the maximum fine per illegal worker and staff stated that this had not gone unnoticed by either employers or their legal representatives. Rather than being a deterrent to employing illegal workers, we believe that this leniency and perceived passivity may actually have had the opposite effect. It most certainly did not constitute a 'hostile environment' for employers of illegal workers, and until the CPCT has a way of measuring efficiency and effectiveness, the true level of performance of the team will remain an unknown quantity.

A July 2013 Home Office consultation paper provided some updated figures. It stated that over 8,100 civil penalty notices had been issued to

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24 *Immigration, Asylum and Nationality Act 2006*, s15
25 *Immigration Act 1971*, s.24(1)(b)(ii)
26 Independent Chief Inspector of the UKBA, *An inspection of the Civil Penalties Compliance Team - Illegal Working March - April 2010*, 18 November 2010

employers between February 2008 and the end of 2012, equating to a net recoverable sum of £57.5 million. Over £24 million in penalties had been paid; in the region of £16.5 were payable and subject to recovery; and just over £17 million had been written off - often because companies with an outstanding civil penalty debt ceased to trade.[27]

In March 2014 the Chief Inspector of Borders and Immigration published *An inspection of the use of the power to enter business premises without a search warrant*, following inspections conducted between October – November 2013. The Chief Inspector raised concerns about non-compliance with guidance, inconsistencies and weak justifications for the use of the power, and examples of the power being used unlawfully.

The Home Office accepted all of the recommendations, and reasserted its commitment to preventing illegal working:

> Illegal working sustains and encourages illegal immigration. It undercuts legitimate business through illegal cost-cutting activity. It is often associated with other forms of exploitative behaviour, including harmful working conditions for employees and tax evasion and non-payment of the National Minimum Wage and statutory payments to employees.
>
> It is right that people with no right to be in the UK should not be permitted to work and we are committed to tackling the issue of illegal working.
>
> …
>
> With the creation of the new Immigration Enforcement Directorate in the Home Office, we have also seen an increased operational focus on action against illegal working, with the delivery of the results we expect.
>
> Importantly our enforcement operation is working closely with other government departments to increase our "enforcement reach" and the range of sanctions that we can bring to bear against abusive behaviour by some employers. We are also working closely with various large employment sectors and community business groups to increase their awareness of the immigration rules and increase their ability to identify fraudulent documentation.[28]

A number of recent Parliamentary Questions have touched on the issue of enforcement action. On civil penalties, David Hanson asked the following in January 2015:[29]

> To ask the Secretary of State for the Home Department, how many companies were fined for employing illegal immigrants in each of the last five years.
>
> **Mike Penning**: The information requested is shown in the following table. The figures are based on the number of civil penalties issued to individual employers during each of the last

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27 Home Office, *Strengthening and simplifying the civil penalty scheme to prevent illegal working consultation document*, 9 July 2013, para 13

28 Home Office, *The Home Office response to the Independent Chief Inspector's report: An inspection of the use of the power to enter business premises without a search warrant October – November 2013*, March 2014

29 Illegal Immigrants: Employment: Written question - 222054

five complete financial years. This includes public and private limited companies, sole traders, partnerships and franchises.

The government is committed to taking effective action against employers of illegal workers. Illegal working drives illegal immigration which leads to exploitation of workers and is also linked to non payment of the national minimum wage, harmful working conditions and tax evasion. Illegal working also undercuts legitimate businesses and adversely impacts on the employment of people who are lawfully resident in the UK.

The government has therefore taken measures to strengthen our approach to rogue employers. In 2014, we doubled the maximum civil penalty that can be levied against an employer to £20,000 per illegal worker and we used the Immigration Act 2014 to make it easier to enforce unpaid penalties in the courts. We have also extended our enforcement reach by working more closely across government departments to identify where illegal working is taking place and to enforce a range of sanctions against employers of illegal workers.

Financial year	Civil penalties issued	Employers issued with civil penalties
2009-10	2,339	2,254
2010-11	1,899	1,849
2011-12	1,341	1,317
2012-13	1,270	1,247
2013-14	2,150	2,090

On 11 November 2014 Emily Thornberry, then Shadow Attorney General, asked about the number of criminal prosecutions:

To ask the Attorney General, how many prosecutions under section 21 of the Immigration, Asylum and Nationality Act 2006 have been (a) brought and (b) successful in each year since the introduction of that offence.

Mr Robert Buckland: The records held by the Crown Prosecution Service (CPS) indicate the number of offences charged, in which a prosecution commenced at magistrates' courts.

Section 21 of the Immigration, Asylum and Nationality Act 2006 creates the offence of knowingly employing an adult subject to immigration control who has not been granted leave to enter or remain or whose leave to remain is invalid, has ceased to have effect or is subject to a condition preventing him from accepting the employment.

The table below sets out the number of offences in each year since the introduction of the offence, charged by way of Section 21 of the Immigration, Asylum and Nationality Act 2006, in England and Wales.

	Offences charged
2009-2010	14
2010-2011	21
2011-2012	18
2012-2013	15
2013-2014	19

Data Source: CPS Management Information System

> It is not possible to disaggregate which of these offences resulted in a successful outcome without reviewing individual case files which would incur disproportionate cost.[30]

For further background see the Library briefing *Employers' duties to prevent illegal working*.[31]

The Bill

Clause 8 would create the new offence of illegal working, inserting a new section 24B into the *Immigration Act 1971*. New section 24B(1) would provide as follows:

> A person who is subject to immigration control commits an offence if the person works at a time when—
>
> (a) the person has not been granted leave to enter or remain in the United Kingdom, or
>
> (b) the person's leave to enter or remain in the United Kingdom—
>
> (i) is invalid,
>
> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
>
> (iii) is subject to a condition preventing the person from doing work of that kind.

For this purpose, "work" includes work:

- under a contract of employment;
- under a contract of apprenticeship;
- under a contract personally to do work;
- under or for the purposes of a contract for services (in the course of a trade, business, craft or profession);
- for a purpose related to a contract to sell goods;
- as a constable;
- in the course of Crown employment;
- as a relevant member of the House of Commons staff; or
- as a relevant member of the House of Lords staff.

Per new section 24B(2)-(3) a person convicted of this offence in England and Wales would be liable to an unlimited fine or six months imprisonment. In Scotland or Northern Ireland, the maximum fine would be £5,000. If a person is convicted of this offence, the prosecutor must consider whether to ask the court to make a confiscation order (Scotland) or commit the person to a Crown Court where a confiscation order can be made (England and Wales, and Northern Ireland). This would allow wages paid to the person to be confiscated under the *Proceeds of Crime Act 2002*.

Clause 9 would amend the existing offence of employing an illegal worker, currently contained in section 21 of the *Immigration, Asylum and Nationality Act 2006*. At present, in order to commit the offence,

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30 Illegal Immigrants: Employment: Written question - 214408

31 Melanie Gower, *Employers' duties to prevent illegal working*, Commons Briefing Paper SN06706, 9 February 2015

the employer must know that the worker is an illegal worker (see above under 'current law'). The Government believes:

> that some employers are deliberately not checking whether their employees have the right to work. These employers are not knowingly employing illegal workers because they choose not to know.[32]

The clause would amend the offence, extending it to those who have "reasonable cause to believe" that an employee is an illegal worker.

Clause 9(2) would increase the maximum period of imprisonment upon conviction of the offence from two to five years.

A person committing or attempting to commit the offence could be arrested without warrant (clause 9(3)).

Clause 10 would give effect to Schedule 1, which would make detailed illegal working-related changes to the licensing framework in the *Licensing Act 2003*. The Government believes:

> that a significant proportion of illegal working happens on licensed premises, where there is the sale of alcohol, late night refreshment (hot food or drink sold between 11pm and 5am) or the provision of entertainment.[33]

Under Schedule 1 a license could not be issued to an illegal worker; it would also make:

> the employment of illegal workers a factor that may be taken into consideration when issuing or revoking licences. Immigration officers will be provided with powers to enter premises to check compliance with these new conditions.[34]

The *Licensing Act 2003* only extends to England and Wales. Clause 10(2) would empower the Secretary of State to implement by regulations similar changes in Scotland or Northern Ireland.

Clause 11 would give effect to Schedule 2, which would enable an immigration officer, of at least the rank of chief immigration officer, to issue an "illegal working closure notice" to close an employer's premises for up to 48 hours, or more at the direction of the court, if the immigration officer is satisfied "on reasonable grounds" that the employer is employing an illegal worker and has previously been given a civil penalty or has been prosecuted for employing illegal workers. The notice could not be issued, or if it was issued may be cancelled, if the employer can show that it carried out the necessary document checks on workers.

Under Schedule 2, paragraph 5, whenever an illegal working closure notice is issued an application must be made to the court for an illegal working compliance order. The application would have to be heard by the court within 48 hours of the issue of the notice. A compliance order could:

- prohibit or restrict access to the premises;

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32 Bill 74-EN 2015-16 para 7
33 Ibid., p5, para 10
34 Ibid., p5, para 10

- require a person specified in the order to carry out checks relating to the right to work;
- require a person specified in the order to produce to an immigration officer documents relating to the right to work; or
- specify the times at which and the circumstances in which an immigration officer may enter the premises to carry out such investigations or inspections as may be specified in the order.

Comment

While the Bill's illegal working proposals have been widely reported, they have not attracted much comment. In their briefing on the Bill, the Migrants' Rights Network said:

> The proposal to create a criminal offence which could lead to a twelve month prison sentence with an unlimited fine for anyone found working without the right papers is grossly disproportionate to any harm which migrants in a vulnerable position may be considered to have done.
>
> …
>
> What it will do, is to drive workers further away from any kind of interaction with authority. Employers of such workers will hold huge power over them, and this measure will increase exploitation and the number of people in a condition of modern day slavery.[35]

Alp Mehmet of Migration Watch UK has said:

> This is not just about not being seen as a soft touch. More important is for the message to go out that if you are here illegally and caught working, you and your employer will end up in court. Let us hope that the authorities will not shy away from acting on the powers …[36]

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35 MRN, *Briefing on the Proposed Immigration Bill 2015-16*, September 2015, p1

36 'Illegal workers face jail as part of Government's immigration crackdown', *Mail Online*, 25 August 2015

3. Access to services (Part 2 of the Bill)

3.1 Residential tenancies (clauses 12-15)

As part of the Government's attempts to cut down on illegal migration, the *Immigration Act 2014* introduced a number of measures to restrict access to services for those without a valid right to remain in the UK.

One of those measures was a new requirement on private sector landlords to check that tenants' immigration status does not disqualify them from renting property. As a result, where the scheme is in operation, landlords who allow tenants without a so-called 'right to rent' to occupy their property are liable for a civil penalty.

The proposed 'right to rent' gave rise to a number of concerns amongst landlords' representative bodies. Consequently, it was decided to pilot the scheme in five West Midland council areas from 1 December 2014 for six months. The results of the pilot are expected to inform the full roll-out of the 'right to rent.' At the time of writing the Government's evaluation of the pilot scheme has not been published but on 21 May 2015 David Cameron announced an intention to roll-out the scheme nationwide:

> For the first time we've had landlords checking whether their tenants are here legally. The Liberal Democrats only wanted us to run a pilot on that one. But now we've got a majority, we will roll it out nationwide, and we'll change the rules so landlords can evict illegal immigrants more quickly.[37]

More information on the 'right to rent' can be found in Library Briefing Paper 07025, *Private Landlords: Duty to Carry out Immigration Checks.*

In August 2015 the Government announced that a new *Immigration Bill* would further amend the 'right to rent,' introducing possible prison sentences for landlords who repeatedly fail to carry out checks. It was proposed that the Bill would also make it easier to evict existing tenants without a current 'right to rent.' The *Immigration Bill 2015-16* delivers on these commitments.

In October 2014 the Migration Observatory at the University of Oxford published its most recent update of *Migrants and Housing in the UK: Experiences and Impacts.* The paper notes that the foreign-born population is almost three times as likely to be in the private rental sector (38% were in this sector in 2013), compared to the UK-born (14%) and that recent migrants (i.e. those who have been in the UK for five years or less) are more than twice as likely to be renters (80% were in the private rental sector in 2013), compared to other migrants.[38]

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37 'Prime Minister's Speech on Immigration', GOV.UK, 21 May 2015

38 Migration Observatory, *Migrants and Housing in the UK: Experiences and Impacts*, October 2014

Offence of leasing premises (clause 12)

The Bill creates four new offences which, according to the Explanatory Notes, are aimed at targeting "those rogue landlords and agents who deliberately and repeatedly fail to comply with the right to rent scheme or fail to evict individuals who they know or have reasonable cause to believe are disqualified from renting as a result of their immigration status."[39] It is expected that the main sanction applied to landlords who do not fulfil their duty to carry out checks on their tenants will be a civil penalty.[40]

Clause 12 would insert new sections 33A, 33B and 33C into the *2014 Immigration Act.* New section 33A would create two new offences. The first offence will be committed by landlords of a residential tenancy where they know or have reasonable grounds to believe that the premises are occupied by an adult disqualified from renting as a result of their immigration status. The offence will be committed if the adult is occupying the premises even if they are not a tenant or named on the tenancy agreement. The offence will not apply where the right to rent scheme is in force if the adult occupant has a limited right to rent and the eligibility period has not expired, unless the landlord has received notice from the Secretary of State advising that the adult is disqualified from occupying under a residential tenancy agreement as a result of their immigration status.

The second offence will be committed where a tenant's leave to remain in the UK expires during the course of the tenancy; the tenant continues to occupy the property; and the landlord is aware of this, or has reasonable cause to believe this has happened and fails to notify the Secretary of State as soon as reasonably practicable.

New section 33B would create two new offences relating to letting agents. A letting agent will be committing an offence if they carry out right to rent checks for a landlord and know, or have reasonable cause to believe, that a landlord will be entering into a tenancy agreement with someone disqualified as a result of their immigration status and fails to tell the landlord despite having sufficient opportunity to do so.[41] A further offence will be committed where an agent carrying out right to rent checks for a landlord does not notify the landlord and Secretary of State when a tenant's leave to remain in the UK expires during the course of the tenancy and they continue to occupy the premises with the agent's knowledge or where the agent has reasonable cause to believe this has happened.[42]

New section 33C provides that a landlord or agent found guilty of an offence under section 33A or 33B will be liable to imprisonment for up to twelve months or to a fine (or both) on summary conviction or up to five years imprisonment or a fine (or both) if convicted on indictment. If

39 Bill 74-EN, para 13
40 Ibid.
41 Subsections 33B(1) and (2)
42 Subsections 33B(3) and (4)

conviction takes place before section 154(1) of the *Criminal Justice Act 2003* comes into force the maximum term of imprisonment on summary conviction will be six rather than twelve months.[43]

Subsections 33C(3) to (5) provides for the commission of offences under new sections 33A and 33B by officers of a body corporate in certain circumstances.

The offence of letting to someone disqualified from renting under new sections 33A and 33B will, when brought into force, apply to landlords even if the tenancy was entered into before that date. However, the new offences applying to agents and the offence created by new section 33A(7) and (8) and new section 33B will only apply to contraventions of the right to rent scheme which take place after these measures come into force.[44]

Immigration officers will be able to use powers under the *Immigration Act 1971* (e.g. entering and searching premises and persons) in relation to these offences.[45]

Eviction (clauses 13 and 14)

A landlord may discover that a tenant no longer has a right to rent but the immigration status of a tenant is not a basis on which the landlord can currently seek repossession of the property. The Bill will enable landlords to obtain possession of their properties where tenants no longer have the right to rent.

Clause 13 will insert two new sections 33D and 33E into the *2014 Immigration Act* to give private sector landlords new powers to evict illegal migrants. The Secretary of State will have the power to serve a notice on a landlord advising that a person or persons occupying their premises are disqualified from renting under the 2014 Act. Having received such a notice a landlord will be able to serve a notice to terminate the tenancy – the minimum notice period will be 28 days. The landlord's notice will be enforceable as if it were an order of the High Court.

A term will be implied into all residential tenancy agreements to allow landlords to terminate the agreement where an adult occupant is disqualified from renting. The *Protection from Eviction Act 1977* will be amended to provide that a tenancy occupied by someone disqualified from renting will be an excluded tenancy (thus excluded from the Act's protection) where the Secretary of State has served a notice on the landlord under subsection 33D(2).

It will be possible to use the new eviction powers in sections 33D and 33E against tenants where the tenancy was entered into before or after the provisions come into force.[46]

Clause 14 will introduce new mandatory grounds for possession against an assured tenant under the *1988 Housing Act* (new Ground 7B in

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43 Subsection 33C(2)
44 Subsection 12(3) of the Bill
45 Subsection 12(6) of the Bill
46 Subsection 13(3)

Part 1 of Schedule 2) and a protected or statutory tenant under the *1977 Rent Act* (new Case 10A in Part 1 of Schedule 15) which landlords will be able to use where the Secretary of State has given written notice that the tenant or adult occupiers are disqualified from renting as a result of their immigration status.

New section 10A in the 1988 Act will allow the courts (as part of possession proceedings) to order the transfer of the tenancy from disqualified adults to joint tenants who are not disqualified as an alternative to making an order for possession.[47]

Extension to Wales, Scotland and Northern Ireland (clause 15)

Clause 15 gives the Secretary of State power to make regulations (subject to the affirmative procedure) to enable the new residential tenancies provisions to apply in Wales, Scotland or Northern Ireland.

The Delegated Powers Memorandum issued alongside the Bill provides the following information:

> The Scottish Government will introduce their new Tenancy Reform Bill in September with a view to gaining Royal Assent around March before Parliament dissolves for the elections. Implementation is unlikely to occur before the end of 2016. That Bill proposes fairly extensive changes to the existing legal framework for landlord and tenant law in Scotland. It is therefore proposed to establish a power enabling future equivalent provision in respect of routes to eviction in Scotland.
>
> 32. The position is similar for Wales and an enabling power is again sought to enable legislation to be passed before the elections in May 2016.
>
> 33. An enabling power is also sought in order to facilitate equivalent provision regarding routes to eviction and provision in consequence of current and future legislation in the devolved administrations.
>
> 34. A comparable power to extend provisions to Wales, Scotland and Northern Ireland can be found at section 53 of the 2014 Act.[48]

Comment

The Government conducted a public consultation exercise on tackling illegal immigration in privately rented accommodation before legislating to introduce landlord checks in the *Immigration Act 2014*. The Home Office received a total of 1,362 responses.[49] The summary of responses published on 10 October 2013 said that "the majority of landlord representative organisations were opposed to the proposals and/or

47 Subsection 14(5)
48 DPRR/13-14/98
49 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, Annex A

expressed concerns with the details of what was proposed."[50] More than half of all respondents disagreed with the principle of the policy.[51]

The key concerns raised in responses included:

- Making untrained civilians (landlords) responsible for the work of immigration officials at a cost to themselves and under threat of legal action[52]
- Additional administrative burdens and complexity for landlords[53]
- Possibility of increased costs being passed on to tenants in the form of higher rents/fees
- Doubts over the speed of responses from the Home Office enquiry service
- The impact on homeless and vulnerable groups (difficulties in obtaining documentation)
- Potential to disadvantage overseas students
- Need for landlords to be familiar with data protection requirements
- Potential for discrimination[54]

The Government acknowledged potential discrimination as a risk and set out its response in some detail in Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation – an Equality Policy Statement is included in Annex C. The Secretary of State published a statutory non-discrimination code of guidance setting out the steps landlords must follow to avoid unlawful discrimination when implementing right to rent checks.

As noted previously, pilot right to rent checks were in place in five West Midland council areas between December 2014 and May 2015 but the Government's evaluation of the pilot has not yet been published. The Joint Council for the Welfare of Immigrants conducted a survey on the pilot which garnered a small number of responses at 76, 45 of which were from tenants/lodgers and 31 from landlords/agents.[55] 42% of responding landlords said that they were less likely to consider someone who did not have a British passport and 27% said they were reluctant to engage with applicants with a foreign accent or name. Only one British citizen responding to the survey had been asked whether they had permission to be in the UK in comparison with 73% of responding non-British citizens.

The survey also suggested that the policy was not well understood by landlords or agents with 57% of respondents nationally and 40% in the

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50 Ibid p9
51 Ibid p12
52 RLA's response to the Home Office's consultation on immigration checks for tenants, August 2013
53 CIH letter to the Housing Minister, Tackling illegal immigration in the private rented sector, 15 July 2013
54 CIH letter to the Housing Minister, Tackling illegal immigration in the private rented sector, 15 July 2013
55 JCWI, *"No Passport Equals No Home": An independent evaluation of the 'Right to Rent, scheme*, 3 September 2015

pilot area claiming either not to have effectively understood the changes or not to have been aware of them at all.

Further information on the full study is available here: JCWI report on survey following Right to Rent pilot scheme.

The *Guardian* reported the following response from a Home Office spokesperson: "there are no indications so far to suggest landlord checks are being carried out unfairly" and that "[the Home Office] do not recognise figures suggesting only half of landlords checked potential tenants' right to rent."[56]

Housing organisations responded to the Government's stated intention to roll-out right to rent checks, accompanied by possible prison sentences for landlords who repeatedly fail to carry out checks and measures to make the eviction of illegal migrants easier, with similar comments to those submitted to the 2013 consultation process. The Chartered Institute of Housing (CIH) again raised concerns over the potential for landlords to discriminate:

> Checking immigration status is complicated so landlords may shy away from letting to anyone they believe isn't British, even if they have a legal right to live in the UK – especially if they face a jail sentence for getting it wrong.
>
> For many people, private renting is the only option, and if this is removed, homelessness and destitution may follow.[57]

The Residential Landlords Association (RLA) has objected to the additional burdens and risks that the new measures will place on private landlords. RLA Chairman, Alan Ward said:

> The RLA is to meet the Home Office tomorrow to discuss immigration checks. Why has this extra responsibility and risk been put on landlords and agents? Why not employers?
>
> The ability to evict illegals may answer the problem of abandonment if an illegal immigrant is removed by the authorities, but is a potential minefield if we get it wrong. Just because a landlord has the right to evict, it doesn't explain how to go about it.
>
> There must be better support to ensure landlords are able to validate tenants' right to rent and what to do when a tenant loses that right. We have real concerns as the Home Office have failed to allocate any meaningful budget to informing landlord, agents and tenants about the right to rent process.[58]

RLA Policy Director, David Smith added:

> There is already substantial confusion over the issue of checking documents of tenants to validate their status. There is the risk that people with unusual documents will be evicted by landlords who do not want to take the risk or who cannot understand their documents. Those landlords will then find themselves having acted in good faith at the time but possibly then facing an unlawful eviction claim if they are wrong.

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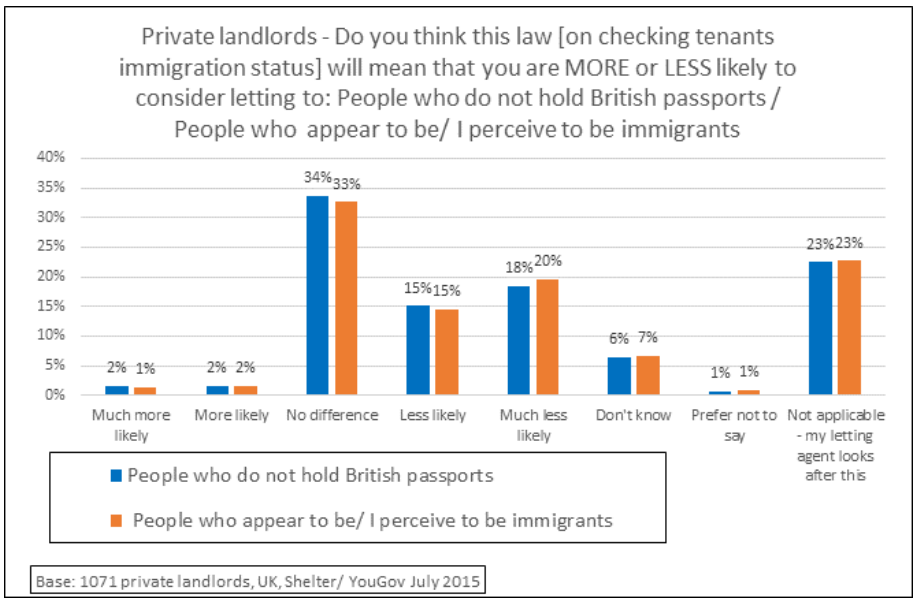
56 Guardian, *Pilot scheme forcing landlords to check tenants' immigration status 'has failed'*, 6 August 2015
57 "CIH warns of Immigration Bill impact," 3 August 2015
58 RLA, *Government ups the stakes on immigration checks*, 3 August 2015

> Given the existing confusion over Right to Rent checks and documents the addition of a new criminal penalty seems premature. Especially as the consultation in the West Midlands has not yet finished. The government has not presented any evidence that landlords are directly involved in housing people they know to be illegal immigrants. There will now be concerns that landlords and agents will be prosecuted as much for not being able to operate the highly complex system as for wilfully ignoring it.[59]

Shelter has said that the Bill's provisions will "significantly weaken tenants' protection from eviction, by making it possible for landlords to evict people who are deemed to have no 'right to rent', without the need for a court possession order."[60] Shelter goes on:

> While the Bill's effects on immigration remain to be seen, it will almost certainly have an impact on the thousands of families who now rely on the private rented sector for a home.
>
> Firstly, there is a real danger that the legislation could create further barriers for people trying to get a private rental home. Recent Shelter research shows that there are already significant barriers facing benefit claimants: close to two-thirds (63%) of landlords either refuse, or prefer not to, let to households receiving housing benefit. When it comes to families, 36% of landlords won't or prefer not to let to families with children.
>
> This same research found that around half of landlords who make decisions on letting to migrant tenants say the Immigration Act 'right to rent' checks are going to make them less likely to consider letting to people who don't hold British passports or who 'appear to be immigrants'. Over a third (37%) already admit that *'It's natural that stereotypes and prejudices come into it when I decide who to let to'*, even before the 'right to rent' is rolled out UK-wide.[61]



59 Ibid.
60 Shelter's policy blog, [accessed on 30 September 2015]
61 Ibid.

Shelter has questioned how the Home Office will locate landlords in order to serve the requisite notices advising that tenants do not have a right to rent (thus initiating the eviction process). There are fears that the ability to evict without the need for a court order could impact on households who are renting legitimately:

> It's not just those without a 'right to rent' who could suddenly be evicted. It could result in no-court eviction of joint tenants (including student flat-mates) with a 'right to rent', or families with children, who **should** have a 'right to rent' but are subject to an erroneous notice because of anomalies with their immigration status, perhaps because of administrative delays at the Home Office itself.
>
> The Protection from Eviction Act was designed to ensure that people cannot be turned onto the streets by their landlord without the oversight and approval of a court. This protection gives people time to show that they shouldn't be evicted, for example by proving that they have the 'right to rent'. As the Government's own advice to tenants states 'it does this in two ways: by making harassment and illegal eviction a criminal offence, and by enabling someone who is harassed or illegally evicted to claim damages through the civil court'. This protects renters from landlords who threaten to evict them by force.
>
> **Unless it is reconsidered, the latest Immigration Bill proposals threaten to increase the discrimination renters' face, making it harder to find a home. And it could leave families with children unable to prove that they have a 'right to rent' in the UK at greater risk of eviction and street homelessness.**[62]

3.2 Driving (clauses 16 - 17)

The clauses in the Bill build on measures introduced by the *Immigration Act 2014*, which defined residence requirements for the purpose of issuing a driving licence (section 46); introduced a power to revoke a driving licence where someone is not lawfully resident in the UK; and made the failure to surrender a driving licence that has been revoked on grounds of immigration status, without reasonable excuse, a criminal offence (section 47).

Over 11,000 UK driving licences have been revoked under the powers in the 2014 Act.[63]

Powers to carry out searches relating to driving licences (clause 16)

Clause 16 amends Part 1 of Schedule 2 to the *Immigration Act 1971*, which contains provisions related to the entry and search of premises and the search of people. It creates new powers for authorised officers, including immigration and police officers, to:

- enter premises and search for a driving licence. This power can only be exercised where there are reasonable grounds for

62 Ibid.
63 Home Office, *Immigration Bill 2015/16 Factsheet – Driving Licences*, September 2015

believing that a driving licence held by an illegal migrant, is on the premises; and

- search a person where there are reasonable grounds for believing that the person is not lawfully present in the UK and may have a driving licence concealed on their person.

A driving licence found by an authorised officer, under either of these new search powers or under existing search powers, may be seized and retained if it belongs to, or was found in the possession of, an illegal migrant. Once a licence has been seized it must be given either to the Secretary of State (in practice the Driver and Vehicle Licensing Agency (DVLA)).[64]

A driving licence must be returned to the holder should the holder successfully appeal against revocation and a person cannot ask for access, or be provided with a copy of, a seized driving licence. This is to ensure that a copy of the licence cannot be used as a form of identification to enable a settled life in the UK.

Offence of driving when unlawfully in the United Kingdom (clause 17)

Clause 17 inserts new sections 24C to 24E into the 1971 Act. It creates a new offence of driving a vehicle on a road or other public place when the driver of the vehicle is not lawfully in the UK. A person guilty of this offence will be liable on summary conviction to imprisonment of up to six months and/or a fine of up to the statutory maximum, or an unlimited fine in England and Wales.

Immigration officers may arrest, without a warrant, a person who has committed, or who they have reasonable grounds for suspecting has committed, the new offence. They, and police constables, would also have the power to enter premises to search for and arrest a person suspected of committing the new offence.

When a person is arrested for this new offence, their vehicle may also be detained. The Secretary of State would have a regulation-making power to set out the circumstances in which a vehicle may be released from detention (e.g. where the vehicle belongs to someone else).

The impact assessment explains the intent behind the clause:

> Although illegal migrants may have their Great Britain or Northern Ireland driving licence revoked, preventing them from legally driving, other illegal migrants may continue to drive legally with a licence issued overseas. Licences issued by non-EU countries may be used in the UK for 12 months irrespective of immigration status. To close this loophole the Bill makes it an offence for illegal immigrants to drive. The Bill will allow police officers and immigration officers to seize and detain vehicles driven by illegal migrants and on conviction the court would have the power to order the forfeiture of the vehicle.[65]

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64 Department of the Environment in Northern Ireland

65 Home Office, *Overarching Impact Assessment - Immigration Bill*, September 2015, p6

Comment

The Government argues that these new powers, taken together with other measures in the Bill, would help prevent illegal migrants from establishing "a settled life in the UK", and "make it harder for those with no right to be in the UK to live and work in the country illegally".[66]

The Migrants' Rights Network has warned that:

> Given the historical issues with stop and search policies, it is likely that ethnic minorities will disproportionately be subjected to driving licence checks, and again mistakes in the system will result in citizens being wrongly arrested. It is doubtful whether the harm caused by denying a group of people in the UK the ability to take driving lessons and pass a driving test which promotes public safety, is outweighed by whatever the supposed benefits are of such a policy.[67]

3.3 Bank accounts (clause 18)

Having access to a bank account is a fundamental part of modern living. Many things require one, including most paid employment and access to credit. Restricting access to having an account automatically reduces the opportunities for illegal migrants and hence, the attractiveness of coming to the UK in the first place.

Existing framework

It is important to remember that opening a current account is not necessarily a straightforward exercise, particularly for people who, for whatever reason, do not have the required documentation. By virtue of the Third and, now, Fourth, Money Laundering Directives, banks worldwide, are required to perform checks on the identity and residence of account applicants. This is supplementary to the range of 'anti-terror' measures introduced at the start of this century by the UK. These measures were brought together as the *Proceeds of Crime Act 2002* (POCA) as amended by *the Serious Organised Crime & Police Act 2005*.[68]

The extension of controls away from criminality and 'terror' are already in place.

Section 40 of the *Immigration Act 2014* requires banks and building societies (hereafter 'banks') to

> (1)….not open a current account for a person (P) who is within subsection (2) unless—
>
> (a)B has carried out a status check which indicates that P is not a disqualified person, or
>
> (b)at the time when the account is opened B is unable, because of circumstances that cannot reasonably be regarded as within its control, to carry out a status check in relation to P.

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66 Home Office, *Immigration Bill 2015/16 Factsheet – Driving Licences*

67 *Immigration Bill 2015 - What you need to know*, MRN, 18 September 2015

68 More detail about money laundering regulation can be found in a Library Paper on this subject.

> (2)A person is within this subsection if he or she—
>
> (a)is in the United Kingdom, and
>
> (b)requires leave to enter or remain in the United Kingdom but does not have it.
>
> (3)For the purposes of this section—
>
> (a)carrying out a "status check" in relation to P means checking with a specified anti-fraud organisation or a specified data-matching authority whether, according to information supplied to that organisation or authority by the Secretary of State, P is a disqualified person;
>
> (b)a "disqualified person" is a person within subsection (2) for whom the Secretary of State considers that a current account should not be opened by a bank or building society;
>
> (c)opening an account for P includes—
>
> (i)opening a joint account for P and others;
>
> (ii)opening an account in relation to which P is a signatory or is identified as a beneficiary;
>
> (iii)adding P as an account holder or as a signatory or identified beneficiary in relation to an account.

The Act has been supplemented by further regulations:

- *Immigration Act 2014 (Bank Accounts) (Amendment) Order 2014*;[69]
- the *Immigration Act 2014 (Bank Accounts) (Prohibition on Opening Current Accounts for Disqualified Persons) Order 2014* [70]
- and the *Immigration Act 2014 (Bank Accounts) Regulations*[71]

These came into force in December 2014.

The Bill

Clause 18, and more significantly **Schedule 3** of the Bill, imposes on banks (and building societies) requirements to carry out immigration checks on people who already have current accounts (as opposed to those applying for new ones).

The Explanatory Notes for this part of the Bill can be seen here.

Most of the significant requirements are set out in the Schedule.

Schedule 3 is framed around the opening paragraph which will amend Section 40 of the *Immigration Act 2014*:

> (1) A bank or building society must, at such times or with such frequency as is specified in regulations made by the Treasury, carry out an immigration check in relation to each current account held with it that is not an excluded account.
>
> (2) For the purposes of this section carrying out an "immigration check" in relation to a current account means checking whether, according to information supplied by the Secretary of State to a specified anti- fraud organisation or a specified data-matching authority, the account is operated by or for a disqualified person.

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69 SI 2014/3074
70 SI 2014/3086
71 SI 2014/3085

> (3) A "disqualified person" is a person—
>
> (a) who is in the United Kingdom,
>
> (b)who requires leave to enter or remain in the United Kingdom but does not have it, and
>
> (c) for whom the Secretary of State considers that a current account should not be provided by a bank or building society.

Given the existing legislation surrounding criminality, terror and immigration, acting as a 'policeman' is nothing new for banks. What is new is that these checks will be made on existing accounts with all the existing linkages that will have built up around them.

New Section 40B of the *Immigration Act 2014* will require the banks to "identif[y] a current account that is operated by or for a person who the bank … believes to be a disqualified person [and] notify the Secretary of State that a current account held with it is operated by or for a person who it believes to be a disqualified person". The Secretary of State will then have general powers to apply for a "freezing order" on the account.

Alternatively, if the Secretary of State decides not to apply for a freezing order, he can direct the bank (new Section 40G) to close the account. Reflecting the possible inter connectedness of existing bank accounts (utility and rent standing orders etc.), the bank has some flexibility in doing this (new Section 40G(3)):

> The bank or building society may delay closing an account which it would otherwise be required to close under subsection (2) if at the time at which it would otherwise be required to close it—
>
> (a) the account is overdrawn, or
>
> (b) where the account is operated by or for the disqualified person and one or more bodies or other persons, the bank or building society considers that closing the account would significantly adversely affect the interests of any of those other bodies or persons.

Comment

There has been very little comment on this issue. The 2014 Act measures attracted little attention from the financial services industry and the subsequent Regulations were agreed to without debate. The British Bankers Association has not produced any briefing on this at the time of writing.

4. Enforcement (Part 3 of the Bill)

4.1 Powers of immigration officers (clauses 19 – 28)

Successive pieces of legislation, most recently the *Immigration Act 2014*, have given immigration officers extensive police-like powers. Their available powers include to examine, arrest and detain irregular migrants to assist their removal from the UK, to search for evidence of criminal immigration offences, to search for documents which would assist removal, and to use reasonable force in the exercise of immigration act powers.

The Bill

Clauses 19 – 27 of the Bill would give some new powers to immigration officers, detainee custody officers and prison officers.

In particular, immigration officers would be given new powers:

- to search for, seize and retain documents which might assist with imposing a civil penalty on a person for 'illegal working' or 'illegal renting' offences, if the immigration officer has reasonable grounds for believing that there may be such documents on the premises **(clause 20**)
- to seize evidence encountered in the course of exercising their immigration functions, which they have reasonable grounds to suspect has been obtained through committing a non-immigration crime, or is evidence of such an offence (**clause 21**)

As per **clause 22**, the relevant authorities (e.g. police or National Crime Agency) would be notified of items seized under clause 21 so that they can decide whether to accept the item for further investigation.

Clauses 24 and 25 would give detainee custody officers and prison officers new powers to search for and seize nationality documents in respect of a person who is detained in a removal centre, short-term holding centre, prison, or young offender institution.

Clause 27 introduces **Schedule 4**, which amends existing legislative provisions related to immigration warrants to enter premises. The changes are being made in order to bring the provisions back into alignment with the comparable provisions applicable to the police in England and Wales. This is intended to enhance joint working between immigration and police officers and other agencies.

The Home Office factsheet for this part of the Bill explains why, in the Government's view, it is necessary to extend immigration enforcement powers again:

> **Why do immigration officers need even more powers of entry and search - don't they have enough already?**
>
> Immigration officers currently do not have powers to search for and seize evidence where the intention is to take administrative action, either to remove an illegal migrant from the UK or to serve a civil penalty notice on an employer or landlord. The Bill provides

additional powers of search and seizure, but no extra entry powers.

Surely collecting evidence of a crime is a job for the police. Why are we giving these powers to immigration officers?

Immigration officers are trained in searches and evidence collection. It is perverse that immigration officers would either have to ignore evidence of a non-immigration crime when they come across it, or risk it being removed or destroyed whilst waiting for the police. We are legislating to close this gap.

If these new powers are important, why didn't we include them in the Immigration Act 2014?

We keep our immigration enforcement powers under regular review, but it is important that we create new powers incrementally to allow one package of new measures to be implemented and embedded before we create more. That is the approach that we have taken here.

Comment

An article on the Free Movement immigration law blog highlights some concerns with extending immigration officers' police-like powers:

> Immigration officers are unlikely to have as much training as the police on evidence-gathering, and will certainly have less experience than them in deciding what might be criminal evidence. Therefore giving immigration officers these new powers is likely to result in a significant number of mistakes, where documents are seized which do not turn out to be evidence of a crime.[72]

It also cautions that small business owned by foreign nationals and those that employ migrants are most likely to be affected by the enforcement powers, and that the provisions may act as a disincentive to employing foreign workers.

The article also raises concerns about the powers given by clause 24 to detainee custody officers and prison officers to search for and seize nationality documents, which include scope to conduct strip searches. It highlights that the wording of the clause does not specify that the person conducting the search must be of the same sex as the person being searched, and contrasts this with comparable arrangements fr police strip searches:

> This power is quite startling. The general strip search powers given to the police make it clear that strip searches should be done in private, where no-one else can see, by a member of the same sex. To be strip searched by a member of the opposite sex, especially for those from religious communities, is extremely distressing. In addition, for many, particularly those identifying as LGBT/Q, as many asylum seekers do, being strip searched in front of members of the same sex, or indeed anyone, would be greatly uncomfortable. Those in immigration detention have not committed any crime. So the strip search powers given to immigration officers in detention centres, at most, should be in line with those given to the police. It would be far simpler, more respectful, and more consistent to require complete privacy for

[72] Free Movement Blog, 'Part 3 of the Immigration Bill – enforcement', 1 October 2015

those strip searched. These clauses, from a Bill introduced in 2015, have all the sensitivity of the 1950s.

4.2 Immigration Bail (clause 29)

Immigration detention is used in respect of asylum seekers, as well as migrants who do not enter the asylum system (such as non-EEA nationals who do not have a valid immigration status in the UK, and foreign national ex-offenders who are being considered for deportation).[73]

Immigration detention is generally used:

- to establish a person's identity or basis of claim;
- to effect a person's removal from the UK; or
- where there is reason to believe that the person will fail to comply with any conditions attached to a grant of temporary admission/release.

It is Home Office policy that immigration detention is used sparingly, and that there is a presumption in favour of granting people liable to detention "temporary admission/release" or "release on restrictions" as an alternative to detention.

Temporary admission is commonly granted when a person's application for asylum or entry to the UK is under consideration, or after it has been refused and the person is liable to removal from the UK. Temporary admission is granted for fixed periods. It can be renewed, and may be subject to conditions, such as reporting and residence requirements. People granted temporary admission/release remain liable to detention.

Decisions to detain are made by Home Office officials. Continued detention is subject to internal administrative review, in order to ensure that detention remains lawful and in line with stated detention policy.

There is no automatic judicial review of a decision to detain, either at the time of the decision or at any stage thereafter. Detainees can contest the lawfulness of their detention through judicial review or *habeas corpus* proceedings.

Bail can be granted to immigration detainees by a Chief Immigration Officer or the Home Secretary. Immigration bail is considered by the Home Office as another "alternative to detention". Bail can be granted subject to conditions, such as to provide sufficient sureties, to live at a specified address and/or regularly report to an immigration reporting centre.

Detainees can also apply for bail to the First Tier Tribunal (Immigration and Asylum Chamber). There is no statutory presumption in favour of bail, although guidance notes to adjudicators indicate that there is a common law presumption, so that the burden of proof that bail should

[73] 'EEA' – European Economic Area (EU Member States plus Iceland, Norway and Liechtenstein. Swiss nationals have similar rights as EEA nationals in the UK, due to bilateral agreements with the EU.

not be granted rests on the Home Secretary, on the balance of probabilities.[74]

Section 7 of the *Immigration Act 2014* introduced some new restrictions on the availability of bail. Firstly, a detainee cannot be released on bail if their removal is scheduled to take place within the next 14 days, unless the Home Secretary consents. Secondly, the Tribunal must dismiss a bail application without a hearing if it is submitted within 28 days of a previous decision, unless there has been a material change in circumstances.

Some general practical information about applying for immigration bail is available from the GOV.UK page 'Immigration detention bail'. Chapter 57 of the Home Office's Enforcement Instructions and Guidance discusses the policy on bail in greater detail.

For background information on the use of immigration detention in the UK, see the related Library briefing *Immigration detention in the UK: an overview*.

The Bill

Clause 29 and Schedule 5 of the Bill would amend existing legislative provisions in order to create a single power to grant "immigration bail".

Schedule 5 would consolidate and replace existing legislation surrounding the use of immigration bail, temporary admission, temporary release, and release on restrictions.

Paragraph 1 of Schedule 5 identifies that people who are being detained or who are liable to being detained under immigration powers may be given immigration bail by the Secretary of State or First-Tier Tribunal. A grant of immigration bail would not prevent the person's subsequent detention.

As per **paragraph 2**, a grant of immigration bail would be subject to at least one of the following conditions:

- A requirement for the person to appear before the Secretary of State or First-Tier Tribunal at a specified time/place
- Restrictions on the person's work, occupation or studies in the UK
- A residence condition
- A reporting condition
- An electronic monitoring ('tagging') condition (further details are specified in paragraph 4)
- A financial condition (further details are specified in paragraph 5)
- Other conditions that the person granting immigration bail thinks fit

The paragraph would also give the Home Secretary some powers to substitute immigration bail conditions imposed by the First-Tier Tribunal:

- Sub-paragraph 4 enables the Home Secretary to impose a residence or electronic monitoring condition on a person if they are granted immigration bail by the First-Tier Tribunal without such a requirement being imposed.

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74 G Clayton, *Immigration and asylum law*, 4th edition, p.570

- Sub-paragraph 5 enables the Home Secretary to impose a different residence condition to the one imposed by the Tribunal.

The Home Office factsheet for this part of the Bill states that the Government intends to make use of these powers in order to ensure that foreign national ex-offenders who are released on immigration bail pending deportation from the UK are subject to an electronic monitoring condition. The Government anticipates that using GPS tagging technology will improve public protection and allow for a faster re-detention of foreign national ex-offenders when their deportation becomes imminent.

Paragraph 3 identifies the factors to be considered by the Home Secretary or First-Tier Tribunal in deciding whether to grant immigration bail, and which conditions to apply. These are:

- The likelihood of the person failing to comply with a condition
- Whether the person has been convicted of an offence (in the UK or elsewhere)
- The likelihood of the person committing an offence
- The likelihood of the person's presence causing a danger to public health or being a threat to public order
- Whether detention is necessary in the person's interest or for the protection of any other person
- Other matters as deemed relevant by the Secretary of State or First-Tier Tribunal

As is already the case, the Tribunal would only be able to grant immigration bail to a person who is due to be removed from the country within 14 days if the Home Secretary gives her consent.

Paragraph 6 sets out powers to vary bail conditions. These could be exercised by the person who granted bail (i.e. the Tribunal or the Home Secretary). Conditions specified by the Tribunal could also be varied by the Home Secretary, if the Tribunal gave a direction to that effect.

Paragraph 7 gives the Home Secretary powers to provide accommodation facilities to a person on immigration bail, in certain circumstances. Facilities for the accommodation of the person at a specified address may be provided for, if the Home Secretary imposes a residence requirement as a condition of bail at an address that the person did not propose or cannot support themselves at (e.g. due to insufficient finances), and the Home Secretary considers that there are "exceptional circumstances which justify the use of the power". Similarly travelling expenses incurred by the person in order to comply with a bail condition may be paid for by the Home Secretary, where justified due to "exceptional circumstances".

The transitional provisions provided for in **paragraph 10** would ensure that the new immigration bail provisions would apply to people already in the system at the time of commencement.

4.3 Power to cancel section 3C leave (clause 30)

Section 3C of the *Immigration Act 1971* (as amended, 'the 1971 Act') is intended to prevent a person from becoming an overstayer if their immigration status expires whilst they have an outstanding immigration application or appeal under consideration. Section 3C provides that, if a person submits a valid in-time application for further leave to remain before their existing immigration status expires, they will continue to enjoy the same status (subject to the same conditions) whilst the application for further leave to remain and any associated appeal is under consideration.[75]

As a result of changes made by the *Immigration Act 2014*, the Home Office no longer has the power to cancel leave which has been continued by section 3C. The leave extended by section 3C only ends when the outstanding application has been determined or withdrawn. The Explanatory Notes to the Bill illustrate how this gap can create delays in being able to take action if a person with section 3C leave is found to be in breach of the conditions attached to their leave.

Clause 30 of the Bill would introduce a power to cancel leave which is or would be extended by section 3C, if the person has:

- failed to comply with a condition attached to the leave, or
- used (or uses) deception in seeking leave to remain.

The effect of cancellation of section 3C leave would be that the person has no leave to remain, and would therefore be liable to removal from the UK, as per section 10 of the *Immigration Act 2014*.

75 See UKVI, *Modernised Guidance*, 3C and 3D Leave, v5.0 valid from 4 February 2015

5. Appeals (Part 4 of the Bill)

The *Immigration Act 2014* made significant changes to immigration appeal rights, which are specified in Part 5 of the *Nationality, Immigration and Asylum Act 2002* (as amended, 'the 2002 Act'). The 2014 Act reduced the range of immigration decisions which give rise to a right of appeal, and restricted the grounds on which an appeal can be brought, to those involving asylum or human rights issues.

Where there is no right of appeal, applicants may be given the opportunity to request an 'administrative review' of the decision (depending on their immigration category). Administrative reviews are conducted by Home Office staff, rather than Immigration Judges, and only consider casework errors.

The 2014 Act also introduced new restrictions on in-country appeal rights for people liable to deportation from the UK (generally speaking, foreign national ex-offenders). Under the 'deport first, appeal later' provisions (section 94B of the 2002 Act), if the Home Secretary certifies that it would not breach the person's human rights or cause serious irreversible harm to temporarily remove them from the UK before their appeal has been heard, the person can only make (or continue) an appeal against deportation after they have left the UK.

Home Office policy guidance gives some examples of the kind of scenarios where the powers might be used currently, in order to deport a person before their appeal hearing:[76]

> By way of example, in the following scenarios where a person is deported before their appeal is determined it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm while an out-of-country appeal is pursued:
>
> - a person will be separated from their child/partner for several months while they appeal against a human rights decision;
> - a family court case is in progress and there is no evidence that the case could not be pursued from abroad;
> - a child/partner is undergoing treatment for a temporary or chronic medical condition that is under control and can be satisfactorily managed through medication or other treatment and does not require the person liable to deportation to act as a full time carer;
> - a person has a medical condition but removal would not breach Article 3;
> - a person has strong private life ties to a community that will be disrupted by deportation (e.g. they have a job, a mortgage, a prominent role in a community organisation etc.).

[76] Home Office, *Section 94B Certification guidance for non-European Economic Area deportation cases*, v4.0, 29 May 2015

The guidance goes on to identify some scenarios where an in-country appeal might be retained:

> 3.7 Although the serious irreversible harm test sets a high threshold, there may be cases where that test is met. Such cases are likely to be rare, but case owners must consider every case on its individual merits to assess the likely effect of a non-suspensive right of appeal. The following are examples of when the test might be met:
>
> - the person has a genuine and subsisting parental relationship with a child who is seriously ill, requires full-time care, and there is no one else who can provide that care;
> - the person has a genuine and subsisting long-term relationship with a partner who is seriously ill and requires full-time care because they are unable to care for themselves, and there is no one else, including medical professionals, who can provide that care.
>
> 3.8 The onus is on the Secretary of State to demonstrate that there is not a real risk of serious irreversible harm. However, if a person claims that a non-suspensive appeal would risk serious irreversible harm, the onus is on that person to substantiate the claim with documentary evidence, preferably from official sources, for example a signed letter on letter-headed paper from the GP responsible for treatment, a family court order, a marriage or civil partnership certificate, documentary evidence from official sources demonstrating long-term co-habitation, etc. Case owners should expect to see original documents rather than copies.

The Home Office factsheet for this part of the Bill states that over 230 foreign national ex-offenders have been deported from the UK before an appeal against deportation in the first year since these provisions in the 2014 Act came into force (end July 2014 – end July 2015). 67 have lodged an appeal, of which three have been determined (and dismissed). Over 1,200 EEA-national ex-offenders have been removed from the UK under equivalent powers. 288 have lodged an appeal. The factsheet does not give details of these appeal outcomes.

The Court of Appeal has recently heard some test cases challenging the application of section 94B powers.[77] The judgments are expected to be handed down shortly. The ECHR Memorandum for the Bill notes that, although the test cases are fact-specific, some of the arguments raised in the appeals are potentially relevant to other certified cases:

> In particular, notwithstanding the ECtHR case law mentioned above, they argue that the Secretary of State has applied the incorrect legal test in reaching a decision to certify in these cases, substituting a test of "serious irreversible harm" for whether the decision would be unlawful under section 6 of the HRA 1998, such that it is incompatible with Article 8. Moreover, they argue that removal renders them unable to effectively pursue their appeal, because of the difficulties inherent in accessing legal support and in presenting cases from abroad.

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[77] C4/2015/0213 *R on the application of Byndloss v Secretary of State for the Home Department*; C2/2015/1004 *The Queen on the application of Kiarie v Secretary of State for the Home Department*

There is a more detailed account of some of the arguments made during the hearings on the Free Movement immigration law blog.[78]

The Bill

Clause 31 of the Bill would extend the powers to certify human rights claims to all immigration cases where human rights issues are raised (rather than only claims made by people liable to deportation, as now).

The clause would enable the Home Secretary to certify that the temporary removal of a person who is subject to immigration control and has made a human rights claim would not breach the UK's human rights obligations. Decisions to certify under this power would be made after individual consideration of the facts of the case, and would be open to challenge by judicial review.

The clause also amends section 94B of the 2002 Act, so that the power can be used in respect of human rights claims which arise in the context of decisions to refuse entry to or require a person to leave the UK, as well as in appeals against removal from the UK (as now).

As is currently the case, in-country appeal rights would remain for asylum cases (except those certified under separate powers as "clearly unfounded"), and for human rights cases where it is considered that removal before the appeal would pose a real risk of serious irreversible harm or a breach of human rights.

The overarching impact assessment for the Bill highlights how these provisions are anticipated to assist removals:

> This change will create more opportunities for prompt removals in human rights cases. Individuals whose case is certified will be liable to removal soon after the refusal decision is made. This will reduce detention costs. There will be an increased incentive to cooperate with removal in order to access the right of appeal where this is only available from overseas. The absence of an in-country right of appeal will remove the opportunity to exploit the appeal process to extend the individual's stay in the UK, and remove the scope for existing human rights to be strengthened or additional rights accumulated while awaiting the outcome of that in-country appeal.

The Home Office factsheet acknowledges that the provisions may result in some families becoming separated:

> **Are you planning to separate families?**
>
> The effect on the family will be considered, but this may be the case in some cases. The best interests of children in the UK are a primary consideration in any immigration decision, including in deciding whether to certify under the new power.

Clause 32 would remove section 3D of the *Immigration Act 1971* (as amended). Section 3D leave ensures that a person continues to have a valid immigration status whilst they are appealing against a decision to curtail or revoke their leave to remain. The Government considers that section 3D leave is no longer needed, as a result of the significant

[78] Free Movement Blog, 'Report: "Serious irreversible harm" test case heard in Court of Appeal', 25 September 2015

changes to immigration appeal rights made by the *Immigration Act 2014*.

Comment

An article on the Free Movement immigration law blog speculates that the provisions extending the scope for out of country appeals may deter some refused applicants from exercising their right of appeal:

> There is a good chance that many people who would have appealed and won simply will not bother; they will move abroad instead. A few extra embittered British citizens leaving with their spouses will count towards the Government's elusive net migration target.[79]

It goes on to emphasise that all migrants, rather than 'illegal immigrants', would be affected by the new certification power. The point is illustrated by a hypothetical example of how a person (Betty) legally resident in the UK as a student would be affected by these provisions, if her application to switch to a partner visa on the basis of marriage to a British citizen (Alfred) was refused:

> Under the Immigration Bill 2015, Betty's right of appeal could only be exercised after she has left the UK. There will still be an appeal but Betty will not be able to attend in person to try and convince the judge, which will make it rather harder for her and Alfred to succeed. Even if she is able to win despite the additional obstacles, she will also lose her job and be separated from Alfred for the duration of the appeal. Or Alfred will also have to leave the UK with her. At the moment, appeals are taking over 18 months to be heard then several additional weeks to be determined and implemented. If they win they can then return victorious but presumably very, very bitter at what they have been put through at the start of their married lives together.

The article also questions the practicality of relying on out of country appeal hearings:

> Given that the immigration tribunal remains utterly impervious to modern means of communication, such as emails or Skype and video link evidence, it is hard to imagine that these new out of country appeals will allow for a fair trial of the issues, never mind the huge disruption they will cause to the lives of those affected, who will have to endure the long delays involved in immigration appeals.

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79 Free Movement Blog, 'The Immigration Bill 2015', 18 September 2015

6. Support for certain categories of migrant (Part 5 of the Bill)

Library briefing Asylum Support: accommodation and financial support for asylum seekers sets out the current asylum support arrangements. These are based on provisions in the *Immigration and Asylum Act 1999* (as amended; 'the 1999 Act').

Put briefly, destitute asylum seekers can apply for accommodation and/or financial support ('asylum support') from UK Visas and Immigration (UKVI; part of the Home Office) whilst their claim is being decided, under section 95 of the 1999 Act.

Refused asylum seekers' asylum support is terminated 21 days after the final refusal decision.[80] They are expected to leave the UK and have few support options. However:

- A destitute refused asylum seeker can apply for a more limited type of accommodation and cashless support, under section 4(2) of the 1999 Act, if the Home Office recognises that there are temporary barriers to their departure from the UK.
- If the refused asylum seeker household includes children under 18, the family continue to receive support under section 95 of the 1999 Act, until they leave the UK.

The following sections give further information on these arrangements.

Refused asylum seekers' eligibility for section 4(2) support

Not all destitute refused asylum seekers are eligible for section 4(2) support. The precise eligibility grounds support are set out in regulations:

> **3.— Eligibility for and provision of accommodation to a failed asylum-seeker**
>
> (…)
>
> (2) Those conditions are that–
>
> (a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;
>
> (b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) he has made an application for judicial review of a decision in relation to his asylum claim–

[80] Asylum seekers granted permission to remain in the UK become eligible to work and access mainstream welfare benefits.

(i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998,

(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 or

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.[81]

Refused asylum seeking families' ongoing eligibility for section 95 support

If a refused asylum seeker's household includes dependant children aged under 18 (at the time of the final refusal decision), the family continue to receive section 95 asylum support until their departure from the UK.

However, powers to deny to refused asylum seekers with dependants access to section 95 support (and various other forms of welfare support and assistance) do already exist: they are specified in Schedule 3 of the *Nationality, Immigration and Asylum Act 2002* (as amended, 'the 2002 Act').[82]

Under those powers, eligibility for section 95 support ceases 14 days after receipt of notification that the Home Secretary has certified that in her opinion, the applicant has "failed without reasonable excuse" to take steps to leave the UK or place themselves in a position to be able to leave the UK.

The powers to terminate section 95 asylum support for refused families have not been widely used. Concerns were raised during the passage of what became the *Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004* that these provisions (which were introduced by section 9 of the 2004 Act) would result in the children of refused asylum seekers being separated from their parents and put into local authority care, as a consequence of local authorities' obligations under section 20 of the *Children Act 1989*.[83]

In 2005 the Home Office piloted the use of the 'section 9' powers in 116 family cases. The pilot was not judged to be a success. A report published in January 2006 by the Refugee Council and Refugee Action, who had contact with many of the families involved in the pilot, concluded that:

- Section 9 has caused immense distress and panic among families who face destitution, homelessness and having their children taken into care

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81 *Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005*, SI 2005/930

82 For background, see Library Research Paper 03/88, *Asylum and Immigration: the 2003 Bill*, 11 December 2003, p.63-82

83 See Library Research Paper *03/88 Asylum and Immigration: The 2003 Bill*, section VI

- Section 9 is completely incompatible with human rights standards
- Section 9 has comprehensively failed to achieve the Government's stated objective of encouraging families to return voluntarily to their home countries

These conclusions are based on the following facts:

- Only one family has left the UK as a result of Section 9.
- At the most, 3 families have signed up for voluntary return and only another 12 have taken steps to obtain travel documents.
- At least 32 families, almost a third of the total, have gone underground without support, housing or access to health and welfare services.
- Nine families were removed from the pilot after having their cases reviewed, highlighting the poor quality of decision making on asylum cases.
- Many of the families we have worked with have serious health and mental health problems which have been made worse by Section 9.[84]

The Home Office published its own evaluation report in June 2007. It concluded that:

> 4.3 In the form piloted section 9 did not significantly influence behaviour in favour of co-operating with removal – although there was some increase in the number of applications made for travel documents. This suggests that the section 9 provision should not be seen as a universal tool to encourage departure in every case.[85]

The powers have not been widely used since the end of the pilot. Instead, refused asylum seeker households with dependants under 18 continue to receive section 95 support until they leave the UK.

The Home Office's August 2015 consultation on reforming support signalled an intention to resume using the powers "on a case by case basis", but argued that a more fundamental change is needed. In the Government's view, the existing powers are unsatisfactory because they place the onus on the Government to establish that the person is not taking the necessary action to be able to leave the UK. They also provide for a right of appeal against a decision to cease support.

Other migrants' eligibility for section 4(1) support

Section 4 support can also be given to certain other categories of destitute migrant (i.e. other than refused asylum seekers) under section 4(1) of the 1999 Act, namely:

- People granted Temporary Admission to the UK, if they cannot reasonably be expected to leave the UK and the provision of support is necessary to avoid a breach of their human rights (sections 4(1)(a) and (b)).

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84 Refugee Council, *Inhumane and Ineffective – Section 9 in practice*, January 2006; See also Barnardo's, *The end of the road*, Autumn 2005

85 Border and Immigration Agency, *Family Asylum Policy The Section 9 Implementation Project*, 25 June 2007

- People in immigration detention who are applying for (or have been granted) immigration bail (section 4 (1)(c)). They may need section 4(1)(c) support in order to be able to provide an address at their bail hearing, or if they can no longer stay at the address provided at the hearing.

The Home Office's policy instruction on section 4 support gives further information about how these cases are handled.[86]

Examples cited by stakeholders of cases which have been granted support section 4(1)(a) or (b) include people who have never claimed asylum (e.g. who came to the UK as children) who have an outstanding application to regularise their stay, and irregular migrants who are attempting to obtain travel documents to be able to return to their country of origin.[87]

Recent Government action

The Government launched a five-week public consultation on 'Reforming support for failed asylum seekers and other illegal migrants', with an accompanying Impact Assessment, in early August. It highlighted the Government's concerns that the current arrangements:

> send entirely the wrong message to those migrants who do not require our protection but who may seek to come to or remain in the UK in an attempt to benefit from the support arrangements we have put in place for those who need our protection.[88]

Home Office figures quoted in the consultation document indicated that, as at 31 March 2015, an estimated 15,000 refused asylum seekers and their dependants were in receipt of asylum support. The Home Office has estimated that this cost £73 million in 2014-15.

As at the time of writing, the Government had not published its response to the consultation, or a summary of the responses received.

The Bill

Clause 34 and Schedule 6 of the Bill would amend the support provisions in the 1999 Act. As indicated in the Home Office factsheet for this part of the Bill, the Government intends that the measures will "reduce the scope for … support to remove incentives for failed asylum seekers to remain in the UK illegally".

Part 1 of Schedule 6 details the proposed amendments. Put briefly:

- Section 4 of the 1999 Act would be repealed.
- A new "section 95A" of the 1999 Act would provide powers to support destitute refused asylum seekers (including family cases) if they face "a genuine obstacle" to leaving the UK.
- Migrants currently eligible for section 4(1) support would not be eligible for section 95A support.

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86 Home Office, Asylum Support Instructions, *Asylum support, Section 4 policy and process*, v 4.0 25 June 2015

87 ILPA, consultation response, *Reforming support for failed asylum seekers and other illegal migrants, 8 September 2015*; ASAP, *ASAP's response to 'Reforming support for failed asylum seekers and other illegal immigrants'*, 7 September 2015

88 Home Office, *Reforming support for failed asylum seekers and other illegal migrants*, 4 August 2015, paragraph 7

- Refused asylum seekers may be eligible for section 95 support if they are waiting for a decision from the Home Office on whether to treat some further submissions as a fresh claim for asylum, or they have been granted permission to apply for a judicial review of a decision to reject their further submissions.

Many of the details relating to the proposed section 95A support, including the definition of a "genuine obstacle", other eligibility criteria, whether the support would be provided in cash or vouchers, and any conditions attached to section 95A support, would be specified in regulations. These would be subject to the negative resolution procedure.

Refused asylum-seeker families who did not qualify for the new section 95A support would not have access to support.

The Home Office factsheet states that the Government is working with local authorities on the details of how the measures will be implemented. It does not intend for the costs of supporting refused asylum seekers and families to fall on local authorities. The August consultation on reforming asylum support committed the Government to conducting a New Burdens Assessment, which, in accordance with the DCLG guidance to government departments, means that if a burden on local authorities is identified the Home Office (as the department responsible) must pay for it:

> If the changes proposed in this consultation document were to lead, or risk leading, to migrants being supported by local authorities who would previously have been supported by the Home Office, we would wish to discuss and address those impacts and their financial implications with local authorities in accordance with the new burdens doctrine and with the Devolved Administrations.[89]

The changes would not be applied retrospectively. Proposed transitional measures, intended to prevent large numbers of people abruptly losing their support entitlements, are detailed in **Part 2 of Schedule 6 (paragraphs 44 and 45)**:

- Section 4 support would continue for people who were in receipt of section 4 support, or who had an outstanding application or appeal for section 4 support immediately prior to the Bill's provisions repealing section 4 coming into force.
- Section 95 support would continue for refused families in receipt of section 95 support, or who had an outstanding application or appeal for section 95 support immediately prior to the repeal of the related provisions coming into force.

However, the 'transitional cases' would not have a right of appeal against decisions to discontinue their support.

The Government intends to make use of existing powers to terminate asylum support in order to encourage transitional family cases to leave the UK in the event of the refusal of their asylum claim. **Paragraph 46**

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[89] Home Office, *Reforming support for failed asylum seekers and other illegal migrants*, 4 August 2015, paragraph 45; see also DCLG, *New burdens doctrine: guidance for government departments*, June 2011

of Schedule 6 would make the powers specified in Schedule 3 of the *Nationality, Immigration and Asylum Act 2002* (as amended) also apply to transitional family cases.

The Home Office's ECHR Memorandum on the Bill sets out the Government's view on how these provisions are compatible with the UK's obligations under the European Convention on Human Rights, with particular reference to Articles 3, 6, 8, and 14.

Comment

The No Recourse to Public Funds Network is a network of local authorities and partner organisations affected by statutory provisions concerning migrants with care needs who have no recourse to public funds. It has highlighted concerns that the Bill would increase the demands on local authorities:

> Local authorities have already raised concerns that the asylum support proposals will result in destitute and homeless children living in their communities and that they will pick up the costs of supporting refused asylum seeking families.
>
> Just under 70 per cent of the client group provided with financial support and accommodation by social services are destitute visa overstayers, or illegal entrants, with children or who have care and support needs. Local authorities are therefore concerned that further measures to disrupt the ability of migrants with no immigration permission to live and work in the UK, along with the national roll out of the landlord checks currently operational in the West Midlands, will lead to more referrals into social services for such assistance, leading to greater pressures on resources and increasing costs.

The Network submitted a detailed joint response to the Home Office's August consultation with the Local Government Association, Welsh Local Government Association, the Convention of Scottish Local Authorities, and the Association of Directors of Children's Services, which sets out local authorities' concerns in greater detail. They are participating in a working group with Home Office, DCLG and Department for Education representatives in order to examine further the implications of the reforms for local authorities.

The charity Refugee Action posted an initial response to the Bill on its website, which summarises its concerns about the changes affecting refused asylum-seeker families:

> At Refugee Action, we know through our work with refused asylum seekers and their families the horrendous damage which the removal of support can have on people's physical and mental wellbeing.
>
> We also know from experience that the approach which the government is proposing does not work. Closing off support will not encourage someone to return if they do not believe it's safe to do so. Instead, it will simply leave them destitute; and far less able to ever engage with the process returning to their country of origin, as every effort is channeled into finding ways to meet immediate survival needs.
>
> (…)

> Support for all asylum seeking families is already appallingly low, and doesn't meet people's essential needs. It's been reduced recently too, with ministers imposing a cut in August of around a third on the amount a family receives. However, inadequate as it is, it's clearly better than nothing – which is precisely what refused asylum seeking families are now facing.[90]

It suggests that the Government should instead focus on:

- improving the quality of decision-making in asylum cases, in order to improve confidence in the asylum system; and
- ensuring that Assisted Voluntary Returns schemes are delivered by independent organisations (rather than 'in-house', as the Home Office intends), in order to promote sustainable voluntary returns.

At the time of writing, few stakeholders had responded in detail to the provisions in the Bill. However, some other organisations have also published their responses to the Home Office's August consultation which has informed this part of the Bill. See, for example, the detailed responses from the Asylum Support Appeals Project (a charity that provides free legal advice and representation in asylum support appeals), Bail for Immigration Detainees (a charity that works with immigration detainees) and the Immigration Law Practitioners' Association.

Concerns commonly raised in the responses included:

- That in practice, the reforms would increase pressures on local authorities and public services such as A&E and mental health services.
- That previous attempts to encourage families to leave the UK by terminating their asylum support were not successful.
- That terminating support will make it more difficult for the Home Office to remain in contact with people liable for removal from the UK and undermine efforts to promote voluntary departures.

Particular concerns have been raised about the impact on non-asylum seekers currently eligible for support under section 4(1):

- That it is important to retain scope to grant support to destitute migrants (non-asylum seekers) in exceptional circumstances.
- That some immigration detainees will be unable to access immigration bail, if they cannot provide a bail address at the point of the bail hearing, and that this could lead to prolonged (and potentially unlawful) detention, and further costs to public expenditure.

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90 Refugee Action, *Blog*, 'Immigration Bill set to drive up destitution of families', 18 September 2015

7. Border Security (Part 6 of the Bill)

7.1 Penalties relating to airport control areas (clause 35)

Paragraph 26 of Schedule 2 of the *Immigration Act 1971* places legal obligations on transport carriers and port operators to manage the disembarkation of passengers in the UK, so as to ensure that they pass though the designated primary immigration control points (i.e. passport control). Failure to comply with these obligations is a criminal offence, as per section 27 of the 1971 Act.

Nevertheless, some passengers are misdirected upon arrival in the UK, due to errors by the transport carrier or port operator (such as opening the wrong doors at the arrival gate or sending passengers to the wrong place). The problem does not appear to be particularly widespread – the Home Office factsheet for this part of the Bill indicates that, out of 117 million passenger arrivals in the UK in 2014, just under 1,000 arriving passengers were not brought to immigration control as a result of such errors. The overarching Impact Assessment for the Bill explains how the immigration authorities respond in such circumstances:

> Passenger information is obtained in advance from airline passengers travelling to the UK, and this helps manage the risks resulting from misdirected passengers as the information is processed to identify those of interest to law enforcement agencies, enabling the appropriate response. Also, in instances of misdirected flights, although individuals concerned will not have been subject to a full immigration control on arrival, appropriate checks will have taken place when the misdirection has come to light. Nonetheless several hundred passengers still enter the UK each year without receiving the required checks on arrival because of failings in this area. So some risk remains, and the operational response to a misdirection can have a significant resource impact on Border Force.[91]

The Government has been engaging with port authorities and transport carriers on this issue. It now proposes to create a civil penalty scheme, which it intends will incentivise port authorities and transport carriers to invest in processes to ensure compliance with their obligations.

Clause 35 and Schedule 7 of the Bill would introduce new powers to issue civil penalties to transport carriers and port operators for failure to take "all reasonable steps" to present passengers at immigration control points.

The detail of the civil penalty scheme, including the maximum penalty amount and the considerations which would inform decisions to impose a penalty, would be specified in secondary legislation (subject to the negative resolution procedure) and codes of practice.

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[91] Home Office, *Overarching Impact Assessment – Immigration Bill*, IA No: HO0214, 17 September 2015, p.8

The Government's view, as set out in the Home Office factsheet for this part of the Bill, is that a civil penalty scheme for transport carriers and port authorities would be a "more proportionate and effective sanction" for carriers and port authorities who do not deliberately seek to evade the immigration controls. The criminal offence would remain available as a sanction in cases of deliberate non-compliance.

7.2 Maritime powers (clause 36)

The Home Office's Border Force has immigration and customs control responsibilities, including to patrol the UK coastline. As explained in the Home Office factsheet for this part of the Bill, there are gaps in its powers in relation to investigating suspected illegal immigration:

> Border Force operates a fleet of cutters to enforce revenue and customs matters, in particular to lead the fight against the importation of controlled substances. Officers on board cannot exercise immigration powers in UK territorial waters so cannot intervene when they identify vessels which they suspect to be involved in facilitating illegal migration.

Due to this gap in powers, if Border Force personnel become aware of a vessel in UK territorial waters they suspect of carrying unlawful migrants, they can only try to monitor the vessel's movements and share information with immigration control staff based on land.

Clause 36 and Schedule 8 of the Bill would extend some immigration officer enforcement powers to UK territorial waters, so that they are available to Border Force staff and police officers and the Armed Forces. The powers would be available in respect of the offences of assisting unlawful immigration, assisting an asylum-seeker to arrive in the UK, and assisting entry to the UK in breach of a deportation or exclusion order, as provided for in sections 25, 25A and 25B of the *Immigration Act 1971*. The Schedule makes some technical amendments to extend the scope of these offences, which are collectively referred to as the "facilitation offences".

The maritime powers would include to:

- Stop, board, divert and detain a ship, if there are reasonable grounds to suspect that it is being used to facilitate a breach of immigration law (or in connection with such a breach).
- Search the ship and anyone and anything on the ship, to obtain information relevant to such a breach.
- Arrest without a warrant a person suspected of being guilty of an offence of facilitation and seize and detain anything which appears to be evidence of the offence.
- Use reasonable force, if necessary, in the performance of the functions specified in the Schedule.

7.3 Excluding people subject to EU or UN travel bans (clause 37)

If a person is subject to a UN or EU travel ban, the UK is obliged to prevent their entry to or transit through the UK. Section 8B of the *Immigration Act 1971* (as amended) provides for people subject to UN

or EU travel bans to be excluded from the UK, when they have been designated by Order (currently, the Immigration (Designation of Travel Bans) Order 2000).[92] The effect is that, subject to the human rights exemptions specified in the Order, the person is excluded from the UK and must be refused leave to enter or remain in the UK, and have any existing permission cancelled. The Order is regularly amended in order to reflect changes to the travel restrictions issued by the UN or EU.

People who are subject to an international travel ban cannot be refused entry to the UK as an "excluded person" until the secondary legislation has been updated to reflect their travel ban. However, they can still be refused entry or have their permission revoked on character, conduct or associations grounds, under the Immigration Rules.[93]

Library briefing paper '*Visa bans': Powers to refuse or revoke immigration permission for reason of character, conduct or associations* contains further background information about the existing powers.

Clause 37 of the Bill would remove the need for secondary legislation to be updated in order to implement an international travel ban, so that the bans could take immediate effect.

92 SI 2000/2724, as amended

93 Home Office, Modernised Guidance *Cross-cutting information – General grounds for refusing Section 1 v23, valid from 1 September 2015*

8. Language requirements for public sector workers (Part 7 of the Bill)

At present, there is no statutory or other blanket requirement for public sector workers to speak fluent English. The Conservative Party Manifesto committed to introduce this requirement:

> Being able to speak English is a fundamental part of integrating into our society … we will legislate to ensure that every public sector worker operating in a customer-facing role must speak fluent English.[94]

Although this proposal did not feature in among the provisions of the Bill announced at the time of the Queen's Speech,[95] the Minister for the Cabinet Office, Matthew Hancock, announced on 2 August 2015 that the measure would form part of the Bill.[96] The press release accompanying the announcement indicated the expected level of English proficiency:

> This will mean that all public sector organisations must ensure that staff can communicate effectively with the public, to what is expected to be at least 'level 2' – equivalent to a C or above at GCSE.
>
> This requirement would increase depending on the nature of the role and profession. Doctors, for example, are already required to have a much higher level of English.[97]

As the law currently stands, under the *Equality Act 2010,* an English-language job requirement may constitute indirect race discrimination. However, indirect discrimination can be justified if shown to be a proportionate means of achieving a legitimate aim.[98] In many cases, where public sector workers are required to interact with English speaking customers, it is likely that a requirement to speak English effectively would be justified. The Equality and Human Rights Commission provides some guidance on this in its *Equality Act 2010 Code of Practice* on employment:

> A language requirement for a job may be indirectly discriminatory unless it is necessary for the satisfactory performance of the job. For example, a requirement that a worker have excellent English skills may be indirectly discriminatory because of race; if a worker really only needs a good grasp of English, the requirement for excellent English may not be objectively justified. A requirement for good spoken English may be indirectly discriminatory against

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94 *Conservative party Manifesto 2015*, p31
95 See *Queen's Speech 2015: background briefing notes*, pp36-37
96 All public sector employees who work directly with the public to have fluent English, Gov.uk, 2 August 2015
97 Ibid.
98 *Equality Act 2010*, s.19(2)(b)

> certain disabled people, for example, deaf people whose first language is British Sign Language.[99]

The Government plans to issue a code of practice to guide public authorities within scope of the proposal on how to comply with it. The Bill's Explanatory Notes state that a "consultation will be launched in parallel with the passage of the Bill through Parliament on the content of the code of practice".[100]

The Bill

Clause 38 would introduce a requirement for public authorities to ensure that each person who works for them in a customer-facing role speaks fluent English. Clause 38(8) defines "fluent" as being "a command of spoken English which is sufficient to enable the effective performance of the person's role". Reference in the clause to a person working in a customer-facing roles is to a person who "as a regular and intrinsic part of the person's role, is required to speak to members of the public in English" (clause 38(7)). As regards Welsh public authorities that exercise functions in Wales, the requirement to speak fluent English is modified so as to be a requirement to speak fluent English or Welsh (**clause 43**).

Under **clause 39** "public authority" means a person who exercises functions of a public nature. As regards Scotland, the definition of public authority for the purposes of the language requirement only covers the functions of an authority insofar as they relate to reserved matters under the *Scotland Act 1998.* The definition also excludes the Security Service; the Secret Intelligence Service; and Government Communications Headquarters. A Minister may add to or modify these exclusions.

The requirement would apply to workers of the public authority, including apprentices, agency workers, constables and those employed in the course of Crown employment. Clause 40 would empower a minister to add to this persons who work for a contractor of the public authority.

The authority must put in place a procedure for handling complaints about breaches of the language requirement (clause 38(3)). In determining how to comply with the requirement, and in evaluating the adequacy of its complaints procedure, the authority must have regard to a code of practice (clauses 38(2) & 38(4)). **Clause 41** would require a relevant Minister to issue this code of practice and ensure that at all times there is a code in force covering authorities within the Bill's scope. The code may make distinctions between authorities and contain different provisions for different purposes (e.g. different standards of fluency for different roles). Before issuing the code, the Minister must lay a draft before Parliament (**clause 42**).

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99 *Equality Act 2010 Code of Practice Employment Statutory Code of Practice*, 2011, p250

100 Bill 74-EN 2015-16 p9, para 30

Comment

The Immigration Minister has said that the "new rules will break down the language barrier to help the public use the services they need and promote integration and British values".[101] Conversely, the Migrants' Rights Network argues:

> It is hard to credit the notion that local authorities do not already try to hire the best people for the job, and assess whether a candidate's English skills are sufficient in doing so.[102]

[101] Home Office, *Immigration Bill 2015 Factsheet – English Speaking in the Public Sector*, September 2015
[102] MRN, *Briefing on the Proposed Immigration Bill 2015-16*, September 2015, p3

9. Fees and charges (Part 8 of the Bill)

9.1 Immigration skills charge (clause 46)

The Government is concerned that it has been too easy for some businesses to bring workers from overseas to the UK, as an alternative to training resident workers. Similar concerns have been expressed by successive governments and some stakeholders, at least since the introduction of the UK's points-based system for immigration in 2008.

Tier 2 of the points-based system caters for skilled non-European Economic Area (EEA) national workers who have a job offer from an employer who is licensed to sponsor non-EEA national workers.[103] The Tier 2 visa rules are intended to restrict non-EEA nationals' opportunities to come to work in the UK to instances where employers cannot recruit a worker from the resident workforce (i.e. from within the EEA). Put briefly, unless the job is on the shortage occupation list, employers must first try to recruit from within the resident workforce before they offer the job to a person based outside of the EEA.

The Prime Minister signalled an intention to use money raised by a 'visa levy' to fund apprenticeships in his May 2015 speech on immigration.[104] The independent Migration Advisory Committee (MAC) has been consulting on this idea, as part of a wider review of Tier 2.[105] The MAC is due to report to the Government by the end of the year.

Separate to the above, a BIS consultation on introducing an apprenticeship levy, which would apply to larger employers in the public and private sectors, is due to close on 2 October.

The Bill

Clause 46 would allow the Home Secretary to make regulations providing for a charge to be imposed on people who make "immigration skills arrangements". In practice, the charge would apply to employers wishing to sponsor a skilled non-EEA national to come to work in the UK under Tier 2 of the points-based system.

Details of how the charge would operate, such as the amount and scope for exemptions, waivers or reductions, would be specified in regulations. These would be subject to the affirmative resolution procedure.

The charge is intended to increase the funding available for apprenticeships and to incentivise employers to recruit and train UK-resident workers, rather than recruit workers from outside the EEA. The money raised would go to the Consolidated Fund, to be used to address

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103 EEA – European Economic Area (EU Member States plus Iceland, Norway and Liechtenstein). Swiss nationals have similar rights as EEA nationals in the UK, due to bilateral agreements with the EU.

104 'Prime Minister's speech on immigration', GOV.UK, 21 May 2015

105 MAC, Call for evidence: Review of Tier 2, July 2015

skills gaps in the UK. There will be a BIS consultation on how the proceeds of the charge should be spent.

There has been little comment on this issue, at the time of writing. The Government intends to consult with business on how the charge would work, and it has asked the MAC to consider the impact of an Immigration Skills Charge, as part of its review into Tier 2. The outcome of the BIS consultation, and the advice from the MAC, is expected to inform the Government's decision on the amount of the charge and which businesses will be subject to it.

9.2 Passport application fees (clauses 47 – 49)

There are different fees for British passports, depending on whether the application is made in the UK or overseas.

At present, passport application fees are set to cover the average costs incurred in processing the application (and because fees are charged for this processing, rather than the issuing of a passport, they are generally not refunded in the event of an unsuccessful or withdrawn application). The Commons Library briefing paper *passport application fees* describes the existing arrangements in more detail, including how fees are calculated.[106]

The Bill would change the legislative framework for passport fees. The Explanatory Notes describe the context which (the Home Office suggests) is one of falling prices and rising standards:

> The Home Office has been lowering the price of passports for a number of years. For example, in April 2014 fees for UK passports for British citizens applying from overseas were reduced by 35%. The Home Office intends to continue to reduce the cost of postal applications for standard passports by delivering further operational improvements. The intention is also to improve premium services, which are currently charged at less than the operational cost. The Bill will allow a fee to be introduced which will exceed the operational costs of premium services, to subsidise the basic service.[107]

Announcing the most recent fee reduction in April 2014, security and immigration minister James Brokenshire said that it had been made possible by efficiency savings:

> … I am pleased to announce that from 7 April the passport fee for customers applying for a UK passport overseas will be reduced by £45 for adults and £28.50 for children. The new fees are as follows:
>
> Adult 32 page passport £83.00.
>
> Child 32 page passport £53.00.
>
> Jumbo 48 page passport £91.00 (child and adult).
>
> This reduction comes as a result of efficiency savings made over the last three years by bringing back the processing and issuing of

106 SN05684, 23 June 2014
107 Bill 74-EN 2015-16 page 9

> overseas passports to the UK, while maintaining the highest levels of security and customer service.
>
> This reduction follows the 2012 decrease in fee by £5 for all UK citizens applying within the UK.[108]

The Bill

A Home Office factsheet on this part of the Bill suggests that the Bill's provisions will ensure a better match between the costs of providing the passport service and the fees charged for it:

> This Bill will allow the Home Office to formalise the framework of costs underpinning the passport fees to better reflect the costs incurred in providing passport services, for example the costs of processing more complex applications requiring costly Home Office interventions, and to allow some passport fees to be set at above cost. This will alleviate the corresponding burden on the vast majority of passport applicants and potentially facilitate further fee reductions.[109]

Clause 47 confers on the Secretary of State the power to make regulations for the fees to be charged for issuing passports or other travel documents. Fees for any function must comprise a specified fixed amount, or an amount based on a specified hourly rate or other specified factor (**subsection 3**) and may have regard only to the cost of that function, any other function of the Secretary of State in connection with UK passports or other UK travel documents or any consular function (**subsection 5**), although the fee charged may exceed the cost of exercising the function (**subsection 4**).

Clause 48 makes further provision for the charging of fees. As the Explanatory Notes explain,

> Passport fees regulations can only be made with the consent of the Treasury (*subsection (1)*), fees may relate to functions exercised outside the UK (*subsection (2)*) and may be recovered as a debt owed to the Secretary of State (*subsection (3)*).[110]

Fees paid under the regulations must be paid into the Consolidated Fund or be applied in any other way specified in fees regulations. These provisions are without prejudice to the existing powers to charge passport fees, in the *Consular Fees Act 1980*, the *Finance (No.2) Act 1987* or in any other legislation.

Clause 49 confers on the Secretary of State a power to charge fees for the provision of passport validation services (that is, services in connection with the UK passport validation service, confirming the validity of a UK passport or the accuracy of the information in them).

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108 HC Deb 13 March 2014 c43WS
109 Home Office, *Immigration Bill 2015/16: Factsheet – Fees and Charges (clause 46-50)*, September 2015
110 Bill 74-EN 2015-16 page 27

9.3 Civil registration fees (Clause 50 and Schedule 9)

At present, the General Register Office and local registration services provide a number of registration and certificate services free of charge. The Government has described the existing legislation governing the registration of births, deaths, marriages and civil partnerships, which dates from the 19th and mid-20th centuries, as being inflexible and restrictive in terms of the products and services for which fees may be charged:

> The Registration Service Act 1953 establishes the office of the Registrar General and the General Register Office (GRO). The GRO charges fees on a cost recovery basis for many, but not all, of its services. Free services include corrections of birth or death entries, the re-registration of births and registrations outside the statutory time limit.[111]

The Bill would reform the legal framework relating to civil registration fees and would introduce "modernised and flexible fee-raising powers" in respect of services provided by the Registrar General, superintendent registrars and registrars, enabling fees to be set for a wider range of products and services than is currently possible.[112]

A Home Office factsheet on this part of the Bill states that civil registration costs around £160m each year. The Government's intention is that civil registration services would become increasingly financially self-supporting through fees, which would reduce their reliance on central Government funding.[113]

Some civil registration services would remain free of charge. The Home Office factsheet confirms the position:

> Will all civil registration services incur a fee?
>
> No, the registration of births, still births and deaths will continue to remain free of charge to users. Fees may be charged where the benefit of accessing the service is solely to the individual, and there will be powers to waive fees in certain circumstances, such as hardship.

Clause 50 introduces **Schedule 9** which would deal with powers to make regulations for the charging of fees. The provisions are described in detail in the Explanatory Notes, paragraphs 382 to 394.

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111 Bill 74-EN 2015-16 para 33
112 Bill 74-EN 2015-16 para 34
113 Home Office, *Immigration Bill 2015/16 Factsheet – Fees and Charges (clause 46-50)*, September 2015

10. Commencement and territorial extent (Part 9 of the Bill)

Clauses 54 and 55 of the Bill deal with commencement and territorial extent.

Clause 46 (immigration skills charge) would come into effect two months after Royal Assent. The rest of the Bill would be brought into force through commencement regulations, at a date specified by the Secretary of State.

Although immigration control is a reserved matter, some of the provisions would have a differential effect across the UK. Annex B to the Bill's Explanatory Notes provides a comprehensive overview of the territorial extent and application of the Bill's provisions.

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