Right to Rent Part Two: The Pressure Increase

This article relates to the law in England only

In the second part of our series of articles looking at Right to Rent, Martin Coates examines the impact of Part 2 of the Immigration Act 2016 on the private rental sector.

In the article 'Identity is the Crisis' in Adviser 174, the author explained about the provisions of the Immigration Act 2014 that related to the rental of private rented accommodation in England.

For all new tenancies and licences in England from 1 February 2016, a private landlord is required to undertake immigration checks on all occupiers of dwellings let under a tenancy or licence where rent is paid. This requirement also applies to letting agents and all references to landlord in this article apply equally to agents. All prospective tenants and their adult occupiers now need to show that they have a 'Right To Rent' (RTR) in England by providing the landlord with relevant documentation that shows that they have a right to reside in the UK. If they do not have that documentation at hand, those occupiers are likely to have difficulties in accessing private rented accommodation.

Any landlord who rents out property to a household that includes any adult occupier without the RTR has been liable to a fine of up to £3,000 in relation to that occupier. It has been estimated that 2.6 million people a year occupying premises under new tenancies could be subject to the immigration checks and approximately 1.8 million private landlords will be required to undertake the necessary checking. Please refer back to the previous article in Adviser 174 for full details on who does and who does not have a RTR, which tenancies are excluded from the legislation, how the checking of documents is to be undertaken and full details on the civil penalties to landlords.

Further legislation in force from 1 December 2016 will now increase the pressure on landlords to ensure that they do not breach the legislation and gives them new powers to end the tenancy where an occupier does not have a RTR.

The new legislation.

Part 2 of the Immigration Act 2016 builds on existing measures in the Immigration Act 2014 and received Royal Assent on 12 May 2016. Sections 39-42 concern residential tenancies and most relevant sections came into force on 1 December 2016. The Immigration Act 2016 amends the Immigration Act 2014 in three main areas.

- New criminal offences for landlords who breach the Act
- A 'notice only' ground/eviction without court order where all occupiers have no RTR
- Mandatory grounds for possession where at least one occupier has no RTR

This article looks at the three main areas of amendment to the IA 2014 by the IA 2016 in relation to the private rented sector in England.

Criminal offences
New amendments to the 2014 Act have created a new criminal offences applicable to landlords/agents who let properties to migrants who do not have a RTR (1). See Box 1.

Box 1 starts
The Criminal Offence - Landlords
Landlords will commit a criminal offence under s.33A IA 2014 if two conditions are satisfied:

1) the premises are occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement; and
2) the landlord knows, or has reasonable cause to believe, that the premises are occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement.

However, unless the Secretary of State has given a notice in writing to the landlord which identifies an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement, the offence will not apply where -

- RTR is in force and
- the adult occupant has a "limited right to rent" (2), and
- the eligibility period on that limited leave has not expired (3).

It is also an offence under s.33A(10) IA 2014 if there has been a post-grant contravention in relation to a residential tenancy agreement which relates to premises in England by the landlord, and the landlord knew, or had reasonable cause to believe that, there has been a post-grant contravention in relation to the agreement, and none of the following excuses under s.24(6) IA 2014 apply:

- The landlord has notified the Secretary of State of the contravention as soon as reasonably practicable;
- A person acting as the landlord's agent is responsible for the contravention;
- The eligibility period in relation to the limited right occupier whose occupation caused the contravention has not expired.

Box 1 ends

There are similar provisions introducing criminal offences in respect of letting agents but the difference where the agent commits a criminal offence is where the agent:

- knew, or had reasonable cause to believe, the landlord would contravene section 22 by entering into the residential tenancy agreement in question,
- had sufficient opportunity to notify the landlord of that fact before the landlord entered into the agreement, but
- did not do so. (4)

It is a defence for a landlord charged with an offence under s.33A(1) to prove he has taken reasonable steps to terminate the tenancy within a reasonable period beginning with the time when he first knew, or had reasonable cause to believe, the premises were occupied by the applicable occupier with no RTR. In determining whether such a defence applies to the landlord, the court must have regard to any guidance which, at the time in question, had

been issued by the Secretary of State and was in force at that time. Guidance was issued in December 2016 and it provides details on how the landlord can take reasonable steps to end the tenancy (5).

The reasonable steps to end the tenancy

Any steps the landlord takes to terminate the tenancy have to be in accordance with the law. There must not be an unlawful eviction. The reasonable period of time allowed for the termination is the time needed to allow for landlords to seek to end the tenancy through agreement with tenants (mutual surrender) or to take the necessary steps to lawfully end a tenancy agreement by other routes (possession action).The clock starts ticking from the point when the landlord first knew, or had reasonable cause to believe, a tenant or occupant of the property was disqualified. It is important for the landlord that he can show evidence of his efforts to terminate the tenancy.

The simplest way for the landlord to end a tenancy is through agreement where the tenant agrees to 'mutually surrender' the tenancy. Where this is possible there will be no need for eviction action. That will avoid potential court costs for the occupiers and the landlord, although for the the occupiers with no RTR and little to no housing options available, that will be the least of their problems. It would be advisable for the landlord that the tenant surrender the tenancy in writing.

Alternatively, where there is a household where some tenants or occupants are not the subject of a notice from the Home Office, or they do have a RTR, the guidance suggests the landlord might get the tenants and other occupiers to agree that the disqualified person or persons (possibly in many cases, family members) should leave the property and the tenancy can continue. In most family situations, the possibility of this scenario occurring simply stretches credibility to its limit. It will be difficult for families to cast other family members with no RTR out of the property with little to no housing options available.

In most cases, it will be expected that the landlord would have to resort to s.21 possession action (if applicable) or by using the new mandatory Ground 7B within Schedule 2 Housing Act 1988 (applicable only if the Secretary of State has given a notice identifying that an occupier is disqualified).

If a landlord is undertaking further checks on someone with a time limited RTR and finds that they are now a disqualified person because the time limited period has come to an end, or the landlord has reasonable cause to believe that this is the case, the landlord must notify the Home Office as soon as reasonably practicable, otherwise they will risk prosecution for the offence at s.33A(10) of the Immigration Act 2014. If an agent is undertaking the checks and discovers, or has reasonable cause to believe, the tenant or occupant is disqualified, they must notify both the landlord and the Home Office as soon as reasonably practicable or they will risk committing the s.33B(4) offence.

The penalties for landlords

A landlord, or agent, who is guilty of the offence under sections 33A or 33B is liable on conviction to imprisonment for a term of up to five years (on indictment) and up to twelve months (on summary conviction) and/or a fine (s.33C). This applies whether or not the

landlord is given a penalty notice by the Secretary of State under s.23 in respect of the contravention.
These criminal offences now mean that there are serious repercussions for a landlord or agent who breaches the RTR regulations.

The Residential Landlords Association has reported that a total of 91 landlords have been issued with civil penalties since the RTR right to rent scheme was brought into force in February 2016 (6). The Government reported that landlords have been fined a total of nearly £30,000 and 667 enquiries were made to the Home Office's landlords checking services specifically regarding tenants without the RTR.

The majority of offences related to lodgers living in England without a right to rent in the UK. It was also confirmed none of the landlords involved had appealed the penalties. The total amount collected in penalty fines up to 13 December 2016 was £29,575.31. With prison sentences now an option for the courts, landlords will need to ensure they make all necessary checks and, where necessary, maintain checks throughout the tenancy.

The flip side of landlords having to be very cautious in their approach to renting is that there is a real risk of latent discrimination against people in the UK who do have a RTR. Recent monitoring by the Joint Council for the Welfare of Immigrants (JCWI) of the possibility of discrimination has revealed that foreigners and British citizens without passports, particularly those from ethnic minorities, are being discriminated against in the private rental housing market as a result of the Right to Rent scheme (7). See Box 2.

Box 2 starts

JCWI impact report February 2017
JCWI's key findings in the report, which was compiled by surveying landlords, found the following:

- 51% of landlords stated the scheme would make them less likely to consider letting to foreign nationals.
- 42% of landlords stated they were less likely to rent to someone without a British passport.This rose to 48% when explicitly asked to consider the impact of the new criminal sanction.
- A white British tenant without a passport was 11% more likely to be ignored or turned down by landlords than a white British applicant with a passport. 17% of British citizens do not hold passports.
- A British Black Minority Ethnic (BME) tenant without a passport was ignored or turned down by 58% of landlords.
- 85% of inquiries from the most vulnerable individuals - asylum seekers, stateless persons, and victims of modern day slavery - who require landlords to do an online check with the Home Office to confirm they have been granted RTR, received no response at all from landlords.

Box 2 ends

The "Notice Only" Ground and eviction without a court order
These new provisions give private landlords new powers to evict tenants who do not have a RTR. There is a new "notice only" ground for possession for the landlord. This is a termination of the tenancy agreement but it only applies where all of the occupiers are disqualified from a RTR. (8)

The following condition has to be met: That the Secretary of State has given one or more notices in writing to the landlord which, taken together:

- identify the occupier of the premises or (if there is more than one occupier) all of them, and
- state that the occupier or occupiers are disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement.

Once the Secretary of State has given a notice to the landlord regarding the occupiers' disqualification from renting, the landlord may then terminate the residential tenancy agreement by giving notice in writing and in the prescribed form to the tenant or, in the case of a joint tenancy, all of the tenants specifying the date on which the tenancy agreement comes to an end (9). That date must not be earlier than the end of the period of 28 days beginning with the day specified in the notice as the day on which it is given.

The notice may be given:

- by delivering it to the tenant or tenants
- by leaving it at the premises,
- by sending it by post to the tenant or tenants at the address of the premises, or
- in any other prescribed manner.

The landlord notice is to be treated as a notice to quit in a case where a notice to quit would otherwise be required to bring the residential tenancy agreement to an end. More crucially, however, the notice is enforceable as if it were an order of the High Court. The landlord does not need to go to court for a possession order. Once the notice has expired, and if the occupiers have not left, the landlord will be able to instruct a High Court Enforcement Officer to enforce the notice.

Rather confusingly, it is not even necessary for a landlord to request HCEO/bailiff involvement to carry out an eviction as the Secretary of State notice under s.33D(2) means the tenancy is excluded from protection under s.3A Protection from Eviction Act 1977, and potentially eviction can actually take place by the landlord enforcing the eviction.

There is no statutory challenge to the service of a notice by the Secretary of State or landlord within the IA 2014. Any challenge to the notice would have to be via judicial review.

Where the Home Office has issued a notice explaining to a landlord that they are letting to a disqualified person, the landlord will effectively be on notice to act in regard to ending the tenancy. He will be in breach of the Act if he does not take the reasonable steps to end the tenancy. As explained above, the landlord may want to see whether it is possible to reach an agreement with the tenants about ending the tenancy, or getting the person with no RTR to

leave the property if the Secretary of State notice relates to one person where others do have the RTR.

In many cases, however, the landlord might decide to end the whole tenancy via possession action and evict the whole household, even if some occupiers do have a RTR.

In circumstances where all known tenants/occupants are named in one or more Home Office notices, the landlord will be required to serve a notice to quit on the tenant(s). Once the notice period has expired, the landlord will be able to take lawful possession of the property, with or without the use of High Court Enforcement Officers (HCEO). The landlord should not do this forcefully, and will usually have to rely on HCEO's where it is not possible to secure immediate vacant possession of the property.

Under s.133E, it is an implied term of a residential tenancy agreement - for example, a licence agreement - that the landlord may terminate the tenancy if the premises to which it relates are occupied by an adult who does not have RTR. For protected tenancies under the Rent Act 1977, and assured tenants under the Housing Act 1988, there are new mandatory grounds for possession.

The new mandatory ground for possession
There are new mandatory ground for possession within the Housing Act 1988 - Ground 7B under Schedule 2. The Rent Act 1977 has Case 10A within Schedule 15. These grounds will will be available for a landlord where the Secretary of State has given written notice that there is a tenant or adult occupiers living in the property who does not have a RTR.

These amendments to the HA 1988 and the RA 1977 came into force on 1 December and they apply retrospectively to all tenancies already in existence. Some tenants could be vulnerable to mandatory possession after living at the accommodation for many years - possibly decades - if their household contains a person who does not have the RTR.
If the new ground for possession are made out at court, the judge will have no discretion to consider the reasonableness of making a possession order. A mandatory possession order will be made. However, if there is at least one joint tenant who does have a RTR, the court will have the power to transfer the assured shorthold tenancy from a person who does not have a right to rent into the name of a joint tenant who does have the right to rent - the"qualifying tenant" (10). The court can only exercise this power if no other ground for possession is made out - i.e. - rent arrears grounds etc.

An order to transfer the tenancy does not operate to create a new tenancy between the landlord and the qualifying tenant or tenants, so if the tenancy is in a fixed term, the term will still come to an end at the same time as if the order had not been made.

There is no equivalent provision in respect of Rent Act 1977 tenants. If the ground is made out against a Rent Act tenant, they will lose the tenancy under mandatory possession.

The RTR legislation remains controversial with the housing sector, with concerns in regard to the lack of detailed impact assessments on its effects, particularly in the area of discrimination.

Aside from the JCWI recent survey - which is recommended reading - there is disquiet that the legislation is not working as a tool to create a 'hostile environment to illegal immigrants' but is actually denying access to accommodation for some of society's most vulnerable people, and leading to increases in latent discrimination in the private rented sector (11).

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Endnotes

1) ss33A-C IA 2014
2) s.21(4) IA 2014
3) s.33A(4) IA 2014
4) s.33B IA 2014
5) https://www.gov.uk/government/publications/ending-a-residential-tenancy-agreement
6) https://news.rla.org.uk/91-landlords-punished-right-rent-rules/
7) https://www.jcwi.org.uk/sites/jcwi/files/2017-02/2017_02_13_JCWI%20Report_Passport%20Please.pdf
8) S.33D IA 2014
9) http://www.legislation.gov.uk/uksi/2016/1060/made/data.pdf
10) s.10A(2) HA 1988
11) https://www.theguardian.com/housing-network/2017/feb/01/right-to-rent-immigration-checks-vulnerable-people-risk