

IMMIGRATION ACT 2014

Creating a hostile environment - the Act as a weapon

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1. The Home Office has declared that the 2014 Act will *'ensure our immigration system is fairer to British citizens and legitimate migrants,'* while being *'tougher on those with no right to be here.'* It is designed to limit the factors that *"draw illegal migrants to the United Kingdom"*
2. From the beginning, a driving force to the original Bill was clearly identified, with Teresa May declaring that its purposes was to create a *"hostile environment"* for migrants in the United Kingdom¹.
3. The Bill's introduction was accompanied by the Home Secretary informing BBC Radio 4's "Today" programme that:

"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."
4. She further confirmed:

"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"
5. The Act deliberately identifies "soft" targets as a means of placing pressure upon "illegal" migrants but the weapons used actually impact upon those migrants who are lawfully present (NHS care) and may result in discriminatory behaviour (lettings).

¹ <http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment>

National Health Service (NHS) Surcharges

The Act provides for an immigration health charge which will be payable by certain categories of temporary migrant. Migrants would pay the charge at the same time as they applied for entry clearance for a limited period of leave, or limited leave to enter or remain in the United Kingdom, including an application to vary leave.

6. *Sections 38 and 39 of the Act* contain provisions relating to access to the NHS. Although health is a devolved matter in Scotland, Wales and Northern Ireland, these provisions will apply across the UK. This is because the UK government has responsibility for immigration matters.
7. Under the new amendments, migrants who apply to stay in the United Kingdom for more than six months will have to pay a '*health surcharge*' to the NHS.
8. This will initially be £150 per year for students and £200 for other non-EEA migrants.
9. These steps have been presented as a means by which to cut down on 'health tourism,' such payments will be mandatory regardless of whether or not foreign citizens make national insurance contributions.

Key changes

10. There have been two key changes with regard to primary legislation:
 - There has been a change to the definition of "ordinarily resident" for the purpose of accessing NHS services;
 - The introduction of a charge.
11. Prior to the Act, entitlement to free NHS hospital treatment arose when a person could establish "ordinary residence" in the United Kingdom:

"A person will be Ordinary Resident in the UK when their residence is lawful, adopted voluntarily and for settled purposes as part of the

regular order of his or her life for the time being, whether of short or long duration.”

12. In most instances the above definition applied to foreign nationals lawfully in the country other than as visitors.
13. At its heart was a consideration as to whether a person was living in this country on a lawful and properly settled basis. There was no minimum time period to be established for residence. For example, an overseas student could register with his local GP free of charge and, should he require hospital or specialist treatment, he would receive such treatment as he would be identified as an ordinary resident, he would be treated at no charge to himself.
14. The Act details at *section 38*:
 - (1) *The Secretary of State may by order provide for a charge to be imposed on—*
 - (a) *persons who apply for immigration permission, or*
 - (b) *any description of such persons.*
 - (2) *“Immigration permission” means—*
 - (a) *leave to enter or remain in the United Kingdom for a limited period,*
 - (b) *entry clearance which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as leave to enter the United Kingdom for a limited period, or*
 - (c) *any other entry clearance which may be taken as evidence of a person’s eligibility for entry into the United Kingdom for a limited period.*
15. *Section 38* came into force on 20 October 2014: *The Immigration Act 2014 (Commencement No. 3, Transitory and Saving Provisions) Order 2014*
16. The new ordinarily resident test is detailed at *section 39*:
 - (1) *A reference in the NHS charging provisions to persons not ordinarily resident in Great Britain or persons not ordinarily resident in Northern Ireland includes (without prejudice to the generality of that reference) a reference to—*
 - (a) *persons who require leave to enter or remain in the United Kingdom but do not have it, and*

(b) persons who have leave to enter or remain in the United Kingdom for a limited period.

17. The Act therefore redefines the ordinarily resident test and in doing so excludes all migrants who do not enjoy Indefinite Leave to Remain in the United Kingdom.
18. Temporary migrants who are lawfully in the country, including students, workers and family members, will now be required to pay an additional charge, prior to entry, so as to cover any potential NHS costs that may arise.
19. Consequently, a Tier 2 (General) migrant coming to the UK for five years with his wife and two children will need to pay an additional £4,000 on top of the visa fee of £4,112 (£1028 per person). Within two weeks of their arrival to the UK, the Tier 2 (General) migrant will need to go to their local Post Office to collect their Biometric Residence Permit (BRP) card, which will be pre-registered with the NHS.
20. The position for foreign nationals travelling to the United Kingdom for less than six months is that they will not be liable to the surcharge, but payment for their treatment will be expected in advance of care being provided (though an inability to pay should not prevent emergency care).
21. The NHS Cost Recovery Programme currently only applies to NHS England, but the surcharge will be taken on all UK visa applications.
22. It is appropriate to observe that the charge will not act retrospectively. It only applies to new visa applications at entry clearance or extension of visas within the United Kingdom.
23. The introduction of the higher threshold may result in uneven consideration, particular in circumstances where an individual has a complex immigration history or in later year where persons entered the United Kingdom prior to the introduction of this requirement but more and more hospitals will assume over time that all non-settled migrants are required to confirm that they have paid the charge. Such circumstances could result in the unfair refusal of free healthcare.

24. There is also a concern for foreign nationals who have lawfully resided in the United Kingdom for many years but do not have relevant stamps/ vignettes in their passport.
25. The position as to EU migrants is different. The authorities will seek to correctly identify a migrant's home country so as to identify that Member State is chargeable for the treatment provided. The EU migrant will have to present a European Health Insurance Card otherwise they will be charged.

Bank accounts

The Act contains provision intended to ensure that those known to be unlawfully in the United Kingdom can be prevented from opening a current account.

26. During the passage of the Bill, the Immigration Minister Mark Harper detailed:

"We welcome those who wish to come here, work hard and make a contribution. But we need to take action to protect our public services and the benefits system from being abused by those who are here unlawfully.

"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.

"By doing this we will deter illegal migration and encourage those with no right to be here to leave."

27. Sections 40–42 introduce provisions with the purpose of preventing individuals who do not have permission to live in the UK from opening bank accounts. The government anticipates that this will in turn make it more difficult for such individuals to access other products such as credit cards, mortgages or mobile phone contracts.
28. Sections 40-42 came into force on 14 July 2014: *The Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014*

29. Consequently, banks and building societies are now required to undertake an immigration status check on all individuals who apply for a current account, unless at the time of opening they are unable to carry out the check for reasons outside of their control.
30. Such measures are designed to make it more difficult for migrants to access financial services.
31. The Government's intention is that:
 - Being refused a current account will also make it extremely difficult for the individuals concerned to access other lines of credit such as mobile phone contracts, credit cards or other types of loans (including a mortgage), which rely on a current account to make repayments.
 - This will in turn assist in preventing illegal migrants from gradually building up a credit history and from illegally establishing a life in the UK.
32. A bank or building society will not be considered 'unable' to carry out a check if a fee is payable for it and this is not paid.
33. The status check must be made with the anti-fraud organisation, CIFAS. The Government has confirmed that CIFAS holds government data on tens of thousands of illegal migrants (in light of the ongoing fiasco of Capita's efforts to seek out "illegal migrants", there is a concern as to how up-to-date such information is).
34. If the check indicates that the person is a 'disqualified person', the bank or building society will be prohibited from opening the requested current account.
35. The Treasury will have the power to enable the Financial Conduct Authority to make arrangements for monitoring and enforcing compliance with the prohibition placed on banks and building societies.

36. It should be observed that the *2014 Act* presently only covers banks and building societies opening current accounts at the present but it enjoys the power to expand the category of financial institutions that can be subject to this requirement: *section 35*

Driving licences

Applicants for driving licences are to demonstrate that they are in the United Kingdom lawfully.

37. Non-EEA nationals can drive on a full driving licence for up to 12 months in the United Kingdom before being required to obtain a United Kingdom licence.
38. In 2010 the government changed the policy on the issuing of United Kingdom driving licences, thereby restricting driving licences for non-EEA nationals to only those with more than 6 months leave. Over 3,000 applications for licences are rejected every year on these grounds.
39. *Sections 46 and 47* contain provisions restricting access to United Kingdom driving licences. The government has made clear that this measure is intended to make it more difficult for individuals who are not entitled to live in the United Kingdom to access other services and benefits by virtue of this form of identification.
40. During the passage of the Bill, the Immigration Minister, Mark Harper M.P. stated:

“The government is determined to build a fairer system and address public concern about immigration.

“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.

“It is already government policy only to issue driving licences to legal residents. The Immigration Bill will reaffirm this position and make it possible, for the first time, to revoke licences held by those with no right to be here.

“The ability to obtain and hold a UK driving licence is a privilege and one that only lawful immigrants and citizens should be able to benefit from.”

41. Sections 46 and 47 came into force on 14 July 2014: *The Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014*
42. The 2014 Act puts into primary legislation the arrangements that have been in place since 2010 restricting the issuing of driving licences for non-EEA and other designated country nationals. Any individual who does not have a driving licence from an EEA or other designated country will be required to demonstrate that they have at least six months leave to enter or remain in the United Kingdom when applying for a driving licence.
43. The Act also grants new powers to the DVLA to revoke a licence issued to someone who is not lawfully resident in the United Kingdom. Where a person’s licence is revoked on this basis, it will not be open to them to argue in an appeal against the revocation that leave should be or should have been granted to them, or that they have been granted leave after the date their licence was revoked.

Landlord Checks

The Act enables civil penalties to be imposed on private landlords who rent out premises to illegal migrants without making appropriate checks.

44. The Act introduces new provisions requiring private landlords to check the immigration status of their tenants, and to refuse to provide accommodation to anyone who cannot demonstrate his or her right to enter or remain in the United Kingdom.

45. The Home Office has published a 31 page *“Code of Practice on illegal immigrants and private rented accommodation”* that notes:

“Under section 22 of the Immigration Act 2014 a landlord must not authorise an adult to occupy property as their only or main home under a residential tenancy agreement unless the adult is a British citizen, or EEA or Swiss national, or has a 'right to rent' in the UK. Someone will have the 'right to rent' in the UK provided they are present lawfully in accordance with immigration laws.”

46. The lack of clarity contained within the Code is evidenced by:

Where the initial right to rent checks are satisfied with a document from List B, or where the Landlords Checking Service has provided a “yes” response to a request for a right to rent check, a landlord establishes a time-limited statutory excuse. This time-limited statutory excuse lasts either for 12 months or until expiry of the person’s permission to be in the UK or the validity of their document which evidences their right to be in the UK, whichever is later. Follow-up checks should be undertaken before this time-limited statutory excuse expires, in order to maintain a statutory excuse.

47. The support to landlords who wish to check is detailed within the Code as:

When an individual cannot provide the landlord with any of the documents from List A or List B, but claims to have an ongoing immigration application or appeal with the Home Office, or that their documents are with the Home Office, or they have been granted a right to rent on a discretionary basis, then the landlord can request a right to rent check from the Home Office’s Landlords Checking Service using an online form. Where a landlord does not have access to the internet, a request can be made by telephone. The Landlords Checking Service will respond to the landlord with a clear “yes” or “no” response within 2 working days.

In order for the landlord to request a check, the prospective occupier must provide the landlord with a Home Office reference number. This can be, for example, an application or appeal number, application registration card (ARC) number, certificate of application number issued to a family member of a national of an EEA country or Switzerland, case number, etc. The landlord must include this information when requesting a right to rent check, to receive the “yes” or “no” response.

48. Landlords who rent to illegal migrants without conducting these checks will be liable for a civil penalty of up to £1,000 for the first breach of *section 22* and up to a maximum of £3,000 for any subsequent breaches.

49. The right to rent checks will only apply to new tenancy agreements. Existing tenancy agreements are unaffected and landlords will not be required to carry out retrospective checks.
50. The requirements apply to all adults (aged 18 and over) living at the property.
51. Some exceptions were secured for student accommodation, homeless hostels, women's refuges, and for vulnerable individuals in immediate need of accommodation.
52. The checks are also confined to those who pay rent to the landlord.
53. The checks are presently localised to "pilot" areas within the West Midlands and applies to all tenancies, leases below 7 years, sub-lets or lodging arrangements granted on or after 1 December 2014 in the affected areas. Existing or renewed agreements where the tenancy/lease/lodging etc. is continuous from before 1 December will not be affected.
54. The scheme has initially been introduced by way of pilot areas because the policy has proved controversial within the private rental sector, with a number of concerns raised by landlord associations at the consultation stage.
55. Councils are exempted (including discharge of homeless duty via private sector), as are other social landlords (where they have already been required to consider prospective tenant's immigration status before allocating them the property) and hostels and refuges *'which are managed by social landlords, voluntary organisations or charities, or which are not operated on a commercial basis and whose operating costs are provided either wholly or in part by a government department or agency or a local authority'*.
56. It can be said that a heavy burden is placed upon landlords who are now required to consider complicated immigration and residence status. It may prevent many landlords from wishing to let to ethnic minorities, regardless as to their status.

Deprivation of citizenship

The Act allows naturalised persons to be deprived of their citizenship where they conduct themselves in a manner seriously prejudicial to the vital interest of the United Kingdom, even where to do so may render them stateless, provided that the Secretary of State has reasonable grounds for believing they are able to become a national of another country or territory.

57. A late amendment to the Bill by Theresa May, new powers are provided to revoke citizenship from individuals considered 'prejudicial' to the UK, even where doing so would render them stateless.
58. The powers have made it in to the final Act, with a late concession that the Home Secretary can only exercise the power where she has reasonable grounds to believe that the person is able to become a national of another country.
59. Lord Pannick called the change '*substantial*' and complained that ministers had added in the proposed powers at the last moment, just 24 hours before the Commons report stage debate, therefore not permitting them to be properly considered by MPs.
60. He questioned how the powers would help. One objective was to prevent suspects travelling to terrorist training camps on a British passport – but, he noted, the Home Secretary could already withdraw passports for that very reason, without making the passport holder stateless. There were already too many dictators willing to use statelessness as a weapon against opponents, he added, and Britain should not give such conduct respectability².
61. Baroness Kennedy observed:
- “Moreover, deprivation of citizenship is not a viable alternative to the responsible prosecution of alleged criminal conduct. Citizenship is not a privilege, but a protected legal status”*
62. Currently any person may lose their citizenship if the Secretary of State is satisfied that doing so is conducive to the public good, provided that depriving

² <http://theparliamentaryreview.co.uk/roty/lord-pannick.html>

them of their citizenship would not render them stateless. Following the Supreme Court judgment in Al Jedda [2013] UKSC 62, the Act will amend this power by allowing naturalised persons to be deprived of their citizenship where they conduct themselves in a manner seriously prejudicial to the vital interests of the United Kingdom, even where to do so may render them stateless, provided that the Secretary of State has reasonable grounds for believing they are able to become a national of another country or territory.

63. Note: we are awaiting judgment from the Supreme Court in the matter of “B2” (Minh Pham) – argument heard in November 2014. The Vietnamese authorities have confirmed that B2 is not a national. However, the Court of Appeal held that while the Vietnamese government did not recognise Pham as a national, under Vietnamese nationality laws he would not have lost the Vietnamese citizenship he was born with when he became a naturalised British citizen at the age of 12. Consideration is also being given as to the impact the loss of British citizenship has upon the loss of EU citizenship

Nationality

Section 50(9A) of the British Nationality Act 1981 amended the definition of father to remove discrimination in that Act against illegitimate children born to British fathers. However, this definition only applied to children born on or after 1 July 2006. This Act amends the 1981 Act to provide an entitlement to registration for persons born before 1 July 2006 to a British father who was not married to their mother at the time of their birth.

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64. *Section 50(9A) of the British Nationality Act 1981* (“the 1981 Act”) amended the definition of father to remove discrimination in that Act against illegitimate children born to British fathers.
65. However this definition applied only to children born on or after 1 July 2006. The *2014 Act* amends the *1981 Act* to provide an entitlement to registration for persons born before 1 July 2006 to a British father who was not married to their mother at the time of their birth.

Sham marriages

The Act extends and amends the marriage and civil partnership notice process to better enable the Home Office to identify and investigate suspected sham marriages and civil partnerships

The Act changes the procedure for giving notice of marriage and civil partnership.

66. *Section 25(5) and (6) of the 2014 Act* provides a definition for “sham” marriages (an unpleasant term, the Tribunal prefers the term “marriage of convenience”):

5) A marriage (whether or not it is void) is a “sham marriage” if—

- (a) either, or both, of the parties to the marriage is not a relevant national,*
- (b) there is no genuine relationship between the parties to the marriage, and*
- (c) either, or both, of the parties to the marriage enter into the marriage for one or more of these purposes—*
 - (i) avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules;*
 - (ii) enabling a party to the marriage to obtain a right conferred by that law or those rules to reside in the*

United Kingdom.

6) *In subsection (5)—*

“relevant national” means—

- (a) a British citizen,*
- (b) a national of an EEA State other than the United Kingdom,*
or
- (c) a national of Switzerland*

“United Kingdom immigration law” includes any subordinate legislation concerning the right of relevant nationals to move between and reside in member States.”

- 67. The Act will change the procedures for giving notice of marriage and civil partnership in England and Wales, in order to provide for a new referral and investigation scheme for proposed marriages and civil partnerships involving a non-EEA national subject to immigration control.
- 68. It also extends the powers for information to be shared by and with registration officials for the purpose of tackling sham marriages and civil partnerships and related abuse.
- 69. From 2 March 2015, the notice period for marriages and civil partnerships will change from 15 to 28 days (unless exceptional circumstances exist).
- 70. Where one of the parties to the marriage is a non-EEA national marrying in the Church of England (or Church in Wales), the parties will need to undertake civil preliminaries and will no longer be able to use Banns instead.
- 71. The Home Office estimates that under the new provisions, some 35,000 marriages per year will have to be referred to the Home Office for potential investigation and some 6,000 will be investigated.
- 72. Where one of the parties is a non-EEA national, both parties to a marriage will need to attend in person to give notice at a designated Registry Office and for

notice to be taken specified evidence, including specified evidence of nationality, must be provided.

73. Where one of the parties is a non-EEA national and might gain “*immigration advantage*”, the notice of marriage must be referred to the Home Office. In addition, if the registrar “*has reasonable grounds for suspecting that the marriage will be a sham marriage*” then a section 24 Notice is to be sent to the Home Office.
74. The Home Office identifies the following risk factors where a party to a marriage:
- Is of a nationality at high risk of involvement in a sham, on the basis of objective information and intelligence about sham cases;
 - Holds a visa in a category linked by objective information and intelligence to sham cases;
 - Has no immigration status or holds leave that is due to expire shortly;
 - Has had an application to remain in the UK refused;
 - Has previously sponsored another spouse or partner to enter or remain in the UK;
 - Is or has been the subject of a credible section 24/24A report, which explains for example how the couple could not communicate in a common language and did not know basic information about each other.
75. If it is suspected that the marriage is a 'sham,' the Home Office may extend the notice period to 70 days for further investigation.

Access to Work

76. The Home Office published a Code of Practice for the Prevention of Illegal Working (June 2014, updated November 2014), which has increased the maximum civil penalty for unlawful employment from £10,000 to £20,000.
77. The starting penalty for an employer who had not been found to be employing illegal workers over the course of the previous three years is £15,000 before any reduction for mitigating factors or the statutory excuse is applied.
78. Where an employer has been found to be employing illegal workers within the previous 3 years, the starting penalty is £20,000 before mitigating factors are considered.
79. The minimum penalty amount is £10,000.
80. An employer can raise an objection to the civil penalty and an administrative review of the decision will be conducted.
81. *Section 44 of the 2014 Act substitutes sections 17(4), (5) of the Immigration, Asylum and Nationality Act 2006 and requires an employer to give a notice of objection. Therefore the administrative review stage is to be undertaken before an appeal is commenced.*