

Identity Is The Crisis...

Martin Coates examines the details of 'Right to Rent' within the Immigration Act 2014 and the implications for the private rented sector in England.

The law in this article applies to England only.

It is fair to say that the Immigration Act 2014 provisions regarding 'Right to Rent' (hereafter referred to as RTR) have been controversial from the moment that they were outlined in the Immigration Bill in late 2013. Under the Immigration Act 2014, private landlords and letting agents are prohibited from authorising an adult to occupy property as their only or main home under a residential tenancy/licence where the occupier does not have a RTR due to their immigration status (1).

Opinion has been deeply divided on the expected impact of the provisions, both before and after the RTR sections of the Act were finally rolled out across the whole of the private rented sector in England on 1st February 2016.

The provisions were initially tested in a pilot scheme in five areas of the West Midlands from 1st December 2014, and were closely monitored by the Joint Council for the Welfare of Immigrants (JCWI). Their subsequent report highlighted a number of issues of concern, especially regarding potential discrimination (2). There remains an overall unease within the housing advice sector that the legislation roll-out could potentially lead to a divisive 'two tier' private rented sector, with tenants of diverse ethnicity and their family members facing potential latent discrimination and a reduction in viable access to the private rented sector.

It is estimated that at least 2.6 million people a year occupying premises under a new tenancy could be subject to the new immigration checks (3). It will mean that approximately 1.8 million private landlords will be required to check the immigration status of prospective tenants and occupiers from 1st February 2016. The legislation does not apply to existing tenancies which began before the commencement dates and does not apply to tenancy renewals entered into between parties who were in an existing tenancy relationship for the same property on the commencement dates. However, it does apply to any pre-existing tenancy prior to February 1st 2016 that has subsequently been 'varied', post commencement date, to include new occupiers, or where a tenancy is surrendered and a new tenancy entered into by the original occupiers/new occupiers after that date.

Why is this happening?

In October 2013, the Home Secretary Theresa May laid out the intentions of the then proposed Immigration Act on BBC Radio 4's Today programme. She stated 'Most people will say it can't be fair for people who have no right to be here in the UK to continue to exist as everybody else does with bank accounts, with driving licences and with access to rented accommodation. We are going to be changing that because we don't think that is fair.'

The intention, she said, was to 'create a really hostile environment for illegal migrants' because 'what we don't want is a situation where people think that they can come here and overstay because they're able to access everything they need' (4).

The 'immigration control' intention has been made clear - to ensure that 'illegal immigrants' are unable to establish settled lives in the UK – so how will the Act now affect private rented tenancies?

It all centres on a tenant and their adult household members requiring a RTR for new tenancies after the provisions came into force, and the landlord's responsibility for undertaking immigration checks to confirm the RTR prior to granting a tenancy. The intention, in effect, mirrors the existing employment laws regarding immigration status and having a 'Right to Work'. RTR in essence means being allowed to occupy residential accommodation in England by virtue of a qualifying immigration status. A

person with no RTR is disqualified from occupying premises held under a residential tenancy agreement. As people with no RTR are already ineligible for social housing (through the application of different rules), the options on getting accommodation are severely curtailed. Any private landlord facilitating such persons by renting out a property under a tenancy or licence to occupiers with no RTR will now leave themselves open to a penalty fine.

Who does this apply to?

The new legislation of RTR applies in regard to any person over the age of 18 who occupies private rented accommodation under a tenancy granted on or after the date of the commencement of the legislation (5). As stated, the legislation has already been in force in five areas of the West Midlands from 1st December 2014 and from 1st February 2016 it has been extended to the remainder of England.

It is important to emphasise that the legislation does not apply to any tenancies that existed before those dates or which are renewed after those applicable dates if the renewed agreement will be between the same parties and there has been no break in the tenant's right to occupy the premises.

Under the legislation, people will fall into three broad categories depending on their immigration status:

- People with an unlimited right to rent,
- People with a time-limited right to rent
- People with no right to rent.

See Box 1 for more details of these categories.

Box 1 starts

The RTR categories

1 - Unlimited right to rent

The greater majority of people in England will have an unlimited RTR if they can provide a valid document confirming that they are a:

- British or Commonwealth citizen with a 'right of abode' in the UK
- European Economic Area (EEA) or Swiss national
- Person with indefinite leave to enter or remain in the UK or are a Commonwealth citizen with right of abode
- Person with a permanent or limited right to reside in the UK under European law

2 - Time-limited right to rent

Some people will have a time-limited right to rent if they can provide valid documents that show that they either:

- have a right to reside as non-EEA family members of EEA nationals exercising Treaty rights, including 'Zambrano carers' and the primary carers of children under 'Baumbast/Ibrahim/Teixeira' case law
- have been granted leave to enter or remain only for a limited period under humanitarian protection, discretionary leave to remain, or under student/work/family visas.
- are a person for whom the Secretary of State has granted permission to rent in the UK, even though their immigration status would otherwise leave them with no right to rent.

3 - No right to rent

Some people will be barred from occupying premises held under a residential tenancy/licence on which rent is payable if :

- they require but do not have leave to enter or remain in the UK

- their leave to remain is subject to a condition that prohibits them from occupying residential premises; or
- their time-limited RTR has ended.

Box 1 ends

The definition of 'landlord'

The term 'landlord' means a person who lets accommodation for use by one or more adults as their only or main home for the payment of rent. This includes people who take in lodgers who pay money for their 'only or main accommodation', including homeowners/resident landlords. It also includes any tenants sub-letting their accommodation for rent, including social housing tenants who sub-let.

Landlords who let holiday accommodation will have to be careful in circumstances where a person is occupying the accommodation on a longer term basis, and arguably using it as their 'only or main home', rather than on a leisure/holiday basis. Such a letting could fall within the legislation and may require RTR checks.

References to 'landlord' in the Act also includes agents who have accepted responsibility for complying with the legislation on behalf of the landlord. Agents are also specifically and separately referred to in the Act. Landlords will have to make certain, in determining arrangements with letting agents, as to who is responsible for fulfilling the requirements of the legislation and therefore would be liable for any potential penalty for a breach of the Act. If an agent establishes that a prospective occupier does not have the RTR and reports the matter to the landlord in writing prior to a tenancy being granted, the landlord will be liable to a penalty if the tenancy proceeds with an occupier in situ with no RTR.

If a landlord takes over a new property with sitting tenants and occupiers (for example by purchasing the property), the new landlord will have to check with the previous landlord in regard to the status of any existing RTR checks, particularly where there are time-limited RTR occupants in the dwelling. If the initial landlord was in breach of RTR checks, that landlord would be liable for the penalty fine, but if the new landlord fails to undertake follow up checks on time-limited RTR, the new landlord could be in breach of the Act.

The definition of 'occupier'

The term 'occupier' means a person who is, or who will be, occupying the property under the tenancy agreement; in other words, it includes any other household member using the property as their 'only or main home' whether or not they are named on the tenancy agreement. Occupiers under 18 are exempt. This means that a landlord can allow anyone under the age of 18 years to occupy property, regardless of their immigration status. A landlord can consider a person to be a child where they are reasonably satisfied that they are under the age of 18, but document checks are advisable for the avoidance of doubt. Landlords can allow anyone who will turn 18 during the course of a tenancy agreement to occupy property and they do not need to conduct additional follow-up checks when the child turns 18. However, if the tenant or another occupier has a 'time-limited RTR' from the start of the tenancy, a follow up check on RTR status will be required at a relevant point and all occupiers, including children who have since turned 18, are to be included in the follow up check.

Which tenancies/leases/licences are affected?

The legislation applies to any new tenancy, lease, licence, sub-lease or sub-tenancy after the commencement dates which –

- grants a right of occupation for premises for residential use as the only or main home of the occupiers, and
- provides for the payment of rent, and
- is not an excluded agreement.

There are a number of exclusions to the regulations – see Box 2

Box 2 starts

Exclusions to the Right to Rent regulations

1 - Accommodation involving local authorities

This is essentially housing provided by the local authority under the homelessness duties within Part 7 HA 1996, including where the occupier is to be placed into private rented property by the local authority.

2 - Social housing

This is housing provided under Part 6 HA1996 (allocations) and includes transfers and exchanges by current tenants of social housing.

3 - Care homes, hospitals and hospices and continuing healthcare provision

Care homes, hospitals and hospices are exempt, as is accommodation arranged by relevant National Health Service bodies under a statutory duty owed towards individuals as part of a package of continuing health care.

4 - Hostels and refuges

This exemption applies to hostels and refuges which are managed by social landlords, voluntary organisations or charities, or which are not operated on a commercial basis. Advisers should note that 'hostel' is closely defined in Schedule 3 to the Act

5 - Mobile homes

Agreements to which the Mobile Home Act 1983 applies, where a person is entitled to station their mobile home on a site and use it as their only or main home. However, should a mobile home owner decide to let their mobile home for use by another adult, the tenancy agreement will be subject to the RTR checks.

6 - Tied accommodation

A residential tenancy agreement that grants a right of occupation in accommodation provided by an employer to an employee, or by a body providing training to an individual in connection with that training.

7 - Student accommodation

Halls of residence (whether the landlord is an educational institution or private accommodation provider) are exempt, as is any accommodation provided for students directly by a higher or further educational institution.

8 - Long leases

Leases which grant a right of occupation for a term of 7 years or more are exempt, but not if the agreement can be terminated at the option of a party – i.e. via a break clause - before the end of 7 years from the start of the term.

9 - Accommodation from or involving local authorities

Agreements under which accommodation is provided to a person as a result of a duty or relevant power that is imposed or conferred on a local authority by an enactment (whether or not provided by the local authority), and which is not excluded by another provision of the Schedule of the Act.

'Relevant power' means a power that is exercised for, or in connection with, a purpose of providing accommodation to a person who is homeless or is threatened with homelessness in accordance with s.175 Housing Act 1996.

10 - Accommodation provided by virtue of immigration provisions
Agreements granting a right of occupation of accommodation that is provided to an individual by virtue of s.4, s.95 and s.98 of the Immigration and Asylum Act 1999.

Box 2 ends

The checking of documents

The requirement for landlords is that they must check the immigration status of all occupiers over the age of 18 before granting the tenancy. For persons who have no time limitations on their stay in the UK, the checks may be undertaken at any point before the residential tenancy agreement is granted. However, where a person has a time-limited right to remain in the UK, the checks must be undertaken not more than 28 days before the residential tenancy agreement comes into effect.

To avoid claims of discrimination, landlords and agents are advised to check the immigration status of all prospective tenants and occupiers applying for tenancies after the commencement dates.

In order to carry out the requirement of statutory checks, landlords/agents will need to request, verify and retain copies of certain original documents (passports, residence cards etc.) for all of the adults who will be living in the property as their only or main home. The Home Office Code of Practice further recommends that the documents are checked in the presence of the holders of the documents, and that the date of the checks is recorded. This suggests that all prospective occupiers are advised to attend meetings/appointments with landlords and letting agents. Problems may arise where a proposed occupier/family member under the tenancy is not available; for example, they are abroad at the time of the checks.

The list of documents is too long to provide in detail here but the full list can be obtained online: the 2014 Regs (SI 2874) and the update 2016 Regs (SI 9) (6). There are two lists of documents (List A and B) within the schedule of the statutory instrument from 2014. It is original documents that landlords must check and not copies of documents.

The Home Office Code of Practice is somewhat confusing regarding the document lists and it is preferable that advisers refer to the 2014 Regs and the 2016 update Regs as these are the definitive statutory materials. If comparisons are made between List A and List B in the Regs with List A and List B in the Code of Practice, there are two big differences. Not only does the Code present the documents differently, but also Code 5.2 says that its List A in effect is for British Citizens/Indefinite Leave to Remain/Right of Abode/EEA Nationals/Swiss Nationals, whilst its List B is for limited RTR cases. The Code suggests that people with a Limited RTR can only evidence it with reference to a narrow combination of documents. However, the 2014 Regs and Act do not make this distinction at all and in effect allow a person with any RTR to establish that right with either one document from Regs List A or two documents from Regs List B. Ultimately a Court may have to decide whether the Code of Practice is binding or whether it represents an unreasonable and additional set of restrictions on people with limited RTR.

Where a person has a time-limited right to remain in the UK, checks should be undertaken no more than 28 days before the residential tenancy agreement is to come into effect and the landlord will need to conduct follow-up checks at the appropriate time (i.e. when the leave to remain is due to expire). All copies of documents taken should be kept for the duration of the tenancy agreement and for at least one year thereafter.

If the landlord is presented with a document that reveals a time-limited RTR, they will have to carry out follow-up checks in order to maintain their statutory excuse. If the landlord discovers on the follow-up check that the RTR for an occupier has ceased,

or is ending, the landlord/agent will avoid a penalty fine if they report this change promptly to the Home Office. The landlord must make the report as soon as reasonably practicable after discovering that the occupier no longer has a RTR in order to maintain their statutory excuse, which will last for as long as the 'no RTR occupier' continues to occupy the premises.

The report to the Home office must be made by phone or online only via email and must contain all of the following:

- The full name of the occupier believed to have no RTR;
- The address of the premises they are occupying;
- The name and contact address of the landlord;
- Where relevant, the name and contact address of the agent;
- The date on which the occupier first took up occupation.

Landlords will have to ensure that they keep a copy of the report sent, noting specifically the time and date sent.

If a prospective tenant's documents (for all household members) are not available at the relevant time of a potential grant of the tenancy, or on a follow up check, a landlord can obtain official confirmation of the household members' RTR from the Home Office's Landlord Checking Service. This may occur where an individual cannot provide the landlord with any of the documents required from List A or B but they inform the landlord of the following:

- that they have an ongoing immigration application or appeal with the Home Office, or
- that their documents are with the Home Office, or
- that they have been given permission to rent by the Home Office,

In such cases, the landlord will need to request verification of the household members' RTR from the Home Office's Landlords Checking Service using an online form. If landlord does not have access to the internet, a request can be made by telephone. There is no charge for the request.

It is stated by the Home Office that the Landlords Checking Service will respond to the landlord with a clear 'yes' or 'no' response to the RTR of the respective household members within two working days. It is important to note that the 2014 Regs state that if the Landlord Checking Service does not make a decision either way within 48 hours, then the landlord or agent may proceed as though the Landlord Checking Service have issued a positive Right to Rent Notice (7).

There is concern that if prospective tenants do not have the required documents at hand before the grant of a tenancy, it is easier for a landlord to grant a tenancy to other prospective tenants 'with their papers in order' rather than proceed with these further checks at the Home Office.

The advice for prospective tenants will be to make sure that all documents relating to all occupants under the tenancy are readily available in advance for verification by the landlord. Absence of required documents is likely to seriously hamper the potential to acquire the tenancy.

Civil penalties and statutory excuses

As stated, landlords have the option to appoint an agent to act on their behalf. Where an agent has accepted responsibility in writing for compliance with the legislation, the agent will be the liable party in place of the landlord, so the following information on 'statutory excuses' can equally apply to a liable agent.

The landlord can breach the legislation either for a pre-grant contravention – failing to check documents and thereby 'authorising' a person with no RTR to occupy - or a post-grant contravention – failing to undertake necessary follow-up checks on time-limited RTR occupiers, or failing to report to the Home Office when required, thereby 'authorising' a person with no RTR to occupy.

A landlord will have a statutory excuse and not be liable for a penalty fine for an alleged pre-grant contravention, if the landlord shows that—

- the prescribed requirements of the 2014 Regs (as amended by the 2016 Regs) were complied with before the residential tenancy agreement was entered into, or
- a person acting as the landlord's agent is responsible for the contravention.

For an alleged post-grant contravention, the landlord will be excused from paying the penalty if any of the following applies—

- 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 RTR occupier has not expired.

If a Limited RTR is established at the start of the tenancy, that sets up an 'eligibility period' of at least one year, during which time the landlord/agent is in effect exempt from a penalty notice – as long as they conduct proper follow up checks within the eligibility period and make a timely report to the Home Office if appropriate. If the landlord discovers that an occupier's Limited RTR has expired, the legislation does not require the landlord to take any steps to end the tenancy/licence.

If a landlord is found to be 'authorising' an occupier with no RTR to live in the dwelling under the tenancy/licence agreement, their case will be referred to officials with responsibility for administering the legislation. A notice will be served on the landlord and the liability for a civil penalty will be considered (8). The landlord will be sent an 'information request' giving them the opportunity to present further information and evidence which will inform the decision on liability and, if appropriate, the level of the penalty.

Anyone issued with a civil penalty notice may object in writing to the Home Office within 28 days of the date specified in the notice; after that deadline, the right to object is lost (9).

A penalty notice may not be given in respect of any adult if the adult has ceased to occupy the premises concerned, and a period of 12 months or more has passed since the time when the adult last occupied the premises (10).

Valid objections to the civil penalty can be made on the following grounds:

- they are not liable to pay the penalty (e.g. they are not the landlord), or
- they have a statutory excuse (e.g. they undertook the correct document checks and made any necessary reports), or
- the level of penalty is too high (e.g. the Home Office has miscalculated the amount of the penalty by reference to the wrong criteria).

The objection must contain:

- the reference number of the penalty notice;
- the name and contact address of the landlord and any relevant agent;
- the name and address of the occupier(s) in respect of whom the penalty was issued; and
- Code of Practice on illegal immigrants and private rented accommodation (11)
- full grounds of objection together with supporting evidence, including copies of any documents relied upon.

The Home Office will consider the objection and reply within 28 days on the outcome. If the landlord is still not satisfied with the outcome on liability, there is an opportunity of a further appeal to the county court.

The landlord must appeal to the County Court within 28 days of either the date specified in the new civil penalty notice or the date specified on the objection outcome notice. The deadline for appeal will be specified on either notice.

A landlord may appeal to the court on the same grounds as allowed under the civil penalty objection.

The landlord must pay the civil penalty by the date specified in the civil penalty notice or the objection outcome notice maintaining or reducing the penalty. This will be at least 28 days after the date on which the notice is given, although the landlord can request permission to pay by instalments provided that they supply evidence of their inability to pay the penalty in one payment. If full payment is made within 21 days of the civil penalty notice being issued, a 30% discount can be applied to the penalty. This discount is only available for landlords on a 'first penalty' breach of the legislation.

The penalty level is determined by stages:

Stage 1 – Determining liability

Stage 2 – Determining the level of breach (Level 1 or 2)

Stage 3 – Determining the final penalty

Once liability has been determined, the penalty amount depends on whether the landlord has previously breached the legislation within the previous three years, as well as the nature of the breach.

If the landlord has been issued with a civil penalty notice under the legislation within the previous three years and exhausted all their objection and appeal rights, they will be subject to a 'Level 2 penalty amount' of either £500 or £3,000.

If a landlord has not previously been in breach of the legislation within the previous three years, they will be subject to the lower 'Level 1 penalty amount' of either £80 or £1000.

Finally, the Home Office will consider the nature of the breach to determine the final penalty amount per occupier. Obviously if there are more than one occupier with no RTR, the penalty fine will be higher.

If the breach relates to a paying lodger in a private household, the landlord/homeowner will be subject to a Category A penalty amount (£80 or £500).

If the breach relates to an occupier in private rental accommodation, the landlord/agent will be subject to a Category B penalty amount (£1,000 or £3,000).

To reiterate: there are three steps involved for landlords/agents in establishing and maintaining a statutory excuse against liability for a civil penalty:

- They must conduct initial RTR checks before authorising an adult to occupy rented accommodation;
- They must conduct follow-up checks at the appropriate date if initial checks indicated that an occupier has a time-limited right to rent, and;
- They must make a report to the Home Office if follow-up checks indicate that an occupier no longer has the RTR.

Future legislation

There are more proposed measures to come regarding RTR. The Immigration Bill 2015, which was working its way through Parliament at the time of writing, will make further amendments to the IA 2014, creating criminal offences for landlords who breach the legislation. The penalty for contravention of the legislation could be a sentence of up to five years imprisonment and/or a fine. The proposed amendments could also introduce measures to enable landlords to evict tenants and occupiers with no RTR tenants more easily, by giving landlords the means to end a tenancy when a person's leave to remain in the UK ends, and in some circumstances to be able to evict the occupiers without a court order.

The Bill also proposes amendments to be made to the Housing Act 1988 and the Rent Act 1977, including a new mandatory ground for possession under the HA 1988. These changes will be covered in a future article in Adviser, if or more likely when the amendments become law.

Martin Coates works for the Housing Expert Advice team at Citizens Advice and is a member of the Adviser Editorial Board.

Endnotes

1 – S.22 of Immigration Act 2014

2 - Joint council for the welfare of immigrants report on pilot:

http://www.jcwi.org.uk/sites/default/files/documets/No%20Passport%20Equals%20No%20Home%20Right%20to%20Rent%20Independent%20Evaluation_0.pdf

3 - Chartered Institute of Housing (CIH) analysis of the English Housing Survey

4 - See Guardian report October 2013

<http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment>

5 - S.21 IA 2014 describes 'relevant national' definition.

6 - http://www.legislation.gov.uk/uksi/2014/2874/pdfs/uksi_20142874_en.pdf and

http://www.legislation.gov.uk/uksi/2016/9/pdfs/uksi_20160009_en.pdf

7 – Article 6 of SI 2874 (2014)

8 – S.23 IA 2014

9 - S.29 IA 2014

10 – S.28(5) IA 2014

11 - <https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation>

12 – Ibid 2

13 –

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf

14- Anti discrimination code of practise:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/376789/Code_of_Practice_for_Landlords__web_.pdf