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Immigration Bill

Bill No 110 of 2013-14

RESEARCH PAPER 13/59 16 October 2013

This Research Paper has been produced to inform Second Reading debate on the *Immigration Bill*, which was introduced to the House of Commons on 10 October 2013 and is due to have its Second Reading on 22 October.

The Bill would significantly reduce rights of appeal; restrict migrants' access to services including private rented accommodation, bank accounts and NHS services by reference to immigration status; establish new arrangements for investigating sham marriages and examining persons departing the UK; and make various other changes related to immigration controls.

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ISSN 1368-8456

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Summary

The *Immigration Bill,* Bill 110 of 2013-14 is due to have its Second Reading in the Commons on 22 October. It is the Government's first major piece of immigration legislation. The Government has made many significant reforms to the immigration system since coming into power, but these have generally been implemented through changes to secondary legislation, and changes to the Immigration Rules. Net migration has fallen under the current Government, although it is no longer falling according to the most recent data.

The Bill is in seven parts and contains eight Schedules.

Part 1 and Schedules 1 and 2 seek to simplify the removal process for persons who do not have leave to enter/remain and to prevent late challenges to removal. Decisions about immigration status and removal would be combined, and there would be new restrictions on immigration detainees' rights to apply for bail. Immigration officers' powers, and powers to collect, use and retain biometric information from applicants are extended.

Immigration appeal rights would be significantly reduced by **Part 2**. Only decisions to refuse a human rights claim or refuse or revoke refugee or humanitarian protection status would attract a right of appeal. The Home Office would be able to deport foreign criminals appealing to stay in the UK on human rights grounds before the appeal has been determined, unless they face a real risk of "serious irreversible harm". The Bill specifies certain factors that a court or tribunal must consider when assessing whether interference with a person's Article 8 rights is proportionate.

Part 3 and Schedule 3 to the Bill would introduce new powers to regulate migrants' access to certain services, including their ability to rent a private sector tenancy, open a bank account and obtain/retain a driving licence. Migrants with time limited immigration status would be required to make a contribution to the National Health Service.

New powers to investigate 'sham' marriages and civil partnerships in England and Wales are provided for by **Part 4 and Schedules 4 and 5**. The notice period would be extended to 28 days, or 70 days for cases which involve a non-EEA national and are being investigated by the Home Office under a new "referral and investigation" scheme.

The Immigration Services Commissioner's powers to take action against unscrupulous immigration advisers are extended by **Part 5 and Schedule 6**.

The Government is committed to reintroducing exit checks by spring 2015. **Part 6 and Schedule 7** would enable third parties such as port and transport carrier staff to play a role in these, by exercising immigration officers' powers to examine persons departing the UK. Also, processes for setting and amending fees for immigration applications and services would be simplified, in order to give the Government greater flexibility over how fees are set.

Introduction

The Government has made many significant reforms to the immigration system since coming into power, in pursuit of its objectives to attract the "brightest and best" migrants to the UK, and reduce net migration levels over the course of this Parliament from the hundreds of thousands to tens of thousands.[1] These have generally been implemented through changes to secondary legislation, and changes to the Immigration Rules.[2]

The *Immigration Bill,* Bill 110 of 2013-14, is the Government's first major piece of immigration legislation. The Bill was announced in the Queen's Speech on 8 May 2013 and introduced to the Commons on 10 October 2013.[3] It is due to have its Second Reading on 22 October.

In addition to the Bill and accompanying *Explanatory Notes*, the Government has also published (or intends to publish in due course):

- A Memorandum considering issues arising under the European Convention on Human Rights
- A Delegated Powers Memorandum
- A Home Office Factsheet providing an Overview of the Bill, and a series of factsheets for each part of the Bill.
- An Overarching Impact Assessment for the Bill, and separate Impact Assessments for the provisions related to appeals, marriage, immigration fees, residential tenancies, the NHS and bank accounts and a regulatory triage assessment for the OISC changes.[4]

This Research Paper follows the order of the Bill, which is in seven parts and contains eight Schedules.

The Prime Minister delivered a high profile speech on immigration and welfare reform on 25 March 2013, in which he referred to several of the issues dealt with in the Bill.[5] During summer 2013 there were public consultations on various issues related to Part 3 of the Bill. Government responses to some of these consultations have been published in the days following the Bill's publication.

At the time of writing, not many organisations had publicly responded to the Bill in detail.

Net migration fell from 242,000 in the year to September 2011 to 153,000 in the year to September 2012. This was the lowest net migration estimate since the year to December 2003. Provisional migration estimates for the 2012 calendar year indicate that while immigration remained broadly unchanged, net migration increased, rising to 176,000. The difference in net migration between the 2011 and 2012 calendar years is not statistically

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1 Library standard note, SN05829 *Immigration and asylum: Government plans and progress made*, 29 July 2013 provides an overview.
2 Immigration Rules (HC 395 of 1993-4 as amended)
3 HL Deb 8 May 2013 c3
4 All available (or expected to become available) from Gov.uk *Series* 'Immigration Bill' (10 October; accessed on 16 October)
5 Gov.uk *Announcements*, David Cameron's immigration speech 25 March 2013 (accessed on 16 October 2013)

significant, so while net migration has fallen under the current Government, it is no longer falling according to the most recent data.[6]

1 Part 1: Removal and other powers

1.1 Removal directions

Background

Legislation provides for separate decisions to be taken about whether to grant leave to remain in the UK and to enforce removal. Powers to make a removal decision are spread across various different pieces of immigration legislation.[7] Which mechanism is used to require a person to leave the UK depends on the type of decision taken (i.e. the grounds on which they have been refused leave and are being removed).

The Home Office factsheet for this clause states that the current process for enforcing removals is a complex and "unnecessarily bureaucratic" process, involving various different stages and decisions.[8]

The Bill

Clause 1 and **part 1 of Schedule 8** seek to simplify the removal process for persons who do not have leave to enter/remain. There would be a single power to remove a person who requires leave to enter/remain but does not have it. Decisions about immigration status and removal would be combined into one decision, so that no further decision or notification would be necessary in order to enforce removal.

It would affect persons refused leave, persons whose leave is curtailed or revoked and persons who do not have leave (and family members of the above). Persons subject to deportation would continue to be subject to provisions in Schedule 3 of the *Immigration Act 1971*.

The Home Office factsheet for this clause states that the notice of the decision would inform the person of their duty to tell the Home Office of any asylum, human rights or EU free movement grounds relevant to their case, and advise them to seek legal advice.[9] It would also inform them of their options to make a voluntary departure. Where a person subsequently raises grounds at a later date, it is "highly likely" that the Home Office would use existing powers to remove the person before considering those grounds, or to remove them and certify that the grounds had been/could have been raised beforehand.

Proposed new section 10(5) of the *Immigration and Asylum Act 1999* would provide a power for the Secretary of State to make further provisions about the removal of family members under immigration act powers in regulations (subject to the negative resolution procedure).

The Home Office considers that the clause will reduce administrative delays in enforcing removal decisions, reduce opportunities for legal challenges, and give migrants greater certainty over whether they are liable for removal action.[10] If it is enacted, the Government anticipates that the clause would take effect from summer 2014. It would apply to relevant decisions taken after the date of commencement.

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6 Discussed in greater detail in Library Standard Note SN6077 *Migration statistics*, 9 September 2013

7 For a brief overview, see the Bill's Explanatory Notes, para 13 and Home Office, *Immigration Bill Factsheet: Removal directions (clause 1),* October 2013; Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, para 11

8 Home Office, *Immigration Bill Factsheet: Removal directions (clause 1),* October 2013

9 *Ibid*

10 *Ibid*

11 Discussed in section 7.4 of Library Research Paper 13/4, *Crime and Courts Bill,* 9 January 2013

There was no prior public consultation on these measures, and at the time of writing, representative bodies from the immigration and asylum and legal sectors and other stakeholders had not publicly responded to the Bill's proposals.

1.2 Enforcement powers

Background

Successive pieces of immigration legislation have extended the range of powers available to immigration officers, most recently section 55 of the *Crime and Courts Act 2013*.[11]

The Home Office factsheet to the Bill states that there are significant gaps in immigration officers' powers to search individuals and property, and summarises why further powers are deemed necessary:

> Border Force officers have raised concerns that although they are able to search people who are being examined at port for passports and other relevant documents, they are not permitted to search those in detention for weapons or other dangerous articles that might cause harm to themselves or another person. A protective search power is currently only available in respect of people who have been arrested.
>
> Immigration officers have a number of powers to enter and search premises for the purpose of finding material that will facilitate the investigation of a criminal immigration offence. Other powers exist for officers to search premises for documents that assist with the removal of illegal migrants. However, the powers do not apply to illegal immigrants in immigration detention who have been arrested by immigration criminal investigators rather than the police. Also, while officers can search for relevant documents at the home of an arrested person or the premises at which they were arrested, they are not permitted to search the premises of a third party, for example those of a relative or partner, even if there are good grounds to believe that documents which would facilitate the removal of an illegal immigrant from the UK might be located there.[12]

The Bill

Clause 2 and Schedule 1 extend immigration officers' powers, including:

- Giving them the power to search a detained person for anything which might cause physical injury or assist in escape from legal custody.
- Allowing for a warrant to be obtained to enter and search premises belonging to a third party where there are reasonable grounds to believe that relevant documents may be found.
- Allowing immigration officers to use reasonable force when necessary in the exercise of a power conferred by any immigration act (currently, this power is restricted to the exercise of powers under the *Immigration Act 1971* and the *Immigration and Asylum Act 1999*).

The Home Office factsheet states that "appropriate guidance" for immigration officers about the use of the extended power will be published.[13]

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11 Discussed in section 7.4 of Library Research Paper 13/4, *Crime and Courts Bill,* 9 January 2013
12 Home Office, *Immigration Bill Factsheet: Immigration Officers' powers (clause 2),* October 2013
13 *Ibid*

1.3 Bail

Background

National and international law allows people to be detained for immigration purposes, at any stage of their application for asylum or their claim to remain in the UK, subject to certain safeguards. The powers of immigration detention are exercised administratively (by Home Office staff) rather than by judges. There are no specific time limits on how long a person may be detained under immigration powers. However, unreasonably lengthy detention is unlawful. Chapter 55 of the Home Office's *Enforcement Instructions and Guidance* sets out the general policy on decisions to detain.[14] Put briefly, this specifies that detention is to be used sparingly and for the shortest period necessary. There is a presumption in favour of temporary admission or release, and wherever possible, alternatives to detention are to be used. Detention will normally be appropriate in foreign national ex-offender cases as long as there is a realistic prospect of removal within a reasonable timescale, due to the higher likelihood of absconding and harm to the public.

Persons detained for more than seven days pending a decision to grant leave to enter the UK, or persons detained under immigration powers at other stages of the immigration/asylum process can apply for bail from a Chief Immigration Officer or the First-Tier Tribunal (Immigration and Asylum Chamber - 'the First-Tier Tribunal').[15] There is no system of automatic bail hearings for immigration detainees and no presumption in favour of bail.

The issue of whether bail should be granted is separate to the lawfulness of detention. In deciding whether bail should be granted or refused, the Immigration Judge considers issues including representations on whether continued detention is necessary, the effect of detention on the detainee and the likelihood of the detainee absconding if released. Bail is usually granted subject to conditions (e.g. for the detainee to live at a specified address, provide a surety, report regularly to the immigration authorities and/or be electronically tagged).

The First-Tier Tribunal's procedure rules state that if a previous bail application has been refused, the bail application should provide details of any subsequent change in circumstances.[16] Guidance issued to Immigration Judges by the First-Tier Tribunal discusses how to consider bail applications.[17] It states that restrictions shall be imposed on the length of the bail hearing, the evidence heard and the applicant's opportunity to have a pre-hearing consultation if immigration bail has previously been refused by an Immigration Judge after a full hearing within the previous 28 days and the fresh application contains no new evidence or new grounds.

A Home Office factsheet about the Bill's bail provisions states that the current system "can and does encourage abusive repeat applications."[18] The Government is also concerned that the Tribunal can grant bail even if deportation/removal is scheduled for within a few days. The Home Office argues that detainees are unlikely to comply with bail conditions in these circumstances.

At the time of writing, organisations working with immigration detainees and other interested parties had not publicly responded to the Bill's proposals.

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14 Home Office, *Enforcement Instructions and Guidance*, Chapter 55 'Detention and Temporary Release' (undated; accessed on 10 October 2013)

15 It is also possible to obtain release from detention through judicial review or *habeas corpus* processes.

16 First-Tier Tribunal, The Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230 as of 19 December 2011

17 First-Tier Tribunal, *Presidential guidance note 1 of 2012 'Bail guidance for Judges presiding over immigration and asylum hearings'*, 11 June 2012

18 Home Office, *Immigration Bill Factsheet: immigration bail (clause 3),* October 2013

The Bill

Clause 3 of the Bill seeks to restrict immigration detainees' opportunities to apply for bail, in order to prevent repeated bail applications intended to delay removal from the UK. In particular, it would amend Schedule 2 of the *Immigration Act 1971* in order to provide that:

- The Secretary of State's consent would be required to release a person on bail, if removal directions are in force and removal is scheduled for within 14 days of the decision to grant bail.

- The Tribunal Procedure Rules must provide that the First-Tier Tribunal must dismiss without a hearing an application for bail made within 28 days of a previously unsuccessful application, unless the applicant demonstrates "a material change in circumstances."

Schedule 8, part 2 provides for similar changes for bail hearings in national security cases, which are heard by the Special Immigration Appeals Tribunal ('SIAC').[19]

Article 5(4) of the European Convention on Human Rights ('the ECHR') provides that persons deprived of their liberty shall be entitled to take proceedings to decide the lawfulness of their detention and have their release ordered if detention is found to be unlawful.[20] The Home Office's view on how the Bill's provisions on bail are compatible with Article 5(4) is set out in a Home Office memorandum.[21]

1.4 Biometrics

Background

The use of biometric information in the immigration system has greatly expanded over the past decade or so. Biometric information is considered to assist in combating illegal immigration, identity fraud and abuse of immigration controls and public funds, such as by assisting the authorities to confirm a person's identity and establish a link between their identity and documents.

The immigration system uses biometric information (particularly fingerprints and digital photos) in various ways, including:

- Asylum seekers' fingerprints are stored on (and checked against) Home Office and EU databases. Asylum seekers are then issued with an Application Registration Card (ARC) containing a chip with fingerprint data which they must present in order to access the services provided for them.

- Persons applying for a visa to come to the UK must provide biometric information (10-digit fingerscans and a digital photograph) as part of the application process. Children under five years old are exempted, and the information can only be taken from applicants under 16 in the presence of a responsible adult. Persons who are exempt from immigration control, and some categories of persons subject to immigration control, are also not required to give their biometric data.[22]

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19 Library Standard Note SN1083, *The Special Immigration Appeals Commission*, 28 February 2013 provides background information about SIAC.

20 European Convention on Human Rights 1950 (as amended and supplemented)

21 Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, p.7-8

22 Such as diplomats, and foreign government and UN officials travelling on official business: see UKBA website, Visas and Immigration/General visa information/'Applying for a visa' (undated; accessed on 16 October 2013)

- Migrants in the UK are issued with biometric immigration status documents ("biometric residence permits").

- Fingerprint checks for persons with biometric visas or biometric residence permits operate at ports of entry to the UK. These are intended to help to verify that the traveller is the same as the person who made the original application. The fingerprint information is kept for a maximum of two working days.[23]

- Immigration enforcement officers use mobile fingerprint scanners in order to assist in the identification of persons who do not have valid immigration leave during operations.

Various pieces of immigration legislation currently provide for the collection and use of biometric information. For example:

- Sections 141 - 144 of the *Immigration and Asylum Act 1999* (as amended) ('the 1999 Act') set out powers under which fingerprints (or other methods of collecting data about external physical characteristics) can be taken for immigration purposes. Information cannot be retained for longer than ten years.

- Section 126 of the *Nationality, Immigration and Asylum Act 2002* ('the 2002 Act') grants the Secretary of State power to make regulations to require the provision of biometric information in support of an application for entry clearance, leave to enter/remain in the UK or variation of leave. Information cannot be retained for longer than ten years.

- Sections 5 - 15 of the *UK Borders Act 2007* ('the 2007 Act') provides for the issuing of biometric residence permits to foreign nationals subject to immigration control and associated regulations. It allows the use and retention of biometric information in connection with immigration, nationality, border control functions, national security, prevention, investigation or prosecution of an offence, or any other purpose specified by regulations.

The Home Office factsheet on this part of the Bill states that an extension of powers to take biometric information is needed, in order to close some gaps in the current provisions.[24]

The Bill

Clauses 4 - 10 and **Schedule 2** would extend the Home Office's powers to collect, use and retain biometric information from persons making an immigration or citizenship application.

Powers to collect biometric information would be extended to the following categories of applicant:

- Non-EEA nationals applying for transit visas (**clause 4**).[25]

- (Non-EEA national) family members of EEA nationals applying for documentation under EU law (**clause 4**).

- Persons liable to be detained, where there are reasonable grounds to suspect that they are someone to whom removal directions may be given (**clause 5**). Biometric

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23 UK Border Agency, *Fingerprint checks at the border*, February 2010

24 Home Office, *Immigration Bill Factsheet: Biometrics (clauses 4 - 10),* October 2013

25 EEA - European Economic Area (comprised of EU Member States plus Iceland, Liechtenstein and Norway). Swiss nationals have similar rights due to bilateral agreements with the EU.

information will be used for identity (and immigration status) confirmation purposes, and will not be retained.[26]

- Persons applying to naturalise or register as a British citizen (**clause 6**). The clause provides an exception to the existing requirement that biometric information be destroyed as soon as reasonably practicable once a person becomes a British citizen, in order to allow for their photograph to be retained until they are issued with their first British passport. The Home Office considers that this change is necessary "in order to prevent imposters from wrongfully acquiring citizenship".[27]

Clause 8 and **Schedule 2** amend the definition of "biometric information" provided in section 15 of the 2007 Act and related legislation. In addition to information about a person's external physical characteristics (including fingerprints and iris features), the Secretary of State may specify in an order (subject to the affirmative resolution procedure) that the definition also encompasses "any other information about a person's physical characteristics". However, this cannot include information about a person's DNA.

Clause 10 replaces various legislative provisions concerning the use and retention of biometric information taken under immigration act powers. It obliges the Secretary of State to make regulations concerning the use and retention of biometric information provided in accordance with various immigration acts and associated regulations.

Such regulations must provide for biometric information to be retained only if necessary for use in connection with an immigration or nationality function; however they may also provide that the information may be used for non-immigration purposes, such as for the prevention, investigation or prosecution of an offence, for protection of national security, or any other purpose specified.

The regulations must include information about the destruction of biometric information. For example, they must require the Secretary of State to "take all reasonable steps" to ensure the biometric information (including copies) is destroyed if she considers it is no longer necessary to retain it for immigration or nationality purposes, or the person it relates to is a British citizen or Commonwealth citizen with the right of abode in the UK. However, a requirement to destroy biometric information does not apply if it is retained in accordance with another power.

The ten year limit for the retention of biometric information taken under the 1999 and 2002 Acts would be removed. The Home Office's ECHR memorandum details the Home Office's reasoning for why this change is needed and how it is compatible with existing jurisprudence.[28]

2 Part 2: Appeals Etc.

2.1 Right of appeal to First-Tier Tribunal

Background

Part V of the *Nationality, Immigration and Asylum Act 2002* (as amended) ('the 2002 Act') provides the main legislative basis for appeals against immigration decisions.

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[26] Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, para 39

[27] *Ibid*, para 52

[28] Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, paras 28-53

What decisions can be appealed?

Section 82 of the 2002 Act specifies 14 types of immigration decision which attract a right of appeal. These include:

- refusal of leave to enter the United Kingdom;
- refusal of entry clearance (a 'visa');
- refusal of a certificate of entitlement to the right of abode;
- refusal to vary leave to enter or remain if the result is that the person has no leave to enter or remain;
- variation of leave to enter or remain if when the variation takes effect the person has no leave to enter or remain;
- revocation of indefinite leave to enter or remain as a refugee;
- a decision that a person is to be removed from the United Kingdom as an overstayer, a person who has breached a condition of leave, used deception to obtain leave, has had indefinite leave as a refugee revoked, or as the family member of a person being removed;
- a decision that an illegal entrant is to be removed from the UK;
- a decision to make a deportation order;
- refusal to revoke a deportation order;
- a decision that a person is a "foreign criminal" liable to deportation.

Sections 83 and 83A of the 2002 Act specify two more types of decision which attract a right of appeal:

- a decision to refuse asylum, where asylum has been refused but leave to enter/remain for at least 12 months has been granted;
- a decision to revoke refugee status, where a person was granted limited leave as a refugee, and a decision is then made to revoke refugee status, and following the decision, the person has limited leave to remain on other grounds.

In addition, secondary legislation provides for rights of appeal against decisions to refuse applications made under EU free movement rules.[29]

What are the grounds for appeal?

Section 84(1) of the 2002 Act specifies seven grounds on which appeals under section 82 of the 2002 Act can be made, namely:

- that the decision is not in accordance with immigration rules;
- that the decision is unlawful on race discrimination grounds;

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[29] Directive 2004/38 EC, transposed by SI 2006/1003 (as amended)

- that the decision is unlawful under section 6 of the *Human Rights Act 1998* as incompatible with the appellant's ECHR rights;

- that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the EU law;

- that the decision is "otherwise not in accordance with the law";

- that the person taking the decision should have exercised a discretion conferred by immigration rules differently;

- that removal of the appellant would breach the UK's obligations under the Refugee Convention or would be unlawful under section 6 of the *Human Rights Act 1998* as incompatible with the appellant's ECHR rights.

The grounds for appeals under section 83 and 83A are that removal would breach the UK's obligations under the Refugee Convention.[30]

Section 85 of the 2002 Act set out the matters which the First-Tier Tribunal can consider as part of the appeal. The Tribunal may consider evidence "about any matter which it thinks relevant to the substance of the decision". Section 85A specifies certain exceptions to this provision. For example, in appeals against refusal of entry clearance, the Tribunal can only consider the circumstances at the time the decision was made.

Recent appeal outcomes

The Impact Assessment for this part of the Bill gives some details of recent immigration appeals outcomes:

Table 4: 2012/13 Cases Determined

	Percentage determined	Volume of appeal cases being heard	Percentage Allowed	Volume of appeals allowed
Managed Migration	77%	16,000	49%	7,800
Entry clearance	63%	10,700	50%	5,400
Deport and other	88%	1,600	32%	500
Total	**N/A**	**28,300**	**N/A**	**13,700**

Source HO Analysis, MoJ

It states that an internal Home Office review estimated that approximately 60 per cent of the volume of allowed appeals are due to case working errors, which the Government considers could be dealt with by an administrative review process.[31]

Only certain visa categories have a right of appeal against a refusal decision under immigration legislation, namely settlement and dependant categories (e.g. partner of a British citizen or person settled in the UK), EEA family permits (for non-EEA national family members of EEA nationals), certain overseas domestic workers in private households, UK ancestry, representatives of overseas businesses and business persons applying under the terms of a European Community Association Agreement.[32]

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30 *Immigration, Asylum and Nationality Act 2002* (as amended, s84(3),s84(4)

31 Home Office *Impact Assessment of Reforming Appeal Rights* IA No HO0096, 15 July 2013, p.7

32 Home Office, *Entry Clearance Guidance* 'Appeals APL 3.1' (undated; accessed on 16 October 2013)

"Administrative Reviews"

Non-EEA nationals refused a visa under the points-based system (students, skilled workers) do not have a full right of appeal against a refusal decision. Instead, they may request that UK Visas and Immigration review the refusal decision through the "administrative review" process.[33] The review is conducted by an Entry Clearance Manager who was not involved in making the original decision. It considers whether an error was made in assessing the original application and the number of "points" the applicant claimed. There is no charge for an administrative review, although applicants may only request one per application.[34]

Some of the inspections conducted by the Independent Chief Inspector for Borders and Immigration have considered the handling of administrative reviews. A 2012 inspection of Tier 4 of the points-based system (which applies to international students) sampled administrative reviews handled by entry clearance staff in New Delhi and Beijing.[35] It found that visa posts were adopting inconsistent approaches in the letters advising applicants of the outcome of the administrative review, particularly in terms of the amount of information explaining the reason for the decision they provided. The Inspector recommended that administrative review letters should adopt a similar approach to refusal notices, addressing each of the points raised. The UK Border Agency ('UKBA' - as then was) accepted the recommendation.[36]

A previous inspection of decision-making in cases processed in Abu Dhabi and Islamabad also considered the quality of decision-making in a sample of 40 administrative review cases. Of the 40 reviews looked at, the initial decision had been upheld in 27 cases, overturned in 11 cases, and refused on revised grounds in 2 cases. The Chief Inspector found that only one of the 40 cases he considered failed one or more quality indicators. This was an improved performance compared to an earlier inspection of those visa posts.[37]

The Home Office factsheet for this part of the Bill states that the current appeal arrangements are "complex and costly", and that the right to appeal can be used to delay removal even if there is no error of law in the appealable decision.[38]

The Bill

Clause 11 significantly reduces the range of immigration decisions which attract a right of appeal and the grounds on which an appeal may be brought.

It amends various sections in Part V of the 2002 Act. Under the proposed new sections 82 and 84, rights of appeal would apply:

- Against a decision to refuse a "protection claim" (a claim that removal would be contrary to the Refugee Convention or grounds for granting humanitarian protection): the grounds of appeal must be that that removal would breach the Refugee Convention or the UK's obligations to persons eligible for humanitarian protection, and/or would be contrary to section 6 of the *Human Rights Act 1998* (i.e. contrary to the ECHR).

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33 UK Visas and Immigration is one of the successors to the UK Border Agency, which was abolished in April 2013.

34 UKBA website, Visas and Immigration/General visa information 'Administrative Review' (undated; accessed on 12 October 2013)

35 Independent Chief Inspector of Borders and Immigration, *An inspection of Tier 4 of the points based system (students) April - July 2012*, 29 November 2012

36 *Ibid*

37 Independent Chief inspector of Borders and Immigration, *A re-inspection of the UK Border Agency visa section in Abu Dhabi and Islamabad September - December 2011*, 5 July 2012

38 Home Office, *Immigration Bill Factsheet: appeals (clauses 11 - 13)*, October 2013

- Against a decision to refuse a "human rights claim": the grounds of appeal must be that the decision is unlawful under section 6 of the *Human Rights Act 1998*.

- Against a decision to revoke "protection" (i.e. refugee or humanitarian protection) status: the grounds of appeal must be that the decision breaches the Refugee Convention or the UK's obligations to persons eligible for humanitarian protection.

Such appeals would continue to be subject to limitations on the right of appeal specified elsewhere in Part V of the 2002 Act.[39]

The Bill's Explanatory Notes state that for other types of case (i.e. where there is no right of appeal), administrative review may be made available. This does not require legislation and would be provided for in the Immigration Rules.[40] Refused applicants would be required to apply for an administrative review within 10 days, and the Home Office would aim to complete the review within 28 days.[41] The applicant would not be required to leave the UK whilst the review is pending.

Clause 11(5) would amend the matters which the Tribunal can consider. The Tribunal would only be able to consider a new ground of appeal that the Secretary of State had not previously considered if the Secretary of State gives her consent.

The Home Office Impact Assessment's best estimate is that around 39,500 fewer appeals will be brought as a result of the changes made by the Bill.[42] It notes that applicants may change the basis of their application to an asylum, human rights or EU free movement rights in order to gain rights of appeal, but notes that there is already scope in legislation

- to certify an asylum or human rights claim as clearly unfounded (with the effect that the appeal can only take place after the appellant has been removed from the UK),

- to certify on the grounds that a claim is repeating issues raised in a previous claim, or could have been made at an earlier stage (in which case no right of appeal applies).

The Impact Assessment also considers the potential impact that reducing rights of appeal could have on Judicial Review volumes:

> **Sensitivity Analysis – Judicial Reviews (JR)**
>
> This section sets out a sensitivity analysis to look at possible JR volumes that could occur from the policy change. This is done by estimating the volume of appeals that were previously allowed, which will no longer have a right of appeal, estimating at the amount that may bring a JR and how many may be granted a JR.

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39 See for example sections 94 and 96 of the 2002 Act, referred to in section 2.2 below.
40 Immigration Rules (HC 395 of 1993-4 as amended)
41 Home Office, *Immigration Bill Factsheet: appeals (clauses 11 - 13)*, October
42 Home Office *Impact Assessment of Reforming Appeal Rights* IA No HO0096, 15 July 2013, p.7

Table 8: 2012/13 Cases Determined (as per Table 4)

	Volume of appeal cases being heard	Percentage Allowed	Volumes allowed
Managed Migration	16,000	49%	7,800
Entry clearance	10,700	50%	5,400
Deport and other	1,600	32%	500
Total	**28,300**	**N/A**	**13,700**

Source: HO Analysis, MoJ

An internal Home Office review suggests that approximately 60 per cent of the estimated 14,000 allowed appeals may be granted a review under the Administrative Review process due to case working errors. This leaves around an additional 5,600 potential cases that may launch a Judicial Review. Data from 2012 shows that around 8 per cent of Judicial Review applications are granted. It is not possible to predict how many of the estimated 5,600 cases will launch a Judicial Review.[43]

2.2 Place from which appeal may be brought or continued

Background

Section 92 of the 2002 Act (as amended) sets out the circumstances in which a person may appeal whilst in the UK. Section 94 of the 2002 Act provides that in certain circumstances where an applicant has made an asylum or human rights claim, an appeal may not be brought before they have been removed from the UK (i.e. the appeal is 'non-suspensive' of removal action). These include if the Home Secretary certifies that the claim is 'clearly unfounded' or removal is to a safe third country.

Section 96 of the 2002 Act removes the right of appeal where the Secretary of State certifies that the grounds of appeal have already been raised, or there has already been an opportunity to do so.

Decisions to certify under section 94 and 96 of the 2002 Act are open to judicial review.

The *Crime and Courts Act 2013* amended the 2002 Act in order to

- remove in-country appeal rights for persons whose leave is cancelled whilst they are outside the UK wholly or partly on the grounds that it would not be conducive to the public good to allow them to have leave to enter or remain in the UK; and

- extend the Secretary of State's powers to restrict in-country rights of appeal in national security deportation cases, where the Secretary of State certifies that removal prior to an appeal against deportation would not breach the European Convention on Human Rights (ECHR), on grounds including that all or part of the human rights claim is clearly unfounded, and that removal would not cause "serious irreversible harm".[44]

The Bill

Clause 12 substitutes a new section 92 of the 2002 Act in order to provide for whether appeals against refusal of a protection claim, human rights claim, or a decision to revoke refugee status can be made from within or outside the UK (i.e. after the appellant has been removed). It provides for the Home Office to be able to deport foreign criminals appealing to stay in the UK on human rights grounds before the appeal has been determined, unless the appellant faces a risk of "serious irreversible harm".

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43 *Ibid*, p.12-13

44 *Crime and Courts Act 2013*, s53, s54

In summary,

- Protection claim appeals must be brought from within the UK, unless the Secretary of State certifies the claim as clearly unfounded or that removal is to a safe third country (in which case, the appeal must be brought from outside the UK).

- Human rights claim appeals must be brought from within the UK if the claim was made whilst the appellant was in the UK and the Secretary of State has not certified that the claim is clearly unfounded, that removal is to a safe third country, or under proposed new section 94B of the 2002 Act (discussed below). Otherwise the appeal must be brought from outside the UK.

- Revocation of protection status appeals must be brought from within the UK if the decision was made whilst the appellant was in the UK. Otherwise the appeal must be made from outside the UK.

Clause 12(3) inserts a new section 94B to the 2002 Act, giving the Secretary of State power to certify that removal prior to the outcome of an appeal brought by a "foreign criminal" who has made a human rights claim would not be unlawful under section 6 of the *Human Rights Act 1998*.[45] The grounds for certification would be that the person would not face a real risk of serious irreversible harm if removed. The effect of certification would be that the foreign criminal would only be able to pursue the appeal after they had been deported.

The Home Office factsheet for this clause states that in 2011-2012, of the 409 successful appeals against deportation by foreign criminals, 177 (around 40%) were allowed on Article 8 grounds (10% of all appeals by foreign criminals).[46]

2.3 Review of certain deportation cases by SIAC

Clause 13 provides for a right of appeal (on Judicial Review principles) to the Special Immigration Appeals Commission (SIAC) in some national security cases certified under the 2002 Act, in cases where there is no right of appeal against the decision.

2.4 Article 8 of the ECHR: public interest considerations

Background

Article 8 of the European Convention on Human Rights provides that "Everyone has the right to respect for his private and family life, his home and his correspondence." Article 8 is a qualified rather than absolute right. The second part of Article 8 sets out a number of circumstances in which public authorities may interfere with the exercise of this right. These can include the purpose of maintaining effective immigration controls.

There have been controversies in recent years about how Article 8 considerations affect immigration case outcomes. Library Standard Note SN6355 *Article 8 of the ECHR and immigration cases* gives background to this.

In summer 2012 the Government changed the Immigration Rules. It wished to ensure that they reflect the qualified nature of Article 8. A motion to recognise the qualified nature of Article 8 and approve the role of the Immigration Rules in determining Article 8 cases was debated by the House on 19 June 2012.[47] The motion was carried without a vote.[48]

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45 For the definition of "foreign criminal", see clause 14 (discussed below).
46 Home Office, *Immigration Bill Factsheet: Article 8 (clause 14)*, October 2013
47 HC Deb 19 June 2012 cc762-823
48 HC Deb 19 June 2012 c824

The Government had intended that by obtaining Parliamentary approval for the Rules changes, the courts would be provided with a clear statement of Parliament's view on where the public interest lies. It expected that as a result, the courts' approach would change to focus on the proportionality of the Immigration Rules rather than proportionality in individual cases.[49] Members who spoke in the debate were generally supportive (in principle) of restrictions to foreign national ex-offenders' rights to remain in the UK on Article 8 grounds, although some doubts were expressed as to how much influence a motion of the House was likely to have on the courts.[50] Several Members called on the Government to bring primary legislation on this matter and Yvette Cooper, Shadow Home Secretary, confirmed Labour's support for this.[51]

The amended Immigration Rules came into force from 9 July 2012.[52] The Immigration Rules now specify circumstances in which leave to remain in the UK will usually be granted on Article 8 grounds for persons who are seeking to remain in the UK on account of their family ties or long residence.[53] The Rules also specify "criminality thresholds" (based on length of sentence) which inform the Home Office's decisions about whether deportation of a foreign national ex-offender is proportionate in light of Article 8.[54]

Over the past year, the effect of the amended Immigration Rules has been considered in appeals heard by the Upper Tribunal, High Court and Court of Appeal. In the case of *MF (Nigeria) v Secretary of State for the Home Department*, the Upper Tribunal found that the amended Immigration Rules did not provide a "complete code" for assessing Article 8 claims.[55] It determined that the amended rules do not cover all of the types of case in which Article 8 claims may be raised, and nor do they "fully reflect Strasbourg jurisprudence as interpreted by our higher courts". Nor had the amended rules changed the courts' legal obligations, such as under section 6 of the *Human Rights Act 1998*.

The effect of the parliamentary approval process for the July 2012 Immigration Rules was considered by the Upper Tribunal in another case, *Izuazu (Article 8 - new rules)*.[56] The Tribunal noted that the Immigration Rules are neither primary nor secondary legislation. It acknowledged that the amended Rules had been the subject of more active debate in the Commons than is usually the case for Immigration Rules changes (which are subject to the negative procedure). Nevertheless, the Tribunal found that this was "a weak form of Parliamentary scrutiny" compared to processes for primary legislation. It noted that it has long been established that debate and resolutions of the House of Commons do not have the same status as primary legislation, and it is for the courts to decide (if necessary) whether they have legal effect.[57]

In February 2013, in a comment piece in the *Mail on Sunday,* the Home Secretary expressed frustration with the way that some judges had applied the amended Immigration Rules. She argued that "a minority think that it is their role to determine, for instance, whether or not foreigners who commit serious crimes shall be deported. They are able to frustrate Government policy and prevent the deportation of criminals."[58]

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49 HC Deb 19 June 2012 cc762-3
50 See, for example, HC Deb 19 June 2012 cc777-80; c788; cc798-800
51 HC Deb 19 June 2012 cc773-5
52 HC 194 of 2012-13
53 Immigration Rules (HC 395 of 1993-4 as amended), Appendix FM and paragraph 2761-276DH
54 Immigration Rules (HC 395 of 1993-4 as amended), paragraphs 398 - 400
55 *MF (Article 8 - new rules) Nigeria* [2012] UKUT 00393 (IAC)
56 *Izuazu (Article 8 - new rules) Nigeria* [2013] UKUT 45 (IAC)
57 [2013] UKUT 45 (IAC) [49]
58 "It's MY job to deport foreigners who commit serious crime - and I'll fight any judge who stands in my way, says Home Secretary", *Mail on Sunday* [online], 17 February 2013 (accessed on 16 October 2013)

In an apparent reference to the comments made by the Upper Tribunal in *Izuazu*, the Home Secretary said:

> Just think for a moment what this judge is claiming. He is asserting that he can ignore the unanimous adoption by the Commons of new immigration rules on the grounds that he thinks this is a 'weak form of parliamentary scrutiny'.
>
> I find it difficult to see how that can be squared with the central idea of our constitution, which is that Parliament makes the law, and judges interpret what that law is and make sure the executive complies with it.

She concluded that "only explicit parliamentary legislation will convince [the judges] that the law is what Parliament says it is, not what they think it should be", and indicated that primary legislation to "specify that foreign nationals who commit serious crimes shall, except in extraordinary circumstances, be deported" would be brought before Parliament.

More recently, on 8 October 2013 the Court of Appeal gave judgement in the Home Office's appeal against the Upper Tribunal's decision in *MF*.[59] The Court accepted the Home Secretary's argument that the amended Immigration Rules provide a "complete code" for assessing Article 8 cases, but nevertheless found that the Upper Tribunal had not erred in law in allowing MF's appeal against deportation.

The Bill

Clause 14 seeks to give the force of primary legislation to the principles reflected by the July 2012 Immigration Rules changes. It specifies certain factors that a court or tribunal must consider when assessing whether interference with a person's Article 8 rights is proportionate ("the public interest question").

Proposed new section 117B of the 2002 Act sets out the considerations that would apply in all cases. These are that:

- The maintenance of effective immigration controls is in the public interest.
- It is in the public interest (particularly the economic well-being of the country), that persons who seek to enter or remain in the UK can speak English and are financially independent, because this reduces burdens on taxpayers and better enables such persons to integrate in society.
- Little weight should be given to private life or a relationship formed with a British/settled partner that is established when a person is in the UK unlawfully, or to private life established when they had a precarious immigration status.
- In cases where the person is not liable to deportation, the public interest does not require removal where the person has a "genuine and subsisting" relationship with a child who is under 18 and is a British citizen or has lived in the UK continuously for seven or more years, and it would not be reasonable to expect the child to leave the UK.

Proposed new section 117C sets out additional considerations that must be considered in cases concerning the deportation of "foreign criminals", where the decision to deport is due to criminal behaviour. These are that:

- The deportation of foreign criminals is in the public interest.

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[59] [2013] EWCA Civ 1192

- The more serious the offence committed, the greater the public interest in deportation.

- In cases involving foreign criminals sentenced to less than four years, the public interest requires deportation unless one of two exceptions apply:

    - The foreign criminal has been lawfully resident in the UK for most of their life, is socially and culturally integrated in the UK, and there would be "very significant obstacles" to their integration in the country they would be deported to; or

    - The foreign criminal has a genuine and subsisting relationship with a British/settled partner or a genuine and subsisting relationship with a child wo is a British citizen or has lived in the UK for seven continuous years or more, and the effect of the deportation on the partner or child would be "unduly harsh".

- In cases involving foreign criminals sentenced to at least four years, the public interest requires deportation unless there are very compelling circumstances (above the exceptions listed above).

"Foreign criminals" are defined as non-British citizens who have been convicted in the UK of an offence and who have been sentenced to at least 12 months' imprisonment, convicted of an offence that has caused serious harm, or who are a persistent offender.

The Home Office's ECHR memorandum highlights relevant case law to this clause.[60]

3 Part 3: Access to Services etc

3.1 Residential Tenancies

Background

Over the summer of 2013 the Home Office consulted on proposals to require private landlords to carry out "simple checks on people who want to rent accommodation, to make sure that they are entitled to be in the country".[61] The aim of the measure, along with the other provisions in Part 3, is to "discourage those who intend to stay illegally or encourage those who are here illegally to leave."[62] Migrants' access to council housing is already subject to controls.[63]

In January 2013 the Migration Observatory at the University of Oxford updated its regular briefing on *Migrants and Housing in the UK: Experiences and Impacts*. The Observatory's research reported 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 (76% were in the private rental sector in 2011), compared to other migrants.[64] Action to tackle overcrowded housing and the "beds in sheds"[65] phenomenon in London has revealed a high concentration of migrants in this type of

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60 Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, paras 66-86

61 Home Office, *Tackling illegal immigration in privately rented accommodation*, July 2013

62 *Ibid,* para 11

63 When a housing authority proposes to allocate accommodation under Part 6 or Part 7 of the *Housing Act 1996* (the parts that govern the general allocation of social housing and the eligibility of homeless applicants for housing assistance) it must decide whether the applicant is *eligible* for an allocation. This decision rests on an assessment, under the statutory framework, of issues primarily concerning an applicant's immigration status and the nature of his or her residence in the UK.

64 Migration Observatory, *Migrants and Housing in the UK: Experiences and Impacts*, January 2013

65 DCLG Press Release, 11 May 2012

housing; immigration enforcement operations against these properties has reportedly resulted in a number of arrests and removals of illegal immigrants.[66]

The Government is of the opinion that private landlords have a role to play in tackling illegal immigration. Although these landlords carry out routine checks on prospective tenants, these checks do not currently extend to immigration status. The consultation paper emphasised the "light-touch" nature of the proposed checks in order to minimise the burden on landlords and tenants. A summary of consultation responses together with the Government's response was published on 10 October 2013.[67] More than half of all respondents to the consultation process expressed disagreement with the principle of the policy.[68]

In summary, the Bill would place a duty on private landlords/agents to request evidence from a prospective tenant of their entitlement to be in the UK. If the prospective tenant cannot produce satisfactory evidence the landlord/agent would be expected not to let to that individual; a landlord/agent found to be in breach would be liable to a civil penalty. The proposed regime is similar to that which currently applies to employers who have a duty to prevent illegal working. In order to fulfil their legal responsibilities employers may require employees to provide documentary evidence of their entitlement to work in the UK. Those who do not comply are liable to a civil penalty of up to £10,000 per illegal worker. Those who "knowingly" employ an illegal worker are liable to up to two years' imprisonment and/or an unlimited fine.[69]

The Bill's provisions in respect of tenancy checks are explained below. At the time of writing the Impact Assessment on the residential tenancy provisions had not been published.

The Bill

Clause 15 defines the type of tenancy arrangements under which a landlord will be required to check the prospective tenant's immigration status. Essentially, all residential tenancy agreements will be covered where they grant a right of occupation for residential use in return for rent payments and are not an excluded tenancy agreement. Excluded agreements are set out in **Schedule 3** to the Bill – they include; for example, holiday lets, hotels,[70] social housing tenancies where the landlord is already subject to an obligation to check the immigration status of prospective tenants,[71] care home agreements, residence in hospital and hospices, accommodation provided in connection with employment or training, long lease agreements and mobile home site agreements. The Secretary of State would retain a power to amend Schedule 3 to add or remove excluded categories of agreement (subject to the affirmative procedure).

Where a tenant sublets a room in his or her home and rent is payable the tenant will be a landlord in these circumstances and will be covered by the duty to check the tenant's immigration status (clause 15(2) and (3)).

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66 DCLG Press Release , 31 August 2012

67 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013

68 *Ibid* p12

69 For more information on the penalty regime that applies to employers see Library note, *Preventing illegal working: employers' duties and the civil penalty regime,* SN/HA/6706

70 Although where someone chooses to live in a hotel the arrangements for that person **will** be captured. A code of guidance will provide advice on how to treat these arrangements.

71 Social housing providers (housing associations/registered providers of social housing) letting to tenants who are not referred by a local authority or who participate in the private rented sector **will** be covered by the scheme.

Clause 16 defines "disqualified persons" i.e. those persons who may not occupy privately rented property as their only or main home because of their immigration status. Essentially, persons who have entered the UK unlawfully or have overstayed their leave to enter or remain will be disqualified and will not have a "right to rent." Persons with a limited right to enter or remain in the UK will have a "limited right to rent." The Secretary of State would have discretion to grant a right to rent to a person who would otherwise be disqualified because of their immigration status (clause 16(3)).

Relevant nationals, i.e. British Citizens, EEA nationals and Swiss nationals would have a right to rent and would not be covered by these provisions.

Clause 17 places a duty on private landlords not to enter into tenancy agreements with persons who are disqualified due to their immigration status.

A breach of this duty would occur where:

- a landlord enters into an agreement to allow a disqualified person to occupy a property (whether or not that person is named on the tenancy agreement); and
- where the landlord enters into an agreement with someone who has the right to rent but when that right ends the person remains in occupation.

The duty on the landlord would be to make "reasonable enquiries" as to the relevant occupiers[72] *before* entering into the tenancy agreement. A breach of the duty would occur where enquires are not made or where they are made and it was, or should have been apparent, that the adult in question was likely to be a relevant occupier. The July 2013 consultation paper acknowledged that private landlords are not expected to be experts in immigration. The intention is to include a list of acceptable documentation for use by landlords in secondary legislation.[73] Guidance for landlords will be issued by the Home Office "so that landlords can easily recognise documents that are presented to them by comparing them with specimens presented in the guidance document."[74] While it is expected that in most cases the prospective tenant's status should be established by examining their documents, it is conceded that some documents will need to be verified by the Home Office. The Home Office will establish an enquiry service for landlords.[75]

Where a landlord refuses to enter into an agreement with a prospective tenant because they cannot provide satisfactory documentation there will be no duty on the landlord to report the individual to the Home Office.

Landlords would not be able to avoid liability for a breach of the duty to make enquiries and act on the results by simply prohibiting occupation by disqualified persons in their tenancy agreements (clause 17(6)).

Clause 18 sets out the penalty for landlords allowing disqualified persons to occupy premises as their only or main home. The Secretary of State would be able to impose a penalty of up to £3,000 on a landlord in respect of each disqualified adult allowed in the premises.[76] The clause sets out which landlord is responsible for the contravention (and

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72 Enquiries must cover all intended occupiers not just those named in a written agreement.

73 A proposed list of documents that landlords will be able to accept as proof of status can be found in Annex D to *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013

74 Home Office, *Tackling illegal immigration in privately rented accommodation*, July 2013, para 40

75 *Ibid* para 43

76 The Secretary of State will have the power to amend the amount by order (subject to the affirmative resolution procedure).

bears the penalty) in situations where ownership of properties with sitting tenants change hands.

In cases of sublets, responsibility for a breach could be passed to a superior landlord where that landlord is willing to accept responsibility (clause 18(5)).

Clause 19 specifies the circumstances in which landlords will not face a penalty for renting to a disqualified person. Landlords will have a "statutory excuse" where:

- they carried out checks according to prescribed requirements and the checks did not reveal the prospective occupant to be a disqualified person; or
- the landlord arranged for an agent to carry out checks on his/her behalf.

If a prospective tenant has permanent status in the UK the landlord will be able to carry out the checks at any time before the tenancy is entered into. For persons subject to immigration control with a limited right to rent the checks will have to be carried out within a given period prior to the tenancy's commencement – this period will be specified by order. This provision will prevent a landlord carrying out checks and entering into an agreement with someone who has a limited right to rent which will expire before the start of the tenancy.

Where an occupant's right to rent expires *during* a tenancy the landlord would be able to avoid a penalty where:

- they have carried out repeat checks and notified the Secretary of State as soon as reasonably practicable of the presence of a disqualified person; or
- an agent acting on their behalf is responsible for the repeat checks; or
- the eligibility period (defined in clause 22) in relation to a limited right occupier whose occupation has caused the contravention has not expired.

Notification to the Secretary of State will have to be made in a prescribed form and manner (clause 19(8)).

Clause 20 sets out the circumstances in which an agent who is responsible for carrying out checks on an occupant's right to rent (under a written contract with the landlord) would be held liable for a breach of the restriction on renting to disqualified persons.

Agents would be liable for a penalty payment of up to £3,000 in respect of each disqualified adult allowed to occupy a property.[77]

Clause 21 - as with landlords, agents would not face a penalty for renting to disqualified persons where:

- they carried out checks according to prescribed requirements and the checks did not reveal the prospective occupant to be a disqualified person; or
- they informed the landlord that the occupant was a disqualified person before the tenancy began.

The same rules would apply to the timing of checks as under clause 19.

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[77] The amount could be varied by order subject to the affirmative resolution procedure.

Similarly, agents would have a "statutory excuse" where an occupant's right to rent expires *during* a tenancy where they have carried out repeat checks at "specified intervals" and notified the Secretary of State as soon as reasonably practicable of the presence of a disqualified person. Notification must be in a prescribed form.

Clause 22 defines "eligibility periods" for the purposes of landlords/agents undertaking repeat checks on persons with a limited right to rent. These periods must be adhered to if landlords/agents wish to rely on the statutory excuses set out in clauses 19 and 21.

Checks on an occupant with limited leave to remain in the UK will have to be carried out by a landlord/agent before their leave is due to expire or one year after the tenancy begins, whichever is the longer period. The explanatory notes to the Bill provide the following examples of how this will operate:

> ...if a landlord grants an agreement allowing use of a room to a visitor who has six months' leave to remain in July 2015, the landlord will not need to undertake a repeat status check until July 2016 to maintain a statutory excuse against a penalty. If, at the same time, the landlord rents a property to a student with four years' leave, he need not undertake a repeat status check until July 2019. Where the occupant has indefinite leave to remain, the landlord will not need to undertake a repeat check; while their biometric residence permit may need to be renewed within a period of 10 years, the landlord can rely on the fact that the leave they have been granted is indefinite and no further check is required.[78]

Clause 23 provides for the issuing of penalty notices by the Secretary of State. It will not be necessary to establish whether a landlord/agent has a statutory excuse before serving a notice. It will be possible to serve a notice for each disqualified adult in occupation. The clause sets out what a notice should contain in terms of who is liable, the level of the penalty, how it should be paid and the deadline for payment. The notice will state how an objection can be lodged.

It will not be possible to serve a penalty notice in respect of adults who are no longer in occupation and where a year (or longer) has passed since a disqualified person occupied the property, unless a new notice is being issued under clause 24(6) following consideration of an objection made by a landlord/agent and the original notice was given within that one year period (clause 23(5)).

Clause 24 sets out the process through which a landlord/agent would be able to object to a penalty notice issued by the Secretary of State and for the Secretary of State to consider those objections.

Clause 25 provides for a right of appeal against a decision by the Secretary of State in respect of an objection lodged under clause 24. Landlords/agents will be able to appeal on the grounds that they are not liable to pay the penalty, the amount is too high, or s/he has complied with the specified requirements.

Objections must have been lodged under clause 24 before an appeal will be possible.

Clause 26 provides for the enforcement of sums due to the Secretary of State following the service of penalty notices. Sums due will be recovered as though they were due under a court order.

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[78] Bill 110-EN, para 131

Clause 27 places a duty on the Secretary of State to issue a code of practice in relation to these provisions. The code will set out:

- the criteria to be applied in deciding whether to impose a penalty and the amount;
- guidance regarding when a person will be considered to be using premises as their 'only or main residence' for the purposes of these provisions, with particular emphasis on tourist lets and lets made in connection with business travel;
- details of the steps landlords and agents will be expected to take to determine who will be occupying the premises under the terms of a residential tenancy agreement.

The code will be subject to review "from time to time" and will have to be laid before Parliament.

Clause 28 places a duty on the Secretary of State to issue a code of practice for landlord and agents specifying how to avoid contravention of the *Equality Act 2010* or the *Race Relations (Northern Ireland) Order 1997* while fulfilling the requirements of Part 3.

Clause 29 elaborates on the Secretary of State's order making powers.

Clause 30 provides that the requirements in Part 3 will not be retrospective – landlords/agents will not need to make checks in regard to tenants in occupation before the provisions come into force. In addition, any new arrangements made between landlords and tenants where they were previously parties to another agreement and the tenant has enjoyed a continuing right of occupation of the premises will also not be subject to the restrictions.

Commencement will be on a day appointed by order of the Secretary of State; different days may be appointed for different purposes or areas.

Clause 31 provides that the restrictions will apply to tenancies of premises on Crown lands except where the Crown itself is the responsible landlord.

Clause 32 sets out the definitions given to terms within the provisions. Clause 32(6) will enable the Secretary of State to prescribe (by order) situations that will or will not amount to "entering into a residential tenancy agreement" and the circumstances in which an individual will be treated as occupying premises as their only or main home. The aim is to give the Secretary of State flexibility to respond to changing circumstances and to put anti-avoidance measures in place if necessary.

Comment

The public consultation on tackling illegal immigration in privately rented accommodation ran from 3 July 2013 until 21 August 2013. The Home Office received a total of 1,362 responses.[79] The summary of responses published by the Home Office on 10 October states that "the majority of landlord representative organisations were opposed to the proposals and/or expressed concerns with the details of what was proposed."[80] More than half of all respondents disagreed with the principle of the policy.[81]

The key concerns raised and Government responses, where provided, are summarised and grouped under the ten sub-headings (below).

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79 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, Annex A

80 *Ibid* p9

81 *Ibid* p12

The principle of immigration checks by landlords

The Residential Landlords Association (RLA), which represents around 20,000 private sector landlords, rejects the proposition that "untrained British civilians" should be expected "to undertake the work of immigration officials at cost to themselves, without support and with the threat of prosecution if they undertake the work incorrectly."[82] The National Landlords Association (NLA) is more supportive of the principle:

> We view the policy underpinning these proposals as a positive way in which landlords can contribute towards neighbourhood cohesion and believe that this represents a recognition of the important function performed by the private rented sector in Britain today.[83]

Cost and administrative burden

Landlords' responses outlined significant concerns around the additional burden that carrying out immigration checks would entail. The NLA said the system "must be clear, accessible and easy to comply with."[84] Most landlords and agents already carry out checks on prospective tenants but the RLA argues that these are carried out for a different purpose:

> Landlords can be flexible in the checks they carry out. They do not do these under the threat of penalty – they take the risk if the check is wrong but this is a financial risk to themselves not neo-criminalisation.[85]

In a letter to the then Housing Minister, Mark Prisk, the Chartered Institute of Housing (CIH) also drew attention to the potential complexity involved in carrying out immigration checks:

> The consultation paper gives 20 example documents that landlords might expect to see, as well as making clear that they will be expected to know (for example) which countries are included in the European Economic Area. However, the UK Border Agency guidance to employers on making immigration checks is an 89-page document with many more than 20 examples.
>
> While the landlords' task is likely to be slightly less complicated than an employer's, the expectation that immigration checks can be 'quick and straightforward' is only realistic in obvious cases. This risks erroneous judgments being made by landlords and agents inexperienced in immigration matters, bearing in mind that staff in local authorities and indeed the Home Office itself often make mistakes in this complex area, despite their experience.[86]

Responses to the consultation paper highlighted the possibility of additional costs being passed on to tenants in the form of higher rents or agents' fees. The Government rejects this proposition:

> The Government does not accept that these proposals represent a substantial burden on the sector which would result in a material impact on rents or fees. The checks will be light-touch and proportionate, and will build upon checks that many landlords and agents already undertake, so as to minimise the burdens arising from the policy.[87]

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82 *RLA's response to the Home Office's consultation on immigration checks for tenants*, August 2013
83 *NLA's response to tacking immigration in privately rented accommodation*, August 2013
84 *ibid*
85 *RLA's response to the Home Office's consultation on immigration checks for tenants*, August 2013, para 14
86 CIH letter to the Housing Minister, *Tackling illegal immigration in the private rented sector*, 15 July 2013
87 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, p13

Specific concerns were raised around the requirement on landlords to carry out periodic checks – a majority of respondents favoured the option of carrying out repeat checks on the renewal of the tenancy. The Bill has been drafted to ensure that landlords will not be penalised if the tenant's immigration status has expired as long as they inform the Home Office "as soon as reasonably practicable":

> The Government believes that the scheme should incorporate a requirement to conduct follow-up checks on tenants with a time-limited immigration status in order to better prevent overstaying. A landlord who discovers a tenant's lawful immigration status has expired when conducting a follow up check will retain their excuse against a penalty if they inform the Home Office of that person's continued residence. All information received from landlords in confidence will be treated in the strictest confidence.[88]

The need for landlords to carry out checks on all the adults planning to live in the property, rather than just the prospective tenant, is recognised as an additional burden:

> The Government recognises that there is some burden associated with ascertaining who will be living in the property with the named tenant. This aspect of the policy is needed to avoid creating a loophole. The Government will clarify the steps that would be considered reasonable to show that landlords have made due enquiries. Landlords will not be held responsible for people living in the property that were not disclosed to the landlord as part of that process.[89]

The Government has acknowledged landlords' concerns around the need minimise complexity and has said it will "take steps to make the process as simple as possible and will support both landlords and tenants."[90] Landlords will not be expected to identify forged documents "beyond that which any untrained person might reasonably identify."[91]

Publicity, guidance and support

The RLA questioned how private landlords would be made aware of their obligation to carry out immigration checks and referred to the potential for non-compliance:

> With no real resources devoted to publicity and the cottage industry nature of the private rented sector so far as landlords are concerned there is little chance of the obligation to comply getting out there to the landlord community. This is in line with low knowledge of the requirements of the Housing Health and Safety Rating System, the basic enforcement tool in the private rented sector. Even the highest measure of compliance (90 per cent for gas safety certificates) shows that 10 per cent are still not aware of their obligations in this regard.[92]

A recently published DCLG response to a Freedom of Information request indicates that a majority of private landlords may not be complying with their duty to provide an Energy Performance Certificate when letting dwellings.[93] This finding would tend to reinforce the RLA's point. The Government has committed to the development of a communications plan:

> The documentation list will be reinforced with clear, simple guidance to make the scheme user-friendly for all landlords and prospective tenants. Together with DCLG, we will take forward discussion with local authorities and social housing organisations

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88 *Ibid* para 78
89 *Ibid* p16-17
90 *Ibid* p13
91 *Ibid* p35
92 *RLA's response to the Home Office's consultation on immigration checks for tenants*, August 2013, para 4
93 DCLG, *Freedom of Information request – Energy Performance Certificates Compliance*, 16 August 2013

> to develop a communications plan for distributing the guidance, particularly to social tenants who may be seeking to take in lodgers. We understand from respondents during the consultation that the step-by-step online guidance for employers on illegal working, (https://www.gov.uk/legal-right-to-work-in-the-uk), has been particularly well received; we are seeking to improve this as part of our work on the illegal working provisions of the Immigration Bill, and we will deliver an enhanced version for landlords. There will also be printed guidance, recognising that not all landlords or tenants have access to on-line services.[94]

Landlords have questioned the resourcing of the Home Office enquiry service. In areas of high demand there is a possibility that prospective tenants without appropriate documentation could lose out to those whose status is easier to verify. The Government's view is that tenants in these areas will have a responsibility to prepare evidence of their status but has said: "Landlords who have not received a response to a clearance request within 48 hours will be deemed to have discharged their responsibility, (subject to evidence that the request was made)."[95]

Potential for discrimination

The CIH described this aspect of the proposal as its "main concern:"

> Recent migrants overwhelmingly rely on the private rented sector and already often occupy poorer quality lettings. It seems likely that if a prospective tenant is not obviously British landlords may simply reject them, given the pressures in the sector at the moment, the competition for tenancies and the potential delay if further checks are needed.
>
> Such discrimination will be very difficult to uncover given that landlords will be making simultaneous enquiries about bank accounts, references etc., which will give them other grounds for rejecting an application.
>
> This could drive migrants, and some UK citizens, even further into poorer quality lettings with less scrupulous landlords who are probably already in breach of the law in other respects. It could also place extra pressure on local authorities at a time when homelessness is already growing.[96]

The Government has acknowledged potential discrimination as a risk and has 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 need for landlords to carry out checks in respect of all prospective tenants is emphasised and there is recognition of the need to support a particular group of prospective foreign tenants:

> A minority of prospective foreign tenants will have a time limit on their stay or will have some other kind of immigration restriction that may require further interpretation or advice. It is this group who respondents indicate are at particular risk of administrative discrimination and the Government recognises that support must be given to this group to ensure that legitimate visitors and legal migrants are not barred from the rented housing market. The Home Office has already committed to providing a service that will deal with general telephone enquiries asking for advice and the facility to request confirmation of a person's status by email. Respondents expressed concern that the

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94 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, para 63

95 *Ibid* p17

96 CIH letter to the Housing Minister, *Tackling illegal immigration in the private rented sector*, 15 July 2013

> service might be too slow to meet their needs. The Government notes these concerns in the context of this risk and will ensure that the service meets agreed service levels.[97]

The Secretary of State will publish a statutory non-discrimination code of guidance setting out the steps landlords must follow to avoid unlawful discrimination under clause 28 of the Bill.

Overseas students

There is concern that the proposed checks, together with the fact that they will mainly be applying for accommodation from abroad at the time of their visa application, will disadvantage overseas students and discourage applications to UK universities. The Government has extended the proposed exemptions to include purpose-built student accommodation along with University halls of residence. Checks will apply to other landlords letting to students; however, the range of documents that will count as suitable evidence of migration status will include a letter from the education institution confirming their status as a student, and:

> The Government will permit landlords to make a conditional offer of accommodation to an overseas student at the time of their visa application abroad. The landlord will however be required to verify that the student has been granted a student visa as described in their application when they take up their accommodation in the UK.[98]

Homelessness and vulnerable groups

Consultation responses raised the difficulty that certain groups may face in providing the required documentation. There is a concern that checks may act as an additional barrier to securing accommodation and could increase levels of homelessness. Some respondents supported the option of deferring checks to allow vulnerable applicants time to produce the evidence required. The Government was not persuaded by this but has "decided to build a suitable level of flexibility into the regulations by broadening the range of exemptions for people housed under local authority powers, pursuant to a local authority's statutory duties."[99]

Level of penalty charge

Additional information has been provided on how the scale of penalties will be graduated:[100]

> The Government does not consider that the levels proposed are excessively harsh. The maximum penalty of £3,000 per illegal migrant is dependent on a serious breach by the landlord and is considerably lower than the level that applies to illegal employment (£10,000 rising to £20,000). Lower penalties will apply in other cases, namely:

	No notice of liability in previous 3 years	Separate Notice of Liability or advisory letter served in previous 3 years
People who take in up to two lodgers in the home they are living in, or sub-let part of the home they are living in to up to two	£80	£500

97 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, p35
98 *Ibid* para 49
99 *Ibid* para 41
100 *Ibid* para 95

people		
Others (including single property buy-to-let investors, larger landlords, letting agents, etc.)	£1,000	£3,000

Privacy issues

The Government acknowledges that there is "a need to create awareness among landlords of their responsibilities under the *Data Protection Act 1988* in connection with this policy." The intention is for the Home Office to work with DCLG and the Information Commissioner's Office and other bodies "to communicate the necessary guidance and promote best practice."[101] There is no intention that landlords/agents should retain original documents provided by prospective tenants.[102]

Implementation

There was some support amongst respondents for a phased roll-out of the system and/or a pilot scheme to test assumptions and guard against unintended consequences. The Government has agreed to consider this but wants to avoid a situation where illegal immigrants are diverted into neighbouring areas.[103]

Enforcement

The Bill does not propose any new powers to ensure that landlords/agents have actually carried out the required checks. The CIH has questioned the effectiveness of this approach:

> Except in the very small proportion of lettings which attract the attention of the UK Border Agency, the scheme appears to rely on a high degree of self-enforcement. Landlords already have to comply with various requirements when they make a letting, but many of these are poorly enforced because of the limited resources available to local authorities and the rapid growth of the sector. There is a strong risk that immigration checks will face similar enforcement challenges.
>
> We suggest that a scheme which affects such a large number of landlords and tenants (we estimate there are 2m private landlords making 1.2m lettings a year in England alone) ought to be trialled first to test its practicality. Any policy change of this magnitude should also be monitored carefully. If there is no trial or monitoring, there is a danger that the scheme will fail to deliver what Ministers want and at the same time permanently affect the housing options for legitimate migrants.[104]

The Government considers that the measures "will provide some deterrent effect."[105]

3.2 National Health Service

Background

National Health Service: changes to residency requirements for non-EEA temporary migrants

NHS services are free at the point of use unless charges are explicitly allowed for by statute. Regulations impose a charging regime in respect of NHS hospital treatment for persons who

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101 *Ibid* para 110
102 *Ibid* para 112
103 *Ibid* para 80
104 CIH letter to the Housing Minister, *Tackling illegal immigration in the private rented sector*, 15 July 2013
105 Home Office, *Tackling illegal immigration in privately rented accommodation – The Government's response to the consultation*, 10 October 2013, para 85

are not ordinarily resident in the UK, although there are a number of exemptions for specific groups, such as refugees and victims of human trafficking on humanitarian grounds.[106]

The Government has described *ordinary residence* as a particularly generous test, as it is "satisfied almost immediately by many new and temporary migrants".[107] As well as being more generous than provision for overseas visitors in some other countries the Government states that the current residency requirement "clearly does not accord with the principle that everybody makes a fair contribution."[108]

In general, health is a devolved matter in Wales, Northern Ireland and Scotland although the devolved administrations currently retain substantially the same legislative framework and almost all regulations on charging visitors. The UK Government has responsibility for immigration matters and the health provisions in the Bill would apply across the UK.

The concept of ordinary residence

Ordinary residence is a common law concept, which was the subject of a judgment in the House of Lords in 1982.[109] That judgment has since been taken to have wider application and the NHS overseas visitor charging regulations impose a charging regime in respect of NHS hospital treatment (secondary care) for persons who are not ordinarily resident in the UK, unless they are subject to a specific exemption.

In order to take the House of Lords judgement into account, when assessing the residence status of a person seeking free NHS services, a relevant NHS body will need to consider whether they are:

> living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being, whether they have an identifiable purpose for their residence here and whether that purpose has a sufficient degree of continuity to be properly described as "settled".[110]

Ordinary residence can be of long or short duration and non-EEA temporary migrants who may currently be covered by the definition include students, workers and newly arriving family members of existing UK citizens.

Further information the overseas visitor hospital charging regulations and the Government review of migrant access to NHS provision can be found in Library Standard Note SNSP3051 but some general background to the proposed changes can be found below.[111]

Review of migrant access to healthcare and consultation on proposals for change

The Government has said it wants to ensure that migrants here temporarily make a fair contribution to the cost of health services in the UK.[112] In addition to the health service measures outlined in section 3 of the Bill the Government has consulted on a number of other proposals to change the rules about which overseas visitors are charged for hospital services, to extend the charging regime for temporary migrants to primary and community services, and to improve the system for identifying patients who should be charged. Any

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106 *NHS Charges (Overseas Visitors) Regulations, SI 2011/1556.*

107 Department of Health, *Sustaining services, ensuring fairness: a consultation on migrant access and their financial contribution to NHS provision in England*, July 2013, para 11

108 *Ibid*

109 R v Barnet LBC Ex p Shah (Nilish) 1983 2AC 309 HL

110 DH, *Implementing the Overseas Visitors Hospital Charging Regulations 2011 (updated October 2012).* Para 3.5

111 Library Standard Note SN/SP/3051, *NHS charges for overseas visitors*, 15 October 2013

112 DH, *Sustaining services, ensuring fairness: a consultation on migrant access and their financial contribution to NHS provision in England*, July 2013

wider changes to arrangements for administering overseas visitor charges will be introduced separately by the Department of Health.

In 2012 the Department of Health carried out a major review of migrant access to healthcare.[113] This found that there were significant weaknesses in the rules for charging overseas visitors, in systems for identifying chargeable patients, and in the recovery of charges. The review's findings and recommendations were published in July 2013, alongside two linked consultation documents about overseas visitors access to the NHS.[114] These consultations asked who should be charged in future, what services they should be charged for, and how to ensure that the system is better able to identify patients who should be charged. In addition to the health service measures outlined in the Bill, proposals included the extension of the overseas visitor charging regime to primary and community healthcare.

The Department of Health states that amendments to secondary NHS legislation will enable changes to detailed eligibility rules and improved system management processes will be implemented directly by the Department of Health during 2014.[115]

Evidence on the extent of NHS use by non-residents

The Government has commented on the lack of detailed evidence on the extent of NHS use by non-residents and the cost to the NHS although a summary of the limited evidence available was presented to accompany the Department of Health consultation.[116]

The 2012 review provided the following conclusions while acknowledging the high degree of uncertainty around the analysis due to the weakness of the evidence base:

- The NHS appears to be recovering gross income of £15 - £25m for treatment provided to chargeable visitors and non-residents.
- This represents less than 20% of estimated chargeable costs.
- This low recovery is accounted for by only 30% - 45% of chargeable income being identified, and 60% of the charges levied not being recovered.
- Administering the current system (in NHS hospitals) may be costing over £15m, suggesting that the overseas visitor charging system may at best be generating a small net gain and possibly none at all.[117]

The review found that while improved practices could increase both identification and recovery from the current very low levels, the circumstances of the main chargeable groups and inherent process weaknesses limit the potential improvement.[118]

The review team estimated that if all currently chargeable overseas visitors were identified, they would expect chargeable income to increase by £45m - £115m. However, given the low

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113 DH, *2012 Review of overseas visitors charging policy: Summary report*, April 2012 (published July 2013)

114 DH, *Sustaining services, ensuring fairness: a consultation on migrant access and their financial contribution to NHS provision in England,* and Home Office, *Controlling Immigration – Regulating Migrant Access to Health Services in the UK,* both published 3 July 2013 (consultation period closed on 28 August 2013; references to some responses can be found in section below).

115 *Ibid*

116 DH, *Sustaining services, ensuring fairness: Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment*, July 2013

117 DH, *2012 Review of overseas visitors charging policy: Summary report*, April 2012 (published July 2013), para 78

118 *Ibid* para 79

recovery rate, they said it is unlikely that this would generate more than £20m - £50m of recovered income. The review goes on to state that more significant revenue could be realised by charging some or all of those currently exempt although it highlights significant problems facing the NHS in identifying and charging a small subset of patients for their treatment.[119]

The 2012 review indicated that if eligibility criteria were to change, as outlined in the Bill, then over 700,000 non-EEA temporary residents would no longer be eligible for free NHS care unless specifically exempted under the charging regulations. The review estimated that secondary care (those for which charging powers to charge already exist) for non-EEA temporary residents, who are currently non-chargeable, costs around £400 million.[120]

The power to charge those not ordinarily resident has only been enacted for secondary care in NHS hospitals (and not other new providers of NHS-funded services). No specific charges for overseas visitors can currently be made for services including primary medical services, community care (given outside of hospital or provided by non-hospital staff) or for prescriptions. Together these exempted services comprise around 40% of NHS treatment expenditure. Their estimated cost for all temporary residents and short-term visitors (including EEA nationals) is up to a further £550m. Practical operational issues and related administrative costs may limit the scope to extend charges to some of these. The review team estimated that the total healthcare cost of non-EEA temporary residents and visitors to be around £1 billion.[121] The review also drew this final conclusion about overseas visitors charging policy:

> Although there may be good policy reasons, and potentially significant income opportunities in extending the scope of charging, the NHS is not currently set up structurally, operationally or culturally to identifying a small subset of patients and charging them for their NHS treatment. Only a fundamentally different system and supporting processes would enable significant new revenue to be realised.[122]

The Government has commissioned an independent audit to provide a "comprehensive assessment of the extent of NHS use and abuse by non-residents." While this audit will focus particularly on those who are inappropriately or fraudulently obtaining services without paying (abuse), it is expected to also provide data on the extent of NHS use by the groups the Government propose should become chargeable in the future.[123] The results of the audit and the Government's consultation response are expected to be published later this year. The impact assessment on the health proposals in the Bill had not been published at the time of writing.

Since November 2011, the Immigration Rules have provided that permission to enter or remain in the UK "should normally be refused" if a person has unpaid NHS debts above £1000.[124]

The Bill

The Bill would implement some of the proposals made in the Home Office consultation, namely to require temporary migrants to pay a charge to contribute to NHS costs, and adopt a revised definition of qualifying residence for free NHS care.

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[119] *Ibid* para 85-86
[120] *Ibid* para 87
[121] *Ibid* para 90-91
[122] *Ibid* para 92
[123] DH, *Sustaining services, ensuring fairness: Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment*, July 2013
[124] Immigration Rules (HC 395 of 1993-4 as amended), paragraph 320(22)

Clause 33 gives the Secretary of State power, by order, to require persons applying for "immigration permission" or "any description of such persons" to pay a charge (an "immigration health charge").[125] In setting the amount of the charge the Secretary of State must have regard to the range of health services likely to be available free of charge to persons who have been given immigration permission. The details of how the charge would be applied (amount, exemptions, consequences of non-payment, etc.) would be set out in the order, which would be subject to the draft affirmative resolution procedure.

The Home Office factsheet gives further details of how the charge (which would be in addition to the immigration application fee) is intended to operate.[126]

Temporary migrants (those coming to the UK for six months or longer) who had paid the charge will be able to access "most" NHS care, but some particularly expensive discretionary treatments may be excluded. The charge would be refunded if the immigration application was refused. The Government intends that the charge will be set at a "competitive rate" which compares favourably with the requirements imposed in competitor countries, many of which require temporary migrants to have private medical insurance in place.

Certain groups, including asylum seekers, could be exempted from the charge. The charge would not apply to persons applying for leave to enter for less than six months (e.g. general visitors) or illegal migrants (who are already subject to some NHS charges).[127] Non-EEA nationals with Indefinite Leave would continue to be entitled to free NHS care (as is currently the case).

Clause 34 states that those who require leave to enter or remain and do not have it, or who have limited leave to enter or remain, are not to be treated as ordinarily resident for the purpose of the charging regulations.[128] This would mean that all non-EEA migrants would be required to be current residents with indefinite leave to remain to qualify for free NHS treatment on the basis of ordinary residence.

Comment

At the time of writing many organisations had not responded in detail to the Bill but a wide range of stakeholders have provided responses to the Department of Health and Home Office consultations in July 2013, which proposed changes to the residency criteria for free NHS treatment.

Most responses to the consultations accepted that there is a need, as the British Medical Association said, to protect the public purse by limiting access to healthcare in some circumstances and preventing the deliberate misuse of scarce resources. However, they have also raised concerns about specific aspects, including changes to the ordinary residence requirement. The BMA and the NHS Employers organisation, among others, have pointed out that many migrants who do not have indefinite leave to remain in the UK are working, paying tax and making National Insurance contributions. The BMA state that it is unfair that under the Bill temporary workers will have to make another separate payment for their healthcare, and that this levy could make the UK a less attractive destination for skilled workers from outside the EEA, including doctors and other healthcare professionals.[129]

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125 "Immigration permission" means leave to enter or remain for a limited period, or entry clearance which gives permission to enter for a limited period.

126 Home Office, *Immigration Bill Factsheet: National Health Service (clauses 33 - 34)*, October 2013

127 The Home Office factsheet states that the Department of Health will be making separate proposals for strengthening the arrangements for applying charges to overseas visitors.

128 *Explanatory Notes to the Immigration Bill 2013-14* para 159

129 BMA, Response, *Sustaining services, ensuring fairness: a consultation on migrant access and their financial contribution to NHS provision in England,* (undated; accessed o 16 October 2013)

Refugee Action's response stated that setting the qualification for ordinary residence as indefinite leave is extremely restrictive and does not reflect either commitment or contribution to the UK.[130]

A number of responses have highlighted concerns about the lack of evidence for the proposals set out in the Government's consultations on migrant access. The Royal College of Nurses state that without the outcomes of the independent audit it is difficult to assess whether the main cost pressures relate to non-application of current charging arrangements or to the currently non-chargeable group of "temporary" migrants.[131] The response submitted by the Migrant Rights' Network and National Voices (coordinated by National Voices' member, the African Health Policy Network) raised concerns about the Government's lack of evidence of the scale or financial impact of "health tourism".[132]

3.3 Bank accounts

Introduction

Clauses 35-38 of the bill provide new responsibilities for banks and building societies to check a person's immigration status before allowing them to open a current account, and for related monitoring and regulation by the financial regulator the Financial Conduct Authority (FCA).

In the Home Office factsheet the Minister for Immigration, Mark Harper, said that although, "we welcome those who wish to come here, work hard and make a contribution ... this legislation will stop illegal immigrants opening bank accounts and will help to prevent them accessing products such as credit cards, mortgages or mobile phones".[133]

These clauses, therefore, appear to be aimed not at migrants with limited resources, but at those with significant assets and regular incomes, sufficient enough to support major outgoings such as a mortgage. As evidenced by the take up of the Government's 'right to buy' scheme, getting a mortgage is not easy for anyone on only average incomes or those at the start of their earning careers.

The Minister also mentioned the fact that, in practice, many migrants (and returning ex-pats, other legal visitors, young people and the elderly too for that matter) already find it difficult to get access to financial services. This is because financial services firms are already under a duty to perform 'due diligence' on their potential customers for money laundering purposes.[134] An article on the *Migrants' Rights Network* website described the experience of a legally-here lady trying to open an account for her seven year old daughter at one bank in the Thames Valley:

> Recently I went into my High Street bank to open an account for my daughter. On arrival, I was told that I should bring my 7 year-old to the branch as well as proof of her identity. I complied and returned with my daughter plus her international passport as proof of identity.

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130 Refugee Action, *Sustaining services, ensuring fairness Refugee Action response,* (undated; accessed on 16 October 2013)

131 Royal College of Nursing, *Home Office consultation on Non-EU migrants' access to NHS services response*, August 2013

132 National Voices, *National Voices' response to the consultation Sustaining services, ensuring fairness,* (undated; accessed on 16 October 2013) and Migrant Rights' Network, *Migrants' access to health services consultation*, July 2013

133 Home Office, *Immigration Bill Factsheet: Bank accounts (clauses 35-38)*, October 2013

134 For more information on the money laundering regulations see Library standard note SN2592, *Money Laundering Regulations*, 14 November 2012

> Finished and the[n] left. Low and behold, today, I received a phone call from an officer at the branch requesting to see if I had a valid visa on my Nigerian passport as I am her parent and it is a minor's account.
>
> She went on to say that it is their policy to check that all non-British account holders (regardless of being a customer since 2007) have a valid visa on their passports. I was left baffled at how my immigration status has now become a matter for the bank to determine if I am a suitable customer for their services.
>
> I asked the officer if they have been mandated to do visa checks when a customer has asked to open a bank account for her daughter. The officer sought clarification from her manager then called back to confirm that their policy is indeed to terminate the relationship with account holders without a valid visa.[135]

The key reason for these clauses given by the Minister is that at present "there is no specific rule to stop illegal migrants from opening an account in the UK".[136]

There has been virtually no public response from the main banking groups to the proposals. The Memorandum on the European Convention on Human Rights found that the measures were compliant and proportionate with the Convention. There are currently no impact assessment figures for the bank account changes.

The Bill

There are four clauses within the bank accounts section.[137] The first establishes the basic prohibition; the second gives the regulator powers of enforcement; the third defines the affected bodies and the last gives the Treasury the power to amend the Act by order.

Clause 35 requires the institution to carry out a 'status check' before it opens a current account unless there are 'circumstances that cannot be reasonably be regarded as within its control'.[138] Although the clause only requires checks on people who "require leave to enter or remain in the UK but [do] not have it"[139] it is not clear how the bank would know this information without checking it, hence, the application of the check is likely to be very broadly drawn.

The legislation specifies that the account in question is a current account. It is silent on, for example, savings accounts. Current account includes:[140]

> (i) opening a joint account for P[the applicant] 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.

Subsection 4 defines the nature of the status check and subsection 6 requires the bank to tell the applicant why it has refused to open an account. This requirement may be waived in

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135 Migrants' Rights Network website, Migration Pulse/'Could your bank be an immigration agency?' (2 September 2013, accessed on 15 October 2013)
136 Immigration Bill Factsheet (clauses 35-38)
137 For 'bank' read 'banks and building societies'
138 Clause 35, 1(b)
139 Clause 35, 2(b)
140 Clause 35, 3(c)

some circumstances, for example if it is deemed to be 'tipping off' as defined in section 333A of the *Proceeds of Crime Act 2002*.

Clause 36 is an enabling clause. It gives the Treasury the power to "enable the FCA to make arrangements for monitoring and enforcing compliance with the prohibition imposed on banks and building societies by clause 35. The regulations are subject to the affirmative resolution procedure (see clause 63(2))".

Clause 37 defines the terms bank and building society. Banks are defined within the framework of the *Financial Markets and Services Act 2000* standard "authorised deposit taker" though this excludes, for example, insurance companies which might also be authorised. The clause also specifically excludes credit unions and friendly societies.

Clause 38 gives the Treasury the power to amend the Act by order. Changes specified by the clause include changes to the category of institution (e.g. to include credit unions) and the type of account that might be included (e.g. savings accounts).

3.4 Work

Background

Employers' legal responsibilities to prevent illegal working apply to staff employed on or after 27 January 1997.[141] The current legislation on prevention of illegal working, set out in sections 15 - 25 of the *Immigration, Asylum and Nationality Act 2006* ('the 2006 Act') and related regulations, came into force on 29 February 2008. Library standard note SN/HA/06706 *Preventing illegal working: Employers' duties and the civil penalty scheme* summarises employers' current obligations and how the civil penalty scheme operates in practice, and recent scrutiny of the Home Office's approach to enforcing the laws against illegal working.

Put briefly, employers must check employees' documents for evidence of entitlement to work in the UK. Home Office guidance advises that employers should check all employees' documents (including British citizens'), in order to avoid the risk of discrimination.[142] Employers are required to retain copies of these documents in order to avoid the risk of incurring sanctions. Those who do not comply with their duties are liable to a civil penalty of up to £10,000 per illegal worker. Those who "knowingly" employ an illegal worker are liable to up to two years' imprisonment and/or an unlimited fine.

Over the past couple of years the number of civil penalties issued to businesses has decreased.[143] The Government's explanation is that this reflects employers' increasing awareness and compliance, and the effect of other immigration enforcement activity against overstayers. The number of arrests made as a result of illegal working enforcement operations has also reduced.[144] The Government has cited several factors to explain this, including tactical decisions concerning where to target suspected immigration offenders (for example, at a residential address rather than an employer's address) and an expansion in the type of enforcement activity conducted by enforcement teams.

The Government launched a public consultation on changes to the civil penalty scheme in summer 2013.[145] It considered that the civil penalty scheme had been effective in requiring employers to conduct checks, but that there was scope to improve it in order to increase the

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141 The UKBA website section on 'Preventing illegal working' includes a summary of employers' duties in respect of staff employed between 27 January 1997 and 29 February 2008 (accessed 10 October 2013).
142 UKBA, *Full Guide for employers on preventing illegal working in the UK*, May 2012, p.13
143 HC Deb 10 April 2010 c1147W
144 HC Deb 25 April 2013 cc134-5W
145 HC Deb 9 July 2013 c9WS

impact on 'rogue' employers and reduce the burdens on 'legitimate businesses'.[146] It proposed introducing tougher measures against employers of illegal workers, such as by increasing the maximum penalty to £20,000, whilst reducing the burdens on compliant employers, such as by simplifying the scheme.

The consultation paper said that there would be an increase in Home Office enforcement activity in 2013/14, and described the civil penalty scheme as the 'core component' of a wider strategy to address illegal working. Other measures referred to include working with other agencies to tackle abuses (e.g. local authorities, the UK Human Trafficking Centre and the Gangmaster Licensing Authority), and sharing intelligence with other public sector enforcement bodies such as HMRC and DWP.[147]

The Bill

The Bill seeks to make some changes to the civil penalty scheme for employers.

Clause 39 would amend employers' rights to appeal to a court against a civil penalty, as currently provided for by section 17 of the 2006 Act. Employers would only be appeal to a court against a penalty notice if they had already exercised their right to object to a penalty notice to the Home Office (as is provided by section 16 of the 2002 Act). Currently, employers can appeal to a court irrespective of whether they make an objection to the Home Office. The Government anticipates that this change will potentially reduce costs for employers and the Home Office.[148] This proposal had not been included in the Home Office's summer 2013 public consultation.

Clause 40 is intended to improve the recovery of unpaid civil penalty debts. It would amend section 18 of the 2006 Act, in order to allow an outstanding penalty to be registered with the court as if it were a debt due under a court order. This would enable enforcement action to begin immediately. The public consultation document had included this proposal, but had not specifically invited responses on this point.

In addition to the measures in the Bill, the Government intends to amend existing secondary legislation in April 2014 in order to increase the maximum civil penalty from £10,000 to £20,000 and simplify the processes employers must follow in order to check entitlement to work.[149] 62 per cent of respondents to the consultation had agreed with the proposal to increase the maximum civil penalty to £20,000.[150]

3.5 Driving licences

The Bill

Clause 41 would put into statute informal arrangements that have been in place since 2010 to restrict the grant of a provisional or full driving licence to foreign-born applicants who have at least 6 months (185 days) leave to remain in the United Kingdom.[151] This applies only to

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146 Home Office, *Strengthening and simplifying the civil penalty scheme to prevent illegal working consultation document*, 9 July 2013, para 14
147 *Ibid* para 18
148 Home Office, *Immigration Bill Factsheet: Work* (clauses 39-40), October 2013
149 Home Office, *Immigration Bill Factsheet: Work* (clauses 39-40), October 2013
150 Home Office, *Strengthening and simplifying the civil penalty scheme to prevent illegal working results of the public consultation*, 10 October 2013
151 HC Deb 25 March 2010, c70WS

applicants who are not covered by other agreements with the European Economic Area (EEA) and individual 'designated countries', who only need to prove residency.[152]

Clause 42 introduces new powers for the Secretary of State (in practice the DVLA) to revoke a licence on the grounds of immigration status (as set out in clause 41) and provides a right to appeal that decision to a Magistrates' Court.

Driving in GB on a foreign licence

At present you can drive in the UK on a foreign licence until the licence expires, if that licence was issued in an EEA country or in a 'designated country'. You can exchange your EEA/designated country licence for a GB one within five years of becoming resident in the UK.

If you come to the UK from any other country you may only drive on your foreign national licence for 12 months, after which you must apply for (and undertake the relevant tests) to obtain a GB licence and continue driving.

What would the Bill do?

The Bill would require anyone who does not have an EEA or designated country driving licence to prove that they have at least 6 months (185 days) leave to remain when applying for a GB driving licence.

Foreign nationals from EEA or designated countries must prove that they are normally and lawfully resident in order to exchange their foreign issued licence for a GB one. In the case of EEA nationals 'normally' resident is defined to include those studying in the UK, even though they may legally reside in another country.

The DVLA would have new powers to revoke a licence issued to someone who does not meet the immigration requirement in clause 41. The affected party would be able to appeal this decision to a Magistrates' Court.

The Bill makes equivalent provision for Northern Ireland by amending the relevant Order.

Who does it affect?

Foreign nationals from non-EEA or non-designated countries who wish to obtain a GB or NI driving licence.

The Government anticipates introducing these measures in 2014.

Why is the Government introducing it?

The Government believes that these changes would allow it to restrict the illegal use of driving licences to establish an identity, and discourage illegal and uninsured driving. The Home Office and the relevant agencies (DVLA in GB and DVA in NI) intend to monitor the initial impact of the new provisions. Immigration Minister Mark Harper said: "It has previously been too easy for those here illegally to hold a UK driving licence and use it not only for driving, but as a piece of identification to help them access benefits, services and employment to which they are not entitled".[153]

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[152] 'designated countries' are: Andorra, Australia, Barbados, British Virgin Islands, Canada, Faroe Islands, Falkland Islands, Gibraltar, Hong Kong, Japan, Monaco, New Zealand, Republic of Korea, Singapore, South Africa, Switzerland, Zimbabwe

[153] Home Office, *Immigration Bill Factsheet: Migrants' access to UK driving licences (clauses 41-42)*, October 2013

4 Part 4: Marriage and Civil Partnership

Background

The *Marriage Act 1949* and the *Matrimonial Causes Act 1973* govern the law on marriage in England and Wales. Scotland and Northern Ireland have their own legislation. Under section 31 of the 1949 Act the notice period for a marriage is 15 days.

The *Civil Partnerships Act 2004* (section 11) contains a "waiting period" of 15 days for a proposed civil partnership.

An overview of the current requirements for giving notice of an intention to marry or enter into a civil partnership in England and Wales is available on the Gov.uk website.[154]

Successive Governments have sought to prevent marriages entered into in order to obtain an immigration advantage ('sham marriages').

There are different provisions for non-EEA nationals to obtain permission to remain in the UK as a partner, depending on whether the relationship involves a British citizen or person settled in the UK, or an EEA national.[155] In either case, they do not apply to marriages of convenience.

Marrying a British citizen or person settled in the UK does not automatically entitle a non-EEA national to live in the UK. Non-EEA nationals, including family members of British citizens, settled persons and refugees, are subject to the UK's Immigration Rules.[156] The circumstances in which EEA nationals and their family members have a 'right to reside' in the UK are set by European law.[157] The Government considers that there is particular scope for abuse of applications made under European law, because the requirements are significantly less onerous than the Immigration Rules.[158] For example, a non-EEA national who marries an EEA national who is exercising free movement rights in the UK acquires a right to reside as an 'EEA family member', regardless of their immigration status at the time of the marriage. They do not have to apply to the Home Office for permission to stay in the UK, but can apply for documentation confirming their right of residence as an EEA family member if they wish.[159] They are required to provide evidence of their relationship, such as a marriage certificate, but are not required to satisfy accommodation and maintenance or language requirements, or to show that the relationship is subsisting at the point of applying for documentation (unlike applications considered against the Immigration Rules).[160]

The Home Office receives advance notice of suspected sham marriages and civil partnerships through notifications from registration officers, and through its enforcement and intelligence activity. The Impact Assessment for this part of the Bill states that more than half of the reports of suspected sham marriages in 2012 applied to cases that would be considered under EU law.[161]

Sections 19-25 of the *Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004* ('the 2004 Act') introduced a package of measures which were designed to deter sham marriages.

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154 Gov.uk, Guide 'Marriages and civil partnerships' (undated; accessed 16 October 2013)
155 There are also specific rules for partners of temporary migrants.
156 Immigration Rules, (HC 395 of 1993-4 as amended), Appendix FM
157 Directive 2004/38 EC, transposed by SI 2006/1003 (as amended)
158 Home Office, *Impact Assessment Tackling Sham Marriage* IA NoHo0090, October 2013
159 See UKBA website, 'Residence documents for non-EEA family members of EEA nationals' (undated; accessed on 11 October 2013)
160 UK Visas & Immigration, *EEA Guidance Notes v08/13*, August 2013
161 Home Office, *Impact Assessment Tackling Sham Marriage* IA NoHo0090, October 2013

As a result, people subject to immigration control who wish to marry or register a civil partnership must give notice to a registrar at a designated register office. Guidance issued by the Church of England in 2011 aimed at preventing sham marriages advises clergy not to offer to publish banns for any proposed marriage involving a non-EEA national, but to direct the couple to apply for a common licence, and to inform persons responsible for granting the licence if they are not satisfied that the marriage is genuine.[162]

Sections 24 and 24A of the 2004 Act also gave registration officers a duty to report to the Home Office any reasonable suspicion they have that a marriage/civil partnership is a sham being entered into to avoid the effect of UK immigration law or the Immigration Rules. There were 1,891 section 24 reports in 2012 (a 9% increase on 2011); some level of under-reporting is suspected.[163]

Furthermore, the 2004 Act introduced a 'certificate of approval to marry' requirement, which came into effect in February 2005.[164] The scheme required non-EEA nationals who had entered the UK without a visa granted expressly for the purpose of marrying to obtain a 'certificate of approval to marry' from the UKBA before they could marry or register a civil partnership, unless they intended to have an Anglican wedding.

The scheme initially resulted in a significant reduction in the number of suspected sham marriage reports (from around 3,500 reports in 2004 to 450 in 2005).[165] Persons granted less than six months' leave to remain, persons with less than three months' leave remaining, and persons without valid immigration leave were initially denied permission to marry. However following a series of legal challenges the Home Office had to change the terms of the scheme, so that it could no longer deny certificates of approval to migrants in these circumstances. The scheme was ultimately abolished after it was found to be incompatible with ECHR Article 14 (non-discrimination) read with Article 12 (right to marry), because it did not apply to marriages in the Anglican Church.

A 2011 Home Office public consultation on *Family Migration* included some proposals intended to prevent sham marriages.[166] The Government announced the outcome of the consultation in June 2012.[167] The Government's response indicated that several of the proposals for preventing sham marriages remained under consideration.[168]

However, some of the significant changes to the Immigration Rules for non-EEA national partners of British citizens, settled persons and refugees introduced in July 2012 were intended to deter sham marriages/civil partnerships. The 'probationary period' before non-EEA national partners can apply for permanent settlement in the UK has been increased from two years to five years, in order to test the 'genuineness' of the relationship. Also, applicants are now required to satisfy a requirement that their relationship is 'genuine and subsisting' (previously, the Rules had required applicants to demonstrate that they intended to live permanently with their partner and that the relationship was subsisting).[169] Home

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[162] Church of England, *House of Bishops Guidance Marriage of Persons from Outside the European Economic Area*,11 April 2011

[163] Home Office, *Impact Assessment Tackling Sham Marriage* IA NoHo0090, October 2013

[164] Library Standard Note SN3780 *Immigration: Abolition of the certificate of approval to marry requirement* , 13 April 2011 provides an overview.

[165] Home Office, *Impact Assessment Tackling Sham Marriage* IA NoHo0090, October 2013

[166] UKBA, *Family Migration: A consultation*, July 2011. Library standard note SN06216 *Immigration: reforms to family migration routes* summarises the background to the consultation.

[167] Home Office, *Family migration: Response to consultation*, June 2012; Home Office, *Statement of Intent: Family migration*, June 2012

[168] Home Office, *Family migration: Response to consultation*, Annex A; see also Home Office, *Statement of Intent: Family migration*, June 2012

[169] Immigration Rules (HC 395 of 1993-4 as amended by HC 194 of 2012-13), Annex FM section E-ECP 2.6

Office caseworker guidance discusses how to approach assessing the 'genuineness' of a relationship.[170]

The Home Office frequently publicises details of enforcement operations against persons involved in sham weddings.[171] In September 2010, in a high profile case, a Church of England vicar was jailed for four years after he had been found to have deliberately failed to follow the correct procedures for marriage, as set out in the *Marriage Act 1949,* and conspiring to facilitate the commission of breaches of immigration law.[172]

The penalties applied to persons involved in sham marriages vary according to the circumstances of the case. Persons involved in sham weddings have been convicted of various immigration offences as well as other offences including bigamy, perjury and fraud.[173] Persons who obtain leave to remain in the UK by deception are liable to removal and subsequent exclusion from the UK.[174]

The Bill

The Bill seeks to give the Home Office greater scope to prevent and investigate suspected sham marriages/civil partnerships.

It would increase the notice period for all marriage and civil partnership cases in England and Wales from 15 days to 28 days (**Schedule 4**). This is in order to give the Home Office more time to act before the marriage/civil partnership happens.

Clauses 43 - 48 and Schedule 4 provide for the establishment of a new referral and investigation scheme for proposed marriages and civil partnerships in England and Wales. **Clause 48** gives an order-making power, so that the Secretary of State would be able to provide for the scheme to be extended to Scotland and Northern Ireland. The order would be subject to the affirmative resolution procedure.

The scheme would require registration officials to refer a proposed marriage/civil partnership to the Home Office, unless satisfied that each of the parties is an "exempt person". "Exempt persons" are those who are:

- British citizens, EEA or Swiss nationals; or
- Persons settled in the UK or who have a right of permanent residence in the UK under EU law, or persons exempt from immigration control (to be defined in regulations); or
- Persons who have a relevant visa for marriage or civil partnership (to be defined in regulations).

Upon receipt of a referral, the Secretary of State would have to decide within the 28 day notice period whether to investigate whether the proposed marriage or civil partnership is a sham, and give notice of her decision to the registrar and both parties to the marriage/civil partnership. **Clause 46** gives the Secretary of State the power to prescribe in regulations what information must be included in such a notice. She can only decide to investigate in

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170 UKBA, *Immigration Directorates Instructions*, Chapter 8 Appendix FM (Family members), section 2.0 (undated; accessed on 16 October 2013)

171 See, for example, UKBA *news release*, 'East London sham marriage fixer jailed', 11 October 2013; 'Arrest at suspected sham wedding in Blackburn', 23 September 2013; 'Bogus groom jailed for sham marriage', 31 March 2011

172 'Vicar jailed over sham marriages', *The Independent*, 6 September 2010

173 HC Deb 1 April 2011 c552-3W

174 *Immigration and Asylum Act 1999*, s10(1) and Immigration Rules (HC 395 of 1993-4 as amended), para 320(7B)

cases in which one or both parties are not an exempted person and she has reasonable grounds for suspecting that it is a sham. Decisions to investigate would take into account information such as reports of suspicions from registration officials and intelligence-based risk profiles.[175]

Cases under investigation would have their notice period extended to 70 days, in order to allow time for the Home Office to conduct its investigation. Details of how such investigations would be conducted are to be set out in regulations and guidance. The investigation would also consider whether the parties complied with the investigation; again, details of how this would be assessed, and the consequences of failure to comply, are to be set out in regulations.

At the end of the 70 day period, if the couple have been found to have complied with the investigation, the registrar would issue their certificates. The couple would then be free to marry/enter into a civil partnership, even if the investigation had found evidence to suggest a sham marriage/civil partnership. However, marriage/civil partnership would not prevent the Home Office from taking enforcement action against the non-EEA national (e.g. curtailing leave or enforcing removal from the UK), or prevent it from refusing a subsequent immigration application based on the marriage/civil partnership.

Registrars would not be able to issue certificates to couples found not to have complied with an investigation. The couple would have to give notice again if they still wished to marry/enter into a civil partnership.[176]

Clause 47 and Schedule 4 make related amendments to the *Marriage Act 1949* and the *Civil Partnerships Act 2004* in support of establishing the referral and investigation scheme, such as by increasing the range of information that registrars must collect during the preliminaries to marriage/civil partnerships.

Clause 49 amends the definitions of "sham marriage" and "sham civil partnership" in existing legislation, in particular so that regulations transposing EU free movement laws are covered by the reference to "UK immigration law".

The Government considers that superintendent registrars are better placed than the Anglican Church officials to establish whether a proposed marriage should be referred to the Home Office.[177] **Clause 51** therefore provides that couples would only be able to marry in the Anglican Church following banns of marriage if both parties are British/EEA/Swiss nationals. Other couples would be able to marry in the Anglican Church after obtaining certificates from a superintendent registrar[178] **Clause 52** amends the requirement to give notice to a designated register office, so that it applies to both parties, where either one is not a British/EEA/Swiss national or a non-EEA national exempt from immigration control.

Clause 50 extends registrar's duties to report suspicious marriages/civil partnerships to the Home Office, in order to include information received in advance of a person giving notice. **Clause 53 and Schedule 5** extend powers for information-sharing between the Secretary of State and registration officials for immigration and crime-fighting purposes.

The Bill's accompanying ECHR memorandum sets out the Home Office's view on how these clauses are compatible with the ECHR. It includes some discussion of current case law and

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[175] Home Office, *Immigration Bill Factsheet: sham marriages and civil partnerships (clauses 43-56)*, October 2013

[176] Home Office, *Immigration Bill European Convention on Human Rights Memorandum by the Home Office*, October 2013, para 149

[177] *Ibid* para 161

[178] Unless provisions for Special Licence or preliminaries on board a ship apply.

the differences between the proposed referral and investigation scheme and previous measures such as the certificate of approval scheme.

The Government anticipates that the referral and investigation scheme would come into effect from April 2015, after an extensive public information campaign.[179] In the meantime, it intends to engage with registration officials and the Churches of England and Wales, in order to develop the detailed arrangements of how the scheme will work. It is also discussing with the Scottish Government and Northern Ireland Executive how the scheme could be extended to the whole of the UK. The related Home Office factsheet acknowledges that Scotland has legitimate marriage tourism which the Government wishes to protect, but notes that the Scottish Government also has concerns about sham marriage, and is already taking action to extend the notice period in Scottish law to 28 days.[180]

5 Part 5: Oversight

Background

Concerns about the quality of legal advice in the immigration and asylum sector led to the creation of a scheme to regulate immigration advisers and service providers, through provisions in Part V and Schedules 5 and 6 of the *Immigration and Asylum Act 1999* (as amended) ('the 1999 Act'). The scheme is monitored and enforced by an Immigration Services Commissioner and the First-Tier Tribunal (Immigration Services). The scheme came fully into force on 30 April 2001.[181]

Put briefly, it is an offence under the 1999 Act for a person to provide immigration advice and services unless they are:

- authorised to practise by a designated professional body (e.g. the Law Societies);
- registered with the Immigration Services Commissioner; or
- exempted either by the Immigration Services Commissioner or the Secretary of State.[182]

The Commissioner has a duty to promote good practice and secure, so far as is reasonably practicable, that persons providing immigration and services are competent to do so, act in the best interests of their clients, do not mislead the courts or tribunals, and do not seek to abuse immigration procedures or advise others to do so.

Organisations offering immigration services for a fee are required to register with the Office of the Immigration Services Commissioner (OISC) and are charged a fee for registration, whereas organisations that do not charge for their services must seek exemption from the requirement to register, and do not have to pay a registration fee.

There are three different competence levels which determine the type and range of work that OISC regulated advisers may undertake. The OISC investigates complaints against OISC regulated immigration advisers and those who are giving advice unlawfully. Appeals against decisions taken by the Commissioner are heard by the First-Tier Tribunal (Immigration Services). The register or regulated immigration advisers (those who charge a fee for their

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179 Home Office, *Immigration Bill Factsheet: sham marriages and civil partnerships (clauses 43-56)*, October 2013

180 *Ibid*

181 Library Standard Note SN2733, *Regulation of immigration advisers*, 6 November 2003 provides some background information.

182 The prohibition does not apply to Crown officers or employees of government departments when acting in that capacity.

services), a list of not-for-profit advisers, and details of advisers who are currently prohibited from providing advice, are available from the OISC website.

The Home Office factsheet for this part of the Bill states that there were 1,971 regulated bodies as at 31 March 2013 ranging from sole traders to national charities and specialist advice services.[183] The Government considers that the immigration advice sector continues to attract "opportunistic and unscrupulous" advisers, and that the Immigration Services Commissioner's powers need strengthening.

The Bill

Clause 57 and Schedule 6 would amend the 1999 Act in order to extend the powers of the Immigration Services Commissioner, so that she could:

- immediately cancel unfit, incompetent or defunct organisations' registration (currently, this can take longer);
- suspend an adviser charged with a serious criminal offence;
- require entry to business premises to conduct investigations (currently, she can only require entry to investigate a specific complaint); and
- require entry to a business operating from a private residence to conduct an investigation or complaint.

The regulatory scheme would also be simplified. All advice organisations would be required to register with the OISC, but there would remain scope to waive a requirement to pay a fee for certain organisations, such as advisers that do not charge for their services.

The Government anticipates that the proposed changes will lead to improvements in the quality of immigration advice, which in turn will protect clients from exploitation and prevent unmeritorious applications and appeals, with associated savings of public funds.[184]

6 Part 6: Miscellaneous

6.1 Embarkation checks

Background

Embarkation ('exit') checks on persons departing the UK were abolished in two stages, in 1994 and 1998.[185] The Government is committed to re-introducing exit checks by March 2015.[186] It has been considering how these may operate, and how the e-Borders system can assist.

E-Borders technology enables detailed information about individual travellers to be electronically collected before, during and after their passing through UK ports of entry/exit, checked against immigration, police and security 'watch lists', and shared between agencies. Watch-list checks and alerts are made by Home Office, National Crime Agency and police staff working from the National Border Targeting Centre. e-Borders is being progressed

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183 Home Office, *Immigration Bill Factsheet: Immigration Advisers and Immigration Service Providers (clause 57),* October 2013

184 Home Office, *Immigration Bill Factsheet: Immigration advisers and Immigration Service Providers (clause 57 and Schedule 6)*, October 2013

185 Home Affairs Committee, *Immigration Control*, 23 July 2006, HC 775-I, para 442

186 HC Deb 30 October 2012 c180W

through the Border Systems Programme, which is led by the Border Force (a Home Office 'command').[187]

Successive governments have been working with private sector contractors to establish the e-Borders scheme since 2003.[188] The anticipated benefits of the system included that it would enable a comprehensive record of everyone who crosses UK borders and provide more accurate information on migration to and from the UK.[189] £475 million was spent on the programme between April 2007 and March 2013.[190]

The original implementation timetable had anticipated that e-Borders would be collecting details of 95 per cent of passengers and crews by December 2010, and be fully operational by March 2014 (i.e. covering all international travellers using all ports, including matching their arrivals to their departures).[191]

In fact, the implementation of e-Borders is behind schedule. Several factors have contributed to the delays. The Government terminated its £750 million contract with Raytheon Systems Limited, the "prime supplier" for delivery of the e-Borders programme, in light of its disappointing record of delivery and missed deadlines.[192] The Government and Raytheon are now in a binding arbitration process which may not be resolved for many more months.[193] Implementing e-Borders has also posed some major operational, legal and sector-specific difficulties. In particular, there has been uncertainty about whether certain transport sectors would be able to accommodate the e-Borders requirements (particularly the railway and maritime sectors), and whether e-Borders can be compatible with EU freedom of movement law and other countries' national data protection laws.[194] The Government now considers that in light of such factors, which potentially limit the volume of passenger data that e-Borders can capture, it is not possible to set absolute targets for collection of passenger data.[195]

The Independent Chief Inspector of Borders and Immigration published a critical inspection report on e-Borders the day before the *Immigration Bill* was published, which was based on investigations conducted between October 2012 and March 2013.[196] He found that whilst e-Borders had resulted in significant benefits for the police, it is yet to deliver many of the benefits to immigration control that were originally anticipated.

It reported that as at March 2013, the proportion of passenger data that e-Borders was collecting was as follows:

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187 HL Deb 4 July 2013 c1383

188 Library Standard Notes SN5771, *The e-Borders Programme*, 23 November 2010 and SN3980, e-*Borders and Operation Semaphore*, 7 November 2008 provide some background information.

189 UKBA website, How does e-Borders work? [National Archives version; as at 8 April 2010]

190 HC Deb 15 April 2013 c38W

191 HC Deb 14 January 2010 c1087W

192 HC Deb 22 July 2010 c44-45WS

193 HC Deb 19 June 2013 c686W

194 As discussed in Home Affairs Committee, *The E-Borders Programme*, HC 170, 18 December 2009; Home Affairs Committee, *Follow-up on E-Borders and Asylum Legacy Cases*, HC 406, 7 April 2010 and *Follow-up of Asylum Cases and e-Borders Programme: Government Response to the Committee's Twelfth Report of Session 2009-10*, HC 457, 16 September 2010

195 HC Deb 24 April 2013 c943W

196 Independent Chief Inspector of Borders and Immigration, '*Exporting the Border?' An inspection of e-Borders October 2013 - March 2013*, 9 September 2013 (footnotes omitted)

Figure 6: e-Borders data received as at 04/03/13	
Total Passenger Movements (air, sea, rail)	65%
International Air	80%
EU Air	70%
Non EU Air	100%

The Chief Inspector concluded that e-Borders has not yet delivered on one of the key benefits referred to in successive business cases, namely the ability to count people in and out of the UK (such as for the purpose of immigration statistics). This is because e-Borders does not collect some of the data which is needed to compile population or migration statistics (for example, the purpose of travel and length of intended stay/departure).[197] The inspection report went on to consider how e-Borders supports exit checks in particular, and noted that Border Force does not use e-Borders information to intercept departing passengers:

> **Exit checks**
>
> 8.54 E-Borders was providing a clear benefit to the former UK Border Agency in identifying individuals who had left the UK following an adverse immigration decision. This was achieved by NBTC staff monitoring the Semaphore system for 'outbound matches' to identify individuals who fit this criteria. The former UK Border Agency was then able to formally claim a voluntary departure and close the corresponding file.
>
> 8.55 This allowed the Agency to concentrate its efforts on other casework rather than looking for individuals that had already left the country. Management information provided to us indicated that approximately 2,700 cases had been closed between April and November 2012 as a direct result of e-Borders analysis.
>
> 8.56 However, this was only one element of what is involved in an exit check. In order for e-Borders to be used as the basis for the delivery of the Ministerial commitment to introduce exit checks by 2015, it must be capable of facilitating physical interventions where appropriate. We found that the Police did mount interventions against passengers leaving the UK as a result of information provided by e-Borders. In contrast Border Force was not able to exploit the system to intercept departing passengers because:
>
> - outbound immigration matches were not processed in real time; and
> - virtually all outbound commodity matches were deleted without further examination.
>
> 8.57 Border Force will need to address these issues and ensure that resources are available to conduct the necessary interventions at ports if e-Borders is to be used as the basis to deliver the commitment to introduce exit checks.[198]

The Home Office factsheet on this part of the Bill reasserts the Government's commitment to reintroducing exit checks by 2015.[199] It states that partnership working with carriers will be part of the solution to reintroducing exit checks.

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[197] ONS, *Migration Statistics Improvement Programme, Final Report* , 27 March 2012 sets out the potential benefits and obstacles to using e-Borders data to measure migration.

[198] Independent Chief Inspector of Borders and Immigration, '*Exporting the Border?' An inspection of e-Borders October 2013 - March 2013*, 9 October 2013

[199] Home Office, *Immigration Bill Factsheet: Embarkation Checks (clause 59 and Schedule 7)*, October 2013

The Bill

The Bill would provide for third parties, such as port and transport carrier staff, to play a role in implementing exit checks on persons departing the UK.

Clause 58 and Schedule 7 would enable designated transport carrier and port operator staff to exercise immigration officers' powers to examine persons departing the UK.

Staff designated by the Secretary of State could have powers to establish information including a person's nationality and identity, whether their entry to the UK was lawful, whether they have complied with conditions attached to their leave to enter/remain in the UK and whether their return to the UK is prohibited or restricted. Persons under examination would be under a duty to provide the designated person with all information in their possession as may be required in the exercise of their functions, and may be required to provide specified documents or declare whether they have/had a document that the designated person considers relevant for the examination. Designated persons would have powers to examine and detain a passport or other documentation pending its inspection by an immigration officer as soon as reasonably practicable. Passengers under examination may be required to provide biometric information to a designated person in order to determine whether documentation belongs to them.

Immigration officers already have similar powers under Schedule 2 of the *Immigration Act 1971* (as amended) ('the 1971 Act').

The Bill states that the Secretary of State may only designate persons who she is satisfied are capable of effectively carrying out the functions, have received adequate training in respect of them, and are "otherwise suitable". Designation may be subject to limitations, such as with regards to the functions which may be exercised or the period it lasts for. The Secretary of State may direct carriers and port operators to make specific arrangements to enable designated persons to exercise their specified functions. Failure to comply with such a direction without reasonable excuse would be an offence under section 27 of the 1971 Act.

The related Home Office factsheet states that the Government will continue to discuss its plans for implementation with the relevant industries.[200] It contends that integrating exit checks with existing processes at ports will help to minimise the disruption to legitimate travellers.

6.2 Fees

Background

Fees policy under the current and previous Labour governments has reflected the view that the persons who benefit most from the UK's immigration system (i.e. the applicants) should contribute towards its costs. The proportion of costs that applicants cover has steadily increased in recent years, in order to reduce costs to the general taxpayer. Fees for visa, immigration and nationality applications and services are published on the UK Border Agency website.[201] The Home Office estimates that around half of the costs of the UK immigration system will be covered by fees income in 2013/14.[202]

Library Standard Note SN06602 *Immigration application and appeal fees* summarises the current arrangements. Put briefly, fees are calculated to reflect, to varying degrees, the administrative cost of processing applications and other immigration functions, and the value of the entitlements that an applicant obtains in the event of a successful application.

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[200] Home Office, *Immigration Bill Factsheet: Embarkation Checks (clause 59 and Schedule 7)*, October 2013
[201] UKBA website, 'About Us/Fees for our services' (undated; accessed on 16 October 2013)
[202] Home Office, *Fees and Charges proposals in HO Immigration Bill 2013 IA No: HO0091*, October 2013, p.3

Three separate regulations implement the current fees regime. One set of regulations specify the types of application, services and processes for which a fee may be charged. The actual fees are then set out in two other sets of regulations: one details fees charged at or below unit costs (and is subject to the negative resolution procedure), another specifies the fees which are above unit cost (and is subject to the affirmative process).

Fees are generally reviewed and updated on an annual basis. The Government considers that the current legislative arrangements are complex and do not give it sufficient flexibility to amend fees more frequently, or take a wider range of factors into account when setting fees.[203]

The Bill

The Bill would replace existing fees legislation, in order to give the Government greater flexibility over how it determines and amends fee levels.

Clauses 59 and 60 of the Bill would "simplify and streamline" processes for setting fees and give the Government greater flexibility over the setting of fees.

Clause 59 provides that the Secretary of State would have the power to charge a fee "in respect of the exercise of functions in connection with immigration or nationality." The range of chargeable functions would be specified in a fees order, subject to the draft affirmative procedure. The fees order would specify how the fee is to be charged (for example whether as a fixed amount or with reference to an hourly rate or other factor), and minimum and maximum charges that may be applied for each function.

The amount of the fee to be charged would be set in regulations, subject to the negative resolution procedure. This is intended to give the Government greater flexibility to be able to change fees quickly.

A greater range of factors could be taken into account when setting fees than under the current legislation, namely:

- The costs of providing the immigration function, or other functions connected with immigration or nationality
- The benefits the Secretary of State thinks the 'customer' is likely to obtain
- The promotion of economic growth
- Fees charged by other countries for comparable functions
- International agreements (e.g. bilateral agreements about visa fee levels).

Clause 59(12) would enable different amounts to be charged for the same type of application/service in different circumstances, for example so that concessions can be made in order to encourage particular types of application or applicant.

Powers to make exceptions, reductions, waivers, refunds etc in fee regulations, as currently provided by section 51 of the *Immigration, Asylum and Nationality Act 2006*, are retained.

[203] Home Office, *Immigration Bill Factsheet: Fees (clauses 59-60)*, October 2013

The Home Office has published an Impact Assessment on these clauses, including a table detailing current fees and proposed fee increases up to 2015/16 (at Annex 2).[204]

The Government intends to conduct a public consultation in autumn 2013 "to help set our priorities for how we use this new flexibility to promote economic growth and fund the immigration system."[205]

7 Part 7: Final Provisions (Commencement, territorial extent, etc.)

Clause 64 sets out the commencement provisions.

Clause 65 provides that the Bill would apply to England and Wales, Scotland and Northern Ireland, apart from section 53 and Schedule 5, which would apply to England and Wales only.

[204] Home Office, *Fees and Charges proposals in HO Immigration Bill 2013 IA No: HO0091*, October 2013
[205] Home Office, *Immigration Bill Factsheet: Fees (clauses 59-60)*, October 2013