

Home Office Consultation: Biometric registration regulations: changes to the Code of Practice

Response of the Immigration Law Practitioners' Association

Contents

Contents	1
Introduction	2
Overarching comments	3
Specific Comments on the Code of Practice	4
About this code of practice	4
Summary of the requirements	4
Application Requirements	5
Process before issuing an application sanction	5
Content of application notification	5
Consequences for failing to comply with an application requirement	6
Stateless persons	7
Maintenance Requirements	7
Updating facial image	7
Following the issue of a facial image notification	9
Other maintenance requirements	10
Process before issuing other maintenance sanctions	11
Content of maintenance requirement warning letter	11
Following the issuing of a maintenance requirement warning letter	12
Civil penalties	12
Process for issuing a civil penalty	12
Determining the amount of the civil penalty notice	13
Right of objection	14
Enforcement of a civil penalty	14
Curtailment or variation of permission	14
Consideration of curtailment or variation	14
Right of appeal	15
Provisions for vulnerable people	15
Vulnerable people	15
Serious medical conditions	16
Where a person lacks capacity to make a decision	16

Introduction

1. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession, and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official, and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.
2. This is a response to the Consultation 'Biometric registration regulations: changes to the Code of Practice',¹ by the Home Office, running from 17 July 2023 to 8 October 2023. It is sent by email to: biometricregscodesofpractice@homeoffice.gov.uk. The lack of detail or response to any specific part of the Code of Practice should not be taken as indicating that no issues arise in relation to it. We are not asking for the information we provide to be treated as confidential.
3. The proposed changes would remove the current category of 'collection requirements' and incorporate the collection requirement into the list of 'maintenance requirements'. The maintenance requirements would apply 'after permission has been granted' as opposed to their current application 'after a Biometric Immigration Document ('BID') has been issued'. In addition, the changes would add the underlined maintenance requirements for foreign nationals subject to immigration control, requiring such persons to:
 - apply for a BID, where the person already has valid permission to enter or stay in the UK, when required to do so by the regulations;
 - collect a physical BID when issued;
 - update a facial image that has either significantly changed following surgery or for some other reason;
 - update their facial image at least once every 10 years (or 5 years if aged under 16) from the date they last uploaded their facial image;
 - notify the Secretary of State when they suspect that the information provided in connection with their application for a BID was or has become false, misleading or incomplete;
 - notify the Secretary of State when they suspect their BID to be used by a person who has not been authorised by them or the Secretary of State;
 - comply with other requirements specified in the 2008 Regulations; or
 - surrender to the Secretary of State when required to do so any physical BID in the person's possession.

¹ Home Office, 'Biometric registration regulations: changes to the Code of Practice' (17 July 2023) <<https://www.gov.uk/government/consultations/biometric-registration-regulations-changes-to-the-code-of-practice>> accessed 5 August 2023 (hereinafter 'Consultation').

4. Where the person appears to have failed to comply with one or more of the maintenance requirements the Secretary of State may consider whether to impose one or more of the following sanctions:
 - a refusal to issue a BID;
 - a financial sanction in the form of a civil penalty notice; and
 - the cancellation or variation by curtailment of a person's existing leave to enter or remain in the UK.
5. Of particular note in the draft Code of Practice is that '[w]here the person appears to have failed to comply with a requirement to update a facial image, the Secretary of State may prevent the individual from being able to create a Share-Code to share with third-party checkers, or allow for a message to be displayed alongside the person's facial image to indicate it needs to be updated until they have complied with the requirement, unless the non-compliance continues or is linked to failures to comply with other maintenance requirements or criminality'.

Overarching comments

6. We oppose the Home Office's imposition of sanctions on individuals that fail to comply with biometric registration regulations, as in our experience failure to comply with legal requirements and/or processes within the UK immigration system is rarely intentional. To help ensure compliance and that individuals are aware of the complex obligations they have within our immigration system, the Home Secretary's letters granting individuals leave should clearly inform each individual of all conditions of their leave and any requirements, including the maintenance requirements, with which they must comply.
7. Regard should be had throughout the Code of Practice, and in considering the imposition of any sanctions or civil penalty, to section 55 of the Borders, Citizenship and Immigration Act 2009, which contains the duty of the Secretary of State to discharge her functions having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. There should be explicit reference to this statutory obligation in the Code of Practice.
8. It is our view that there should be a new and improved draft of the Code of Practice and further stakeholder engagement and consultation should be conducted on the proposed amendments before the Code of Practice and the Immigration (Biometric Registration) Regulations 2008 are updated. Under section 13(5)(b) of the UK Borders Act 2007, the Home Secretary has a legal duty to consult members of the public. Under the [2018 Consultation Principles](#), 'C. Consultations should be informative': a consultation should '[g]ive enough information to ensure that those consulted understand the issues and can give informed responses'. We have identified several places in the Consultation where there is insufficient or inadequate information to provide an informed response. Moreover, in accordance with Principle D, consultation 'is an on-going process'. Therefore, we urge the Home Secretary to continue consulting in this on-going process,

regarding new iterations of the Code of Practice before a re-issued draft is laid before Parliament.

9. The draft Code of Practice does not adequately translate the Home Office's intention to implement a softer approach to civil penalties (communicated to ILPA by FBIS Engagement representatives in a meeting on 18 September 2023).

Specific Comments on the Code of Practice

About this code of practice

Summary of the requirements

13. *Maintenance requirements are those which apply after permission has been granted. They require a person to:*

- *apply for a BID, where the person already has valid permission to enter or stay in the UK, when required to do so by the regulations;*
- *collect a physical BID when issued*
- *update a facial image that has either significantly changed following surgery or for some other reason,*
- *update their facial image at least once every 10 years (or 5 years if aged under 16) from the date they last uploaded their facial image.*
- *notify the Secretary of State when they suspect that the information provided in connection with their application for a BID was or has become false, misleading or incomplete;*
- *notify the Secretary of State when they suspect their BID to be used by a person who has not been authorised by them or the Secretary of State*
- *comply with other requirements specified in the 2008 Regulations; or*
- *surrender to the Secretary of State when required to do so any physical BID in the person's possession.*

10. The collection requirements have been subsumed into maintenance requirements and significantly shortened. The 2015 issued Code of Practice states at paragraph 15:

The collection requirements for those people applying from outside the United Kingdom were introduced into the Immigration (Biometric Registration) Regulations 2008 by the Immigration (Biometric Registration) (Amendment) Regulations 2015. They require a person to collect their BID:

- *from the UK Post Office specified in the person's decision letter or from an alternative Post Office collection branch, as arranged by the migrant with the Post Office; or*
- *from their sponsor organisation/another location or organisation where specific arrangements have been put in place for this; and*

- *within the specified number of days of the person's first arrival in the UK set out in their decision letter.*

11. We appreciate that it is the overall intention of the Home Office in its digital strategy to move away from issuance of physical BIDs, and 'transitioning to a digitised format of the BID referred to as an eVisa, which can be accessed online via Gov.UK' per paragraph 2 of the draft Code of Practice. However, in ILPA's recent discussions with the Home Office, there has been discussion of issuing physical documents as a back-up for vulnerable groups. It is unclear to us whether any amendments are planned to the requirements introduced in the Immigration (Biometric Registration) (Amendment) Regulations 2015. Therefore, we would query whether 'collect a physical BID when issued' is sufficiently detailed as a requirement for vulnerable groups (or any individual issued with a physical BID) to understand and comply with the requirement, particularly if sanctions may be imposed for non-compliance.

Application Requirements

Process before issuing an application sanction

19. The Secretary of State will send a written notification to the person to remind them about any outstanding actions they need to complete before the date they are expected to complete the application process.

12. It would be helpful for the Code of Practice to specify what format the written notification would take. The Secretary of State should consider sending a written notification through multiple means, by email and text message, and via another method for individuals located in the UK such as a letter in the post, to ensure that the notification reaches the intended recipient.
13. Furthermore, it would be helpful for the Code of Practice to specify how many attempts will be made to contact the individual, and over what period, before further action is taken.

Content of application notification

21. Where a person is making an application for entry clearance from overseas and consider they are unable to comply with the application requirements, they must contact the Home Office at the time they submit their application or otherwise withdraw their application and submit a new application, so they can contact the Home Office about their circumstances.

22. Where a person is making an application for permission for entry or remain and is located in the UK and consider they cannot comply with an application requirement they must contact the Home Office before the time they are required to complete the application requirements about their circumstances. Unless they can evidence their circumstances prevents them from complying with the requirements, such

as the person needing to stay in hospital having received emergency medical treatment, they will be expected to comply with all the application requirements within the allotted timeframe.

14. There is separate guidance for circumstances in which it is unsafe for an applicant to travel to a Visa Application Centre to enrol biometrics for an entry clearance application ('VAC').² It sets out the contact process for applicants and the standard of proof and criteria that must be met for the biometric enrolment requirement to be waived/excused or for the application to be predetermined. Therefore, it would be appropriate to link or cross-refer to that process here.
15. Page 8 of the 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)' guidance referred to above explains the process for contacting UK Visas and Immigration when it is unsafe for the applicant to travel to a VAC: *'When individuals have completed the online application process on GOV.UK they will be taken to a commercial partner's (VAC operator) website to book a VAC appointment. This website includes information on how they contact the UKVI Contact Centre if they believe they are unable to attend a VAC within 240 days from submitting their application online.'*³ The UKVI Contact Centre is a paid service. There is then a lengthy escalation process before a determination is made on the applicant's request. This approach seems convoluted. As we have recommended before, it would be easier to have a centralised inbox for requests to waive application requirements, the details of which should be linked in the Code of Practice.
16. In any event, for both in-country and out of country applicants, the contact address of the Home Office will need to be given in the Code of Practice and should include a postal and email address and a contact telephone number.

Consequences for failing to comply with an application requirement

23. Where the person fails to comply with one or more of the application requirements within the time they must complete their application, including any requirement to book an appointment and attend an event to enrol biometrics, the Secretary of State will disregard their application and refund the fee, less set administrative charges. The Secretary of State will also not issue the person with a BID.

17. Are 'set administrative charges' the 'administration fee' of £25 referenced in the Home Office's 'Validation, variation, voiding and withdrawal of applications' Guidance? If so, the Code of Practice should contain a link to the webpage containing the relevant fee.

² Home Office, 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)' (Version 1.0, 3 May 2023)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1154703/Bio-metric_enrolment_guidance_-_unsafe_journeys.pdf> accessed 6 October 2023.

³ Ibid, 8.

18. It would be helpful to provide further explanation regarding what is meant by ‘within the time they must complete their application’, and include reference to any discretion to extend such time for completion.

Stateless persons

25. The Secretary of State may treat an application for permission as a “Stateless Person” as invalid where the person has failed to comply with an application requirement of the regulations.

19. Why are stateless persons singled out in the draft Code of Practice?
20. Are there no other immigration routes in which it is appropriate and necessary for the Home Secretary to have discretion rather than an obligation to treat an application as invalid if the biometric enrolment validity requirement is not met? There are a number of paragraphs within the Immigration Rules in which the validity requirements refer to the fact that an application *may* (rather than *must*) be rejected as invalid. Paragraph 23 states the Secretary of State ‘will’ disregard their application if one or more application requirements is not met.
21. Furthermore, how does the provision in paragraph 25 interact with paragraphs 23 to 24 of the draft Code of Practice above? It would be helpful if this exception to those paragraphs was made clearer.

Maintenance Requirements

Updating facial image

27. Where the non-compliance relates to the person failing to update their facial image within 10 years, or 5 years where the person is aged under 16, from when it was last updated, the normal sanction that will be imposed is to prevent the person from creating a “Share-Code” necessary to enable them to share their status with a third-party checker.

28. The Secretary of State must issue a notification to the person, in a format that reflects the person’s circumstances. In most cases, this can be in the form of a digitised notification. It must set out the steps they must undertake to enable them to comply with the requirement to update their facial image and the consequences for not doing so.

29. Where the failure to update a facial image is linked to other non-compliance with one or more of the maintenance requirements or is linked to criminality the Secretary of State may also consider imposing additional or other sanctions, on top of preventing the person from creating a Share-Code.

22. We would urge the Secretary of State to give the individual who has failed to comply with a maintenance requirement more than one opportunity to respond to the request. Failure to respond could be due to a Home Office error, i.e. the notice being sent to the wrong address or a system failure. For example, the Independent Monitoring Authority's inquiry into delays in issuing Certificates of Application to EU Settlement Scheme applicants found that when the system was unable to automatically verify an applicant's identity upon them uploading a facial image and scanning their passport, a manual verification by a caseworker was required.⁴ The inquiry found that delays were due to an insufficient number of caseworkers to meet demand.⁵ We are concerned that similar manual workarounds may be required during the process of updating a facial image, which would hinder a person's ability to comply with the maintenance requirements. In such circumstances, an automatic sanction would be highly inappropriate.
23. The Secretary of State should consider sending a notification in a variety of formats, including text message, post, and email, as this will increase the likelihood of the notice coming to the attention of the individual and reduce the likelihood of non compliance.
24. In the FBIS Programme's virtual event on this consultation on 18 September 2023, ILPA was advised by FBIS representatives that regular notifications will be sent to individuals, including an advance notification, and that there will be guidance 'out there' to signpost customers to this requirement. Whereas, paragraph 28 of the draft Code of Practice suggests the Home Secretary is only obliged to send a person one notification: 'a notification'. The Code of Practice should specify the number of attempts that will be made to contact the individual, and over what period, before further action is taken.
25. Ultimately, we are concerned about the lack of clarity regarding the process of notifying an individual of their potential failure to comply. In particular, the proposals could harshly impact individuals who hold indefinite leave to enter or remain and who may be less likely to update their UKVI accounts, particularly their contact information, and/or be less likely to realise the need to update their facial image, for example if they are in the same job for a long period of time or if they are not renting.
26. Given the draft Code of Practice lacks detail on the specific method(s) of notification, we are impaired in our ability to provide an informed response regarding this aspect of the draft Code of Practice. We recommend further consultation on the exact notification process.

⁴ Independent Monitoring Authority for the Citizens' Rights Agreements, 'An Inquiry by the Independent Monitoring Authority for the Citizens' Rights Agreements into Certificates of Application' 21-23 <<https://ima-citizensrights.org.uk/app/uploads/2023/06/IMA-Inquiry-Report-2023-FINAL-ONLINE-3.pdf>> accessed 7 October 2023.

⁵ *ibid*, 5.

Following the issue of a facial image notification

30. *The Secretary of State will automatically impose the sanction without further recourse to the person. However, the Secretary of State must ensure there are adequate arrangements in place to enable the person to comply with the mandatory notification.*

31. *Where the person complies with the mandatory notification the Secretary of State will cancel the sanction as soon as practicable.*

27. It is our opinion that the sanction should not be automatic, particularly considering the failure to comply may be a fault of the Home Office, as highlighted above. There should also be a warning letter and a warning period following the notification that enables a person to comply with the requirement to avoid the Share Code sanction being imposed, and outlining ‘how the person may avoid a sanction being imposed provided they:
- respond within the “warning period”, specified in the warning letter or if given orally on the same day the officer acting on behalf of the Secretary of State issued it to the person; and
 - provide an acceptable explanation as to why they were unable to comply and demonstrate that compliance will take place as soon as is practically possible; or
 - allow the Secretary of State to put into place special arrangements to enable the person to comply; or
 - provide satisfactory evidence which explains why they are unable to comply.⁶
28. Why is there no consideration (as there are for other sanctions⁷) of whether taking account of the person’s circumstances, including whether they have limited or indefinite permission to enter or remain in the UK, such a sanction would be appropriate in the circumstances of the case?
29. Are there no circumstances where an exception should be made if a person, including a vulnerable person, is unable to produce a share code, such as if they do not have mental capacity, are in the hospital or have a serious medical condition, or are a victim or survivor of domestic violence, human trafficking or modern slavery etc., and should not be without the ability to prove their status in order to immediately rent, work, access benefits or the NHS?
30. We are concerned that this automatic sanction may have a discriminatory impact, including on individuals with protected characteristics. We request the publication of the equality impact assessment for the proposed changes.

⁶ This would be akin to the process outlined in paragraph 39 of the draft Code of Practice.

⁷ Paragraph 33 of the draft Code of Practice.

31. It is unclear how automatic imposition of the sanction reconciles with paragraph 16 of the draft Code of Practice, which states that *'Where the person appears to have failed to comply with a requirement to update a facial image, the Secretary of State may prevent the individual from being able to create a Share-Code to share with third-party checkers, **or allow for a message to be displayed alongside the person's facial image to indicate it needs to be updated**'*. This gives the impression that such a digital message would be an alternative to a sanction. If this is the case, in what circumstances will the message be displayed rather than a sanction automatically imposed? Or, is this message the 'digitised notification' referred to in paragraph 28 of the draft Code of Practice? If it is a 'digitised notification', paragraph 16 requires clarification.
32. In conjunction with other methods of notifying individuals (such as by post, email and text message), displaying a message alongside the person's online image would be an appropriate and proportionate method of reminding the individual of the requirement before the deadline for compliance. Moreover, sending notifications and warning letters through various means (not only displaying it alongside their facial image), before and after a person has failed to comply, but before imposing a sanction (including the automatic Share-Code sanction) would be a proportionate response to the failure to upload a facial image.
33. Furthermore, the Code of Practice should set out in greater detail what 'as soon as practicable' in paragraph 31 means, and provide an overall maximum timeframe for the Secretary of State to cancel the sanction following the individual's compliance.

Other maintenance requirements

32. The Secretary of State will only consider imposing a maintenance sanction if they are satisfied a person has failed, without a reasonable excuse, to comply with one or more of the maintenance requirements of the regulations. Where the non-compliance with the requirement to update a facial image is linked to other non-compliance or criminality, the Secretary of State may impose additional or other sanctions.

34. The Code of Practice will need to set out instances when a person will have a 'reasonable excuse' for non-compliance. The list of instances should not be exhaustive.
35. The 'additional or other sanctions' should be defined. We are concerned that the current draft offers the Secretary of State a significant amount of discretion to determine the sanctions to apply, without the consultation required in the Borders Act. The severity levels of non-compliance which would warrant a particular 'additional sanction' should be prescribed. By comparison, the Code of Practice on civil penalties for employers and landlords sets out a staged process for how the level of breach will be reflected in the penalty amount.⁸

⁸ Home Office, 'Code of practice on preventing illegal working: Civil penalty scheme for employers' (March 2022) <https://assets.publishing.service.gov.uk/media/6239f82ed3bf7f6ac63c3918/Code_of_practice_on_preventing_illegal_working.pdf>

Process before issuing other maintenance sanctions

37. *The Secretary of State will only impose a civil penalty or to vary or cancel the person's permission to enter or stay in the UK in the most serious failure to comply with a requirement of regulations, where preventing the person from creating a Share-Code or refusing to issue a BID is not appropriate.*

36. The Code of Practice must clarify what is meant by 'in the most serious failure to comply'.

37. In FBIS Engagement's virtual event on this consultation on 18 September 2023, FBIS representatives were clear that one of the intentions of this Code of Practice is to make civil penalties and immigration sanctions a 'last resort', as these sanctions have been ineffective at encouraging compliance. This intention is not clear in the draft Code of Practice.

38. *Before the Secretary of State can issue a civil penalty or vary or cancel the person's permission to enter or stay in the UK, they must issue the person with a warning letter.*

Content of maintenance requirement warning letter

39. *The warning letter will set out the reasons why the Secretary of State considers the person has not complied with the requirements of the regulations and what action may be taken, and will outline how the person may avoid a sanction being imposed provided they:*

- *respond within the "warning period", specified in the warning letter or if given orally on the same day the officer acting on behalf of the Secretary of State issued it to the person; and*
- *provide an acceptable explanation as to why they were unable to comply and demonstrate that compliance will take place as soon as is practically possible; or*
- *allow the Secretary of State to put into place special arrangements to enable the person to comply; or*
- *provide satisfactory evidence which explains why they are unable to comply.*

38. A warning letter, if given orally, should be followed up with a written warning to increase the likelihood of compliance.

39. If the warning is given orally, why is there no specified timeframe for response after it is given? Such a period may be necessary for an individual to seek legal advice or assistance and compile satisfactory evidence.

[gal_working_GOV.UK_version_March_2022.pdf](#)> (accessed 6 October 2023); Home Office 'Code of practice on right to rent: civil penalty scheme for landlords and their agents: 6 April 2022 (accessible version)' (Updated 23 March 2023) <[Code of practice on right to rent: civil penalty scheme for landlords and their agents: 6 April 2022 \(accessible version\) - GOV.UK \(www.gov.uk\)](#)> (accessed 6 October 2023).

40. The Code of Practice published in 2015 specifies that the warning period *'is 10 working days beginning on the day the letter is served, which is either the date it is administered by an officer acting on behalf of the Secretary of State, or two days following the post date of the letter or the email date if the warning letter is issued by email'*.⁹ It is unclear why this has been removed. We recommend specification of the warning period in the Code of Practice.

Following the issuing of a maintenance requirement warning letter

41. *The Secretary of State will not proceed to impose a sanction until the warning period either stated in the letter has ended or if the notice was issued orally in person by an officer acting on behalf of the Secretary of State, as soon as they are satisfied the person does not intend to comply with the requirement.*

41. We are concerned that the above test *'as soon as they are satisfied the person does not intend to comply with the requirement'* is a highly subjective one. An individual's intention could be misinterpreted by the officer who has issued the oral warning. What if an individual fails to properly explain the special arrangements they require in order to comply appropriately or does not have satisfactory evidence to hand?

Civil penalties

Process for issuing a civil penalty

43. *If the Secretary of State decides to issue the person with a civil penalty notice, the person will have the right to make a written objection, which must be received by the Secretary of State within the "objection period". This is 32 working days beginning with the date of the civil penalty notice. The person will also have a right of appeal to the relevant civil court against the Secretary of State's decision to issue a civil penalty notice.*

44. *If the Secretary of State decides to impose an immigration sanction, the person may have a right of appeal against that decision under the Nationality, Immigration and Asylum Act 2002.*

42. Will an individual be able to access legal aid assistance to appeal a civil penalty notice or an immigration sanction? If not, how does the Secretary of State propose that an appeal will be funded, including any appeal fees?
43. We are deeply concerned that a person who has a meritorious appeal may be unable to appeal if they are unable to fund their appeal.

⁹ Home Office, UK Borders Act 2007: Code of Practice about sanctions for non-compliance with the biometric registration regulations (March 2015)
<https://assets.publishing.service.gov.uk/media/5a747ae340f0b646ce8d9c54/UK_Borders_Act_2007-Code_of_Practice_-_non_compliance_with_biometric_registration_regulations_March_2015.pdf> accessed 6 October 2023.

45. *The Secretary of State may consider imposing a financial sanction in the form of a civil penalty notice following a failure to comply with a requirement where the person:*

- *failed to update their facial image following a change in appearance, or after 10 years (or 5 years if aged under 16) from the last time they uploaded their facial image;*
- *has existing permission and the Secretary of State has decided not to impose an immigration sanction for that failure to comply;*
- *has applied for a Home Office travel document but has failed to apply for a BID;*
- *has been granted permission but has failed to register for a customer account to enable the Secretary of State to issue a BID;*
- *failed to provide accurate data to enable the issue of a BID.*

44. It is difficult to comment on the compliance issue where a person ‘has been granted permission but has failed to register for a customer account’, as this element of the digital roll-out is yet to be confirmed by the Home Office. It has not been confirmed how and when individuals will be notified of the requirement to create an account, or whether there will be a deadline for doing so.

45. In order for consultation on this point to be meaningful and for our response to be informed, we recommend further consultation on this crucial point once the Home Office is in a position to share further details regarding this process.

Determining the amount of the civil penalty notice

49. *The Secretary of State may reduce the penalty by the amount stated in the Sanctions Table where there is satisfactory evidence that the penalty would cause undue financial hardship to a person in receipt of means tested benefits.*

46. The penalty should also be reduced for those who are not in receipt of benefits but are on low incomes and cannot afford to pay the required fee.

52. *Where a person provides evidence of more than one extenuating circumstance the Secretary of State will allow only a single discount of 50% of the amount stated in the Sanctions Table regardless of the number of mitigating circumstances.*

47. This lack of fairness and reasonableness is concerning, especially in situations of domestic violence where a victim may lack access to or control over their finances. The amount of discount should be determined by the facts of each particular case and the nature of the extenuating circumstances.

Right of objection

58. The person must submit a notice of objection using the specified form, which must be completed in English, or it can be submitted in Welsh if the person ordinarily resides in Wales. The notice of objection must be received by the Secretary of State by post or by email within the objection period.

48. What is the process/action to be taken by either the Secretary of State or the individual who has received the notice, either if the individual completes the wrong form or objects outside of the objection period?

72. The Secretary of State may apply to the court to recover the Secretary of State's reasonable costs from an unsuccessful appellant.

49. The Code of Practice should set out in which circumstances costs will be recovered from the individual for reasons of transparency.

Enforcement of a civil penalty

74. The debt may be enforced by various means, including attachment of earnings orders (in England, Wales and Northern Ireland), or earnings arrestment or attachment in Scotland.

50. In our view the enforcement of debt in the current economic climate, including the cost of living crisis, may adversely impact migrants, including families with children. This situation may leave them incapable of meeting their basic needs, potentially leading to exploitation and, in some cases, jeopardising their immigration status if they are unable to then afford other associated costs of extending or renewing their leave.

Curtailment or variation of permission

Consideration of curtailment or variation

80. In circumstances where the person has failed to comply with a requirement of the regulations and has been convicted of a criminal offence in relation to the use of their BID, the Secretary of State may consider curtailing or cancelling any existing limited permission to enter or remain in the UK.

51. Can the Secretary of State set out to which criminal offences she is referring or if she has an intention to establish new offences?

81. *The Secretary of State will only consider cancelling permission in compelling circumstances, and if doing so would not contravene domestic law or the UK's international obligations.*

52. The 'compelling circumstances' referred to above should be set out in the Code of Practice to ensure transparency.

Right of appeal

83. *Under the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014 there will not be a statutory appeal against an immigration sanction. This is because there are only appeal rights against the refusal of protection or human rights claims and these are circumstances excluded from an immigration sanction (see above).*

84. *Transitional cases will exist which pre-date the Immigration Act 2014 being fully in force. If the Secretary of State decides to refuse an application for permission, or to curtail or cancel permission in a transitional case, the person may have a right of appeal to the First-tier Tribunal.*

53. It would be sensible to clarify the above in paragraph 44, which states only, 'If the Secretary of State decides to impose an immigration sanction, the person may have a right of appeal against that decision under the Nationality, Immigration and Asylum Act 2002.'

Provisions for vulnerable people

Vulnerable people

85. *All foreign nationals who are subject to immigration control are required to comply with the regulations. This includes a person who may be vulnerable, such as a person;*

- *with a serious medical condition (see paragraph 87 for further guidance on this);*
- *who lacks capacity as defined under:*
 - a. *the Mental Capacity Act 2005 (for England and Wales);*
 - b. *the Adults with Incapacity (Scotland) Act 2000 (for Scotland); or*
 - c. *the Mental Capacity Act (Northern Ireland) 2016 (for Northern Ireland);*
- *who is a victim of trafficking, modern slavery or domestic violence.*

86. *In such cases, and where there is satisfactory evidence that a person has difficulty or has failed to comply with a requirement because of a vulnerability, the Secretary of State will consider alternative arrangements to enable the person to comply. Each case will be considered on its individual merits and handled with care and sensitivity.*

54. Can the Secretary of State provide examples of 'alternative arrangements'? The arrangements should not be too onerous for the vulnerable individual to comply.

55. It is unclear how paragraphs 86 and 93 interact with the automatic sanction pertaining to Share-Codes, for individuals who fail to comply to update their facial image. Paragraph 93 states:

'The Secretary of State will only impose a sanction on a vulnerable person where there is satisfactory evidence that despite arrangements appropriate to their particular vulnerability having been available, they:

- *intentionally failed to cooperate;*
- *understood what was required of them; and*
- *understood the consequences of not complying.'*

56. Therefore, before imposing any automatic sanction there must be an opportunity for a vulnerable person to make representations to explain they are vulnerable and that one of the above applies. Vulnerability should not be assumed only on the basis of application-type. Individuals should be permitted the opportunity to demonstrate their vulnerability.

Serious medical conditions

87. Where the person's vulnerability is based upon a serious medical condition, for example, the person has substantial mobility difficulties or is infirm they or their carer or designated adult, must provide satisfactory medical evidence from the treating clinician. It includes people detained under mental health legislation. In the majority of cases, the Secretary of State will consider delaying the requirement for a short period to enable the person to either recover sufficiently to enable them to comply, or to make alternative arrangements to enable them to comply

57. How has it been established this will happen in the 'majority of cases'? What factors would determine whether the Secretary of State will 'consider' such action in a case?
58. The Code of Practice should provide clarification regarding the course of action for cases that are not eligible for such consideration.

Where a person lacks capacity to make a decision

88. Where there is satisfactory evidence that a person lacks the capacity to make decisions within the terms of the Mental Capacity Act 2005 (in England and Wales) or the Mental Capacity Act (Northern Ireland) 2016 (in Northern Ireland), the Secretary of State will allow the person to identify a person such as their carer, a close friend or family member to assist them to comply with the requirements of the regulations. Where the person concerned is unable to identify someone who is able to assist, efforts will be made to identify such a person. Where the person has appointed an attorney, under a lasting power of attorney (in England and Wales), or under an enduring power of attorney (in Northern Ireland), whilst they had capacity, or a deputy has been appointed by the Court of Protection, it is likely that individual will be the most suitable person to assist.

59. In the FBIS Engagement virtual event on this consultation, on 18 September 2023, FBIS representatives described this system as two-tier. The vulnerable individual may have a 'proxy' who acts on their behalf, for example where they lack mental capacity, or they may have a 'helper', who is a third party nominated to work alongside the account holder. This is not clear in the draft Code of Practice.
60. Will sanctions for non-compliance be issued to proxies or helpers, as they may be to a designated adult acting on behalf of a child?

90. Where no suitable person can be identified, the Secretary of State will act in accordance with the principles of the relevant mental capacity law in supporting the person to comply with any of the regulations. In particular, the Secretary of State will ensure, as far as is possible, that the person is given:

- the opportunity to make decisions for themselves and the fullest possible input into any decisions made on their behalf; and*
- help to express their wishes, ensuring that they are able to make those decisions for which they have capacity; and where decisions are made on their behalf, that they have their wishes taken into consideration (where possible).*

61. The Secretary of State should secure a 'suitable person' to act on behalf of the person without capacity.

94. The Secretary of State will not impose a sanction on a person who is aged over 70 years who fails to update their facial image on their eVisa.

62. This should be made clear in paragraph 13 of the Code of Practice.

7 October 2023

Immigration Law Practitioners' Association