ILPA briefing for the Immigration Bill (Part 3, Chapter 1) House of Lords Report 3 April 2014 ff

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association 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 an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups and has provided briefing on immigration Bills to parliamentarians of all parties and none since its inception.

ILPA's briefings to date on this bill can be read at http://www.ilpa.org.uk/pages/immigration-bill-2013.html . ILPA is happy to comment on or assist with ideas for other amendments and will provide further briefing on the final selection of amendments tabled. All references are to HL Bill 96. We include briefings to all amendments printed at the time of writing. Inclusion does not imply that ILPA supports the amendment; this should be clear from the briefing.

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PART 3 ACCESS TO SERVICES

AMENDMENT 23 NEW CLAUSE Exemption to charges under Part 3 Lord Hannay of Chiswick, Lord Tugendhat, Baroness Williams of Crosby, Baroness Warwick of Undercliffe

Purpose

Provide that any bars on access to tenancies, bank accounts driving licences or "other services" (which would appear, without more, to encompass the health charge under Clause 33 and charges levied under the NHS charges regulations mentioned in clause 34 for health services but may or may not encompass the levy identified) shall not be imposed on those holding a Tier 4 visa as students of universities or those holding a Tier 2 (skilled worker) visa registered in full time postgraduate study at a university.

Briefing

ILPA supports this amendment for the attention it will draw to the range of practical problems, suffering and hardship these proposals will cause, not just for persons under immigration control but for British citizens also, although we do not think that it will achieve its aim of exempting persons in the group specified from the tenancies provisions. Nor will it exempt them from having to prove their status when they go to the doctor.

Every single person in this country, whether British or under immigration control, will be subject to the residential tenancies provisions and will have to prove their status to obtain

health services (it may be that some or all of those who already hold a National Health Service number are passported into health services when the provisions come into force, whatever their immigration status).

The ways to escape the provisions, other than the health service levy which will be imposed on all members of particular categories of migrant will be to own your own home and have private health insurance. Alternatively, to be entitled to accommodation in the categories exempt from the scheme under Schedule 3 or enter into informal cash in hand arrangements disguised as being non-commercial or being "holiday lets etc.) And to obtain health services and medicines in the informal economy.

Even if it were to suffice to prove to a landlord or landlady that you were a student, you would still have to prove that student status to take the benefit of that exemption. British citizen students could prove their student or British citizen status. That accommodation is arranged specifically for students will suffice under the Government amendment but other students, renting on the open market, would need to prove their student status. And, at least in the case of foreign students, to keep proving it through periodic checks.

It does not appear that students will be exempt from the health levy. Even if they were, they would not be exempt from checks on their status. They would still need to prove that they were students (who had paid the levy, but it is likely that you will not get a student visa without doing so) to prove that they should not be charged.

The amendment raises the question of just how unpleasant we are prepared to make life for British citizens, the settled and persons under immigration control in our attempts to run to ground those without lawful status. The Bill is predicated on our being prepared to pay a very high price highlight including:

- race relations;
- the attractiveness of the UK as a destination for study or stay, with the attendant economic benefits, benefits in terms of goodwill and relationships with other countries in future;
- And last, but not least, the triumph of petty bureaucracy.

If students say that they do not feel welcome perhaps it is because none of us feel particularly welcome under this scheme, particularly if something about us leads others to conclude that we must be "foreign" in accordance with their stereotypes. The "hostile environment" is hostile to us all, although it is more hostile to some than others. The way to protect students from feeling unwanted or unwelcome is not through a carve out for students but through challenging this hostility head-on.

Aneurin Bevan said of access to the National Health Service:

> *However, there are a number of more potent reasons why it would be unwise as well as mean to withhold the free service from the visitor to Britain. How do we distinguish a visitor from anybody else? Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…*"[1]

[1] *In Place of Fear*, Bevan, A., (1952), chapter 5.

We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

> *The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good.* [2]
>
> …
>
> *We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of*
>
> > *"whatever emanation of the state has demanded that I produce it."*
>
> *I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government.*[3]

It is not the mere fact of a card that produces discomfort or that those carrying out the checks are remote emanations of the State: private citizens checking upon each other. British citizens, EEA nationals and third country nationals alike would be required to produce identity documents at many turns in schemes that would be intrusive, bullying, ineffective and expensive and likely racist and unlawful to boot. "…intrusive government does not enhance our well-being or our safety" said the Home Secretary. It is as good a rallying cry against these provisions as any.

Many workers and students secure accommodation before they arrive in the UK. Checks prior to agreeing the tenancy are not possible in these cases. Where a person is confident that a visa will be awarded, or is prepared to take the risk, they may secure accommodation before they have leave. The proposals would make this impossible. It has been suggested that an agreement could be made conditional upon a satisfactory check on arrival and that students will be able to arrange accommodation prior to arrival (per Lord Taylor of Holbeach col 1653). In his memorandum to peers following Second Reading, Lord Taylor of Holbeach addressed the question of international students who need to arrange accommodation in advance of their arrival in the UK. He said that the Government would make regulations

> "*…which will provide for overseas students to be able to arrange accommodation in advance of taking up their studies in the UK, and for such tenancies to be entered into conditional on the production of the relevant visa or residence permit when the student arrives and takes up residence."*

What student or indeed landlord or landlady will be satisfied with an agreement that will be conditional until the very last minute? The landlord or landlady may fear losing an opportunity to rent at the beginning of the academic year and having property lying empty if the agreement falls through. The student will be conscious that they have no final promise of accommodation and risk being left in the lurch, or vulnerable to being asked to pay surcharges. Proposals such as this one do not inspire confidence that the realities of the rental market have been fully understood.

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[2] HC report 9 Jun 2010: Column 345.
[3] *Op. cit.* Col 350.

We recall what the Home Secretary said on 28 March 2013 when she abolished the UK Border Agency:[4]

> *…the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework, … the agency has been a troubled organisation since it was formed in 2008, and its performance is not good enough.*
>
> *…. I believe that the agency's problems boil down to four main issues: the first is the sheer size of the agency, which means that it has conflicting cultures and all too often focuses on the crisis in hand at the expense of other important work; the second is its lack of transparency and accountability; the third is its inadequate IT systems; and the fourth is the policy and legal framework within which it has to operate... UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files instead of modem electronic case management. …*
>
> *… The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, …*
>
> *UKBA has been a troubled organisation for so many years. It has poor IT systems, and it operates within a complicated legal framework that often works against it. All those things mean that it will take many years to clear the backlogs and fix the system."*

This project sets the Home Office up to fail. Again.

Chapter 1 Residential Tenancies

Key interpretation

Clause 19 Residential tenancy agreement

AMENDMENT 24 Baroness Hamwee, Lord Clement Jones

Purpose
Obliges the Secretary of State to consult whomsoever she considers appropriate before implementing a pilot and lay a report on the proposed criteria, including an equalities impact assessment, before parliament.

Briefing
An obligation to consult whomsoever you consider appropriate is not an obligation at all. Parliament might be heavily critical of the report; the equalities impact assessment might evidence discrimination: this would not prevent the pilot going ahead. There is nothing in this amendment to mitigate the effects of the scheme and indeed the amendment does not create any obligation to have a pilot at all.

Finally we emphasise that a pilot is likely to paint a rosier (although not rosy) picture of the reality because those who find it impossible to rent can move to another area to escape

[4] Hansard HC Deb 6 Mar 2013 : Column 1500.

homelessness. Some may lose jobs, doctors, or have to take children out of their schools but they are likely to be invisible to the pilot.

AMENDMENT 25 in the names of Baroness Smith of Basildon Lord Pannick, the Earl of Clancarty and the Lord Bishop of Leicester, and 29-40 42-47 Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara, The Lord Bishop of Leicester

Purpose
To remove the chapter on residential tenancies from the Bill. In addition, amendment 25 makes provision for a pilot, the details of which would be set out in an order. The amendment does not create any obligation to have a pilot at all nor as to any features of the pilot. A report on any pilot would be laid before parliament.

Briefing
ILPA supports these amendments that will remove Chapter 1 of Part 3 from the Bill. The more closely peers have scrutinised the residential tenancies provisions, the more they have fallen apart in their hands. Despite piles of letters and many column inches of Ministerial responses little but aspirations have been expressed.

We are left with the impression of a scheme whose "light touch" operation will mean that decisions to fine are wholly arbitrary and where there will be no check upon discrimination.

The approach taken in the amendments is to say "have a pilot if you must, but then if you want to go ahead you must go back to the drawing board and start from scratch to create a scheme." We consider that the recognition in the amendments that what is proposed will not work is sound. This scheme is far beyond the reach of tweaking.

Those desirous of renting to a particular person may call the telephone helpline as a protection, indeed they would be well-advised to do so, but they are likely to be almost the only callers as the prospect of a 48 hour delay means that a person under immigration control is unlikely to be a desirable tenant. Persons without documentation, both British and under immigration control, are at risk of homelessness and the amendments made so far to the Schedule of exclusions point up how difficult it is to identify all the exclusions.

Anyone who carries with them the spectre of a £3000 fine is likely to find it very difficult to rent at all, and prejudices and stereotypes will dictate who those persons are. The notion that the former UK Border Agency is any shape to administer this scheme is fanciful.

In his letter of 24 March 2014 Lord Taylor of Holbeach wrote to Baroness Smith of Basildon to try to reassure her that there was no loophole in the scheme. Somewhat despairingly, to our eyes, he wrote

> *Of course the tenant may claim that the sub-tenants are guests, not paying any rent, or the landlord may claim that they asked about who would be living at the premises and were informed that only the tenant would be living there. Many circumstances may arise where the relationship between* landlord *and tenant is informal or relatively difficult to establish and these will be assessed and investigated by Immigration Enforcement Officers* (letter of 24 March 2014)

There is a receipe for throwing good money after bad. The financial costs encompass not only the costs of enforcement but unpaid taxes on arrangements being disguised as guest arrangements without money changing hands. Other costs are intrusion into people's homes, contracts and daily arrangements. By immigration officers, whose track record is just not great as described in the briefing to Amendment 23. Who has forgotten the Capita texts, the GO HOME vans, the stories employers and universities have to tell?

We have seen the Home Office subcontract to Capita Plc. to text and telephone those allegedly with no leave telling them to leave the UK. British citizens, nurses, students, investors with a million pounds invested in the UK, all have been recipients of these texts. This is no surprise. Capita has been working from the Home Office database which both reflects the complexity of current immigration law and is not up to date[5].

Both the Capita exercise and the Go HOME campaign involving vans have been of questionable legality and the subject of widespread condemnation[6]. Both are object lessons in how difficult it is to produce a workable and efficient system against the backdrop of an enormously complex immigration system and longstanding problems and delays in Home Office immigration casework and record keeping. Both are object lessons in the extent to which there is at best a cavalier attitude to promoting equality or ensuring that the actions of the Home Office do not leave people, be they persons under immigration control or British citizens, vulnerable to abuse and victimisation.

Capita case December 2012

The student has ...only been given until the 1 Jan 2013 to respond… (I'm assuming most institutions will not be operating an Independent Student Advisor service until term starts…).

…the student previously had a Tier 1 visa that was due to expire in 2011. … in 2010 the student obtained Tier 4 entry clearance to study a PhD. This leave is valid from 1 May 2010 until August 2014 and was stamped on entry on 10 May 2010. .. the Capita case ID has been logged on the UKBA system against this student but she could not see any record of the student's Tier 4 leave. It therefore looks like the UKBA (and Capita) think that the student has been an overstayer since his Tier 1 leave expired in 2011 – very alarming since as far as X knows the student doesn't in fact have any irregularities on his history to prompt this kind of confusion / action.

[5] See further Capita's work for the UK Border Agency, Oral and written evidence 29 January 2013, Paul Pindar, Chief Executive, Andy Parker, Joint Chief Operating Officer, and Alistair MacTaggart, Managing Director, Secure Border solutions, Capita Plc , report of the Home Affairs Select Committee HC 914-I, published on 11 April 2013.and ILPA's August 2013 response to the Home Office consultation Strengthening and simplifying the civil penalty scheme to prevent illegal working.

[6] Examples include:. 'You are required to leave the UK': Border Agency contractor hired to find illegal immigrants sent them TEXTS Daily Mail 11 January 2013, available at http://www.dailymail.co.uk/news/article-2260667/UK-Border-Agency-contractor-hired-illegal-immigrants-send-TEXTS-warning.html#ixzz2bm4JCfg2 (accessed 12 August 2013); ICO to investigate SMS messages sent to immigrants by Capita, Computer World 15 January 2013; Nigel Farage attacks Home Office immigrant spot checks as 'un-British', The Telegraph, 2 August 2013; Vince Cable MP, BBC 28 July 2013, available at http://www.bbc.co.uk/news/uk-politics-23481481 (accessed 12 August 2013), Bishops condemn Home Office 'go home' campaign, Ekklesia, 12 August 2013, available at http://www.ekklesia.co.uk/node/18785 (accessed 12 August 2012), nongovernmental organisations such as Show Racism the Red Card (see http://www.srtrc.org/news/newsand- events?news=4511 accessed 12 August 2013) and Liberty "Go Home" vans, nasty racist and likely unlawful 1 August 2013, see https://www.liberty-human- rights.org.uk/news/2013/go-home-vans-nastyracist-and-likely-unlawful.php

Capita case December 2012
A client of mine received a text message on his phone from Capita Plc. and messages say they need to leave the UK and a phone number to call them on. He has also been getting phone calls from them-quite a few on a daily basis. Needless to say that our client is actually waiting for his application to be reviewed and we have a letter to confirm this, but obviously Capita have not been informed of this and he was extremely concerned.

It is not possible to point to the civil penalty scheme for employers as proof that this scheme will work. Employers spend thousands on lawyers to avoid penalties. See our August 2013 response to *Strengthening and simplifying the civil penalty scheme to prevent illegal working*[78] for details of our experience of the employer scheme.

- The page of the Home Office website dealing with Preventing Illegal Working used to provide links to some eight separate current documents, totalling some 194 pages. Now that the website has moved to gov.uk we can only find two of the documents[9] but one is 84 pages long. List A of acceptable documents goes on for 9 pages and list B for 6. This gives some notion of the difficulties employers face and some idea of the complexity of the online tool that the Home Office will provide, promised by Lord Taylor of Holbeach in his memorandum following second reading[10].

Lord Taylor said

> *"In addition to this, the Home Office will provide a Landlords Enquiry service, which will be able to offer help and advice."*

This suggests that, unlike the employer's helpline, it will not be possible to check the status of individuals. **The Minister could be asked to confirm this.**

This would not be a surprise, given the concerns about data protection. An employer can be required to give details of a business but

- **what checks would ensure that a caller is really a landlord or landlady is checking on a potential tenant, rather than someone being nosy?**

If safeguards were too onerous, no one would ring. If it is not possible to check the status of an individual, the scheme will provide no comfort to landlords and landladies.

We emphasise that not having the right documents will affect British citizens just as it will affect migrants. Baroness Smith of Basildon observed at Committee

> "*I return to the issue that was not really addressed my satisfaction: victims of domestic violence who may not have the appropriate documents."* (col 1656)

It will affect not only British citizens but others exempt from the scheme. Persons seeking asylum living in Home Office sponsored accommodation will not face checks, as that accommodation is exempt under the Schedule. The Minister said at Committee:

> *`There is also a facility for the Home Office to authorise persons to rent property in certain circumstances even though they do not have a lawful immigration status. We will exercise*

[7]Available at http://www.ilpa.org.uk/resources.php/20798/ilpa-response-to-the-home-office-consultation-tackling-illegal-immigration-in-private-rented-accommo
[8] http://www.ilpa.org.uk/data/resources/19317/13.08.20-ILPA-response-to-strengthening-civil-penaltiespdf.pdf
[9] See https://www.gov.uk/government/publications/prevent-illegal-working-in-the-uk
[10] Try out the employer document https://www.gov.uk/check-an-employees-right-to-work-documents

this power in favour of those with outstanding asylum applications and failed asylum-seers who face a recognised barrier to returning home. The landlord will be provided with confirm of the authority to rent by contracting the Home Office and will receive a response within 48 hours" (col 1652)

Too late. And the landlord or landlady has had chance to contemplate that the person will become a failed asylum seeker able to return in the none too distant future. The landlord or landlady is unlikely to ring the helpline at all. The person will be forced either to be accommodated at State expense, even where they have funds to pay rent, because they have nowhere else to go. Or they will be deemed not destitute and thus not able to be accommodated by the State. They will face street homelessness, or reliance on emergency accommodation mentioned in Schedule 3, where local authorities will have to pay.

Clause 16 is not about proving an entitlement to rent property. It is about having or not having any entitlement to rent at all. A landlord or landlady or any type: private individual or State institution, faces a fine of £3000. Insofar as it is considered that these persons should live anywhere at all, they are supposed to live in the accommodation excluded from the scheme under Schedule 3. This is not suitable for all the groups defined in the amendment, or the definitions of the excluded accommodation are so narrow as to limit their choices.

The intention is that those whose claims have failed depart the UK. Lord Taylor of Holbeach said in his memorandum: "The Bill is designed principally to persuade illegal migrants to depart or to make it easier for the Home Office to remove them[11]." It is certainly not easier to remove a person who is of no fixed abode – finding them to notify them of an appointment with a legal representative is in many cases impossible, you just have to wait for them to turn up or rely on friends. So the intention must be to persuade them to leave. But will they? No one who heard it will forget the speech of Diane Abbott MP about those denied support under Schedule 3 of the Nationality Immigration and Asylum Act 2002, one of the groups envisaged in this clause. She said:

I have heard the Minister for Citizenship and Immigration say, very reasonably, that reasonable, sensible parents, faced with the prospect that their children would be taken into care, would agree to go back whence they fled. They would do the reasonable and sensible thing, take the plane ticket and go back. She clearly has not done what some of my hon. Friends have been doing for 17 years: she has not sat across a table from people whose asylum or immigration case was going nowhere and told them what they have already heard half a dozen times from lawyers, advisers or social workers. She has not had to try to talk to such people only to see complete disbelief and terror in their eyes.

Reasonable people, people in the Minister's position, take reasonable decisions. Desperate people—those with whom I and some of my colleagues deal week in and week out—take unreasonable and irrational decisions. Tragically, some parents faced with that choice will take the ticket and go home, but many others will find themselves forced underground, or even more vulnerable and marginalised than they were before.

I do not care if most parents take reasonable decisions. If some parents are so frightened of going home to face torture, political persecution and, yes, economic chaos and destitution—something that we in this place cannot really get our heads round—that they are prepared to see their children go into care, that is a situation that no decent Government should bring

[11] Paragraph 4.

about. The use of even one child as an instrument to enforce the removal of its parents is one child too many. As a Government, we cannot use the threat of destitution or losing a child as an instrument of asylum policy. There must be better methods than that.[12]

Checks are difficult. Suppose a landlord or landlady does get as far as checking.

- **Will a British passport be accepted as proof of a right to rent?** A British passport does not mean that a person is a British citizen, only a British citizen passport does that. There are many types of British passport and some people who hold a British passport are not exempt from immigration control.
- **Will a birth certificate be accepted as conferring a right to rent?** A birth certificate only proves a person is British if the person can be linked to the birth certificate and if it says that the person was born in the UK pre 1983 or in the UK to a British mother post 1983. In any other case there are further checks to make.
- **Will a landlord or landlady be obliged to establish whether British citizenship has subsequently been renounced or taken away?**
- A person with a right of abode certificate is not necessarily a British citizen. On the face of the Act, such as person is in a more exposed position than a Swiss national (Clause 30(5)(c)). **Will a certificate of entitlement to a right of abode be accepted as proof of having a right to rent? How will a landlord or landlady know that it truly belongs to the person before them?**
- Many EEA nationals and non-EEA nationals who are lawfully present are still reliant on leave to remain that is endorsed in passports, e.g. those who applied for indefinite leave to remain before the end of February 2012 when Biometric Residence Permits were introduced for all new applicants (not all applicants – a suggestion that the permits can be used for all is wrong and will continue to be wrong for at least the next five years and in some cases longer).
- The Home Office does not issue letters saying that a person has an outstanding appeal. Communications come from the Tribunals. A Notice of Hearing for a Tribunal case may not be received immediately. **In any event, how does a person prove that they are the person named in a notice of hearing?**
- Family members of EEA nationals are not required to obtain family member residence cards, etc. The checks would force such family members to obtain documents if they wish to rent accommodation and raises questions under European Union law. **The Minister should be asked: what documents will non-EEA national family members of EEA nationals be asked to provide?** It is a good test of whether the scheme has been thought through.

Establishing when a person's leave expires is not always easy. A landlord or landlady may find it difficult to establish at the outset when the prospective tenant's leave will expire.

A person's documents may all be with the Home Office at the time when their leave expires and an application for an extension of leave be pending. Establishing that a person has lawful leave under section s 3C or 3D of the Immigration Act 1971 is not straightforward and, even where it is established, what is achieved? A landlord or landlady sees a person whose passport is with the Home Office. That person's leave may end at any time, when a decision is made on the application or when appeal rights are exhausted.

[12] 17 Dec 2003 : Column 1645.

The introduction of these checks risks forcing EEA family members to obtain documents if they wish to rent accommodation. Documents should be accepted if they evidence a right to reside, failure to do so, even if the documents are not prescribed, is arguably unlawful under EU law. The Home Office guidance says (and correctly) that what is required for, in this instance, an "other" family member is

> *"…enough documentary evidence such as birth certificates or other evidence which confirms how they are related to their EEA national family member who is exercising free movement rights in the UK… In making a decision, you must consider each case on its own merits.* "[13]

The current application form asks for

> *3.16 Evidence of relationship: birth certificate/marriage certificate/civil partnership certificate/evidence of durable relationship/other evidence of relationship (please circle to indicate).*

The has repeatedly had periods of failing to keep to the six month time limit imposed by European law for the provision of residence documents to those who want them. target. Many cases, not just the wholly exceptional, take the full six months. We are also familiar with hearing nothing for five months then seeing the application returned as invalid, including when it is valid.

The Home Office has really struggled to meet this deadline. Since being warned by the European Commission that it was breaching European law to keep people waiting more than six months it has made efforts to meet the target, some helpful, others not, such as keeping people waiting five and a half months then writing to say a document is missing from the application and it is being treated as invalid. The Home Office will be overwhelmed if all third country national family members with rights under European law apply for a document. But what is to happen during the period when an application is pending or if they do not apply? What is the Home Office going to permit landlords to accept as proof? A marriage certificate (which could potentially be from any country in the world)? In combination with what? The third country national's passport? We can think of no simple check way to check eligibility. Simple combinations of documents have the potential to yield the wrong answer.

Community preference is a matter of EU law. EEA nationals should as a matter of law be treated as well as any third country national. Nationals of a country should not be worse off after joining the EU than they were before. Yet it seems that they will be, for their third country family members are going to find it harder to prove their entitlement to be in the UK than those from a family composed entirely of non-EEA citizens who have visas. **The Minister could be asked to comment on how long it is taking to process EEA residence documents for third country national family members and whether that period will go up if levels of application go up.**

Repeat checks were the subject of particular criticism by those landlords' associations who gave oral evidence to the Public Bill Committee[14]

[13] Home Office Modernised Guidance EEA Family Permits Volume 7
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283657/EEA_family_permits_v7_0EXT.pdf

[14] On 29 October 2010, see
http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm

Carolyn Uphill:. We certainly fully oppose the idea of periodic checks, because we believe those can lead to very dangerous and unintended consequences… (col 43)
If we require a landlord to make a periodic check, you must be under no illusion that you are putting the landlord in an extremely difficult position. A comparison has been made with the employment checks. An employer is in a totally different position. It has an ongoing day-to-day relationship with their employee. …
If an employer has to ask the employee to leave because they are no longer entitled to work in the country, it can do so. …e landlord simply cannot walk into the property and require the tenant to speak to them or communicate with them; if a landlord turns up unannounced, that can be harassment and a criminal offence. If the landlord says, "Can I come round to check the documentation?" when they get there, the tenant may have disappeared and then the immigration services have lost them. The tenant will not have paid any bills.
Conversely, the tenant may refuse to give the landlord admission, which then bars the landlord from doing maintenance checks and even the gas safety test, and that is very dangerous for the property. In the worst scenario, the tenant, possibly feeling themselves under threat because they might be sent out of the country, perhaps back to a war zone of which they are frightened, could become aggressive with the landlord.
You only need one incident, where the landlord and the tenant get into some sort of physical situation, for that publicity to put all landlords off even considering taking on anybody on a temporary visa. Then you have all those people as vulnerable tenants forced into the underclass of rogue operators…(cols 44-45)

…

Q 95 Mr Harper: …*We do not require the landlord to evict the tenant—we did think about that, and we decided not to do it for the reasons you set out—nor does the contract become unlawful. All we require is that the landlord notifies the Home Office, and then, quite properly, our immigration enforcement officers will use our legal powers to take action against the tenant. We do not require the landlord to do anything other than notify the Home Office.*

Carolyn Uphill: *… Please let us remember that the landlord letting the property has the overheads of the property—probably a mortgage, and certainly gas checks, licensing, electric checks, maintenance fees—to pay. They need the income from the tenant. If they perceive that there is a risk in letting to somebody who is here only on a visa, they are simply not going to take the business risk. You will force those people into the hands of rogue operators, who will be delighted.* (col 52)

What is proposed is very different to the system for employers or universities. The civil penalty scheme for employers is, in its current incarnation, backed by the sponsor licensing system (whether the person subject to immigration control is also sponsored or not) and in practice the two are interlinked. It is not proposed to licence all private landlords and landladies (the government rejected proposals made by the previous government to have such a register[15]) and the costs and bureaucracy involved in so doing would be prohibitive. But this creates enormous challenges even in communicating with landlords and landladies.

Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is more difficult to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality

[15] HC Report, 3 June 2013, col. 1232.

Act 2010. Private landlords and landladies come in all shapes and sizes and many manage the letting of their property with a minimum of formality. They may be relaxed about matters such as subletting or persons succeeding to the tenancy. According to the Department of Communities and Local Government, in 2010 individual private landlords and landladies had responsibility for 71% of all private rental properties in England[16]. That survey showed that 78% of all landlords and landladies in England had only one rental property.

In 2013 Shelter estimated that some nine million people in England rent[17]. Tenancies are often granted for a short period, typically six to 12 months, and then renewed. Many persons will rent more than one property in the course of a year. Persons with sub-tenancies change perhaps more rapidly.

We recall the problems when in 2006 when attempts were made to identify foreign national prisoners. Prison records showed place of birth. British citizens born overseas, for example those who were children of members of the armed forces, were frequently wrongly identified.

People from black and ethnic minorities would be likely to find it more difficult to rent property than the white population. Those with indefinite leave to remain, or permanent residence under European Union law, including those born in the UK, would be likely to find it more difficult to rent property than British citizens.

Were the proposals implemented, a landlord or landlady would be aware of the immigration status of their tenants and would know, and hold on file, all information that is contained in their passports or other acceptable documents. Will they keep that information confidential? Or store the documents safely? Or destroy them safely? There are risks to having private citizens hold such data on each other.

If landlords and landladies are companies, or if they do not check the status themselves but contract with a third party company to do this on their behalf then **that company will need to ensure that the checks are being done by a solicitor, barrister, legal executive or person registered with the Office of the Immigration Services Commissioner because advice on a person's status will fall within the definition of immigration advice under Part V of the Immigration and Asylum Act 1999**. For all save regulated or exempt persons to give such advice is a criminal offence[18]. A judgement as to when leave is due to expire will constitute immigration advice if provided in the course of a business, whether or not for profit, by a third party. Thus, for example, a letting agent's identifying when leave is due to expire.

- **Will the Minister acknowledge that companies checking status for landlords will need to register as Alternative Business Structures with the Law Society or register with the OISC?**

That the advice is given to the landlord or landlady rather than the person under immigration control matters not for the purposes of the Act; it is given in respect of a particular individual[19]. Even if an exemption is given, we recall the matters aired in the discussions on whether social workers should be given an exemption to advise separated

[16] *Private Landlords Survey 2010,* Department of Communities and Local Government, October 2011.
[17] See http://england.shelter.org.uk/campaigns/fixing_private_renting (accessed 12 August 2013).
[18] Immigration and Asylum Act 1999 s 84 read with s 91.
[19] Immigration and Asylum Act 1999 s 82(1).

children (which ended in consensus that they should not – the Home Office, the Ministry of Justice, the Local Government Association, ILPA and the Office of the immigration Services Commissioner were among those involved in the discussions). Even if an exemption is given in the form of a Ministerial Order under s.84 (4)(d) of the Immigration and Asylum Act 1999, under Schedule. 5 paragraph 3 (3) of the Act, they still have to comply with the Commissioner's Code of Standards. The requirements of the Code include:

- Professional Indemnity Insurance
- Continuous Professional Development
- Acting in the best interests of the client
- Not acting where there is a potential conflict of interests[20].

On 3 July 2013 the Residential Landlords Association issued a news release with the results of a survey showing that 82% of landlords and landladies opposed the plans: *Landlords oppose Government's immigration plans*[21] The Chair of the Association, Alan Ward said:

> *The private rented sector is already creaking under the weight of red tape so it is little wonder that landlords are so clearly opposed to this flagship Government measure.*
> *"Whilst the RLA fully supports measures to ensure everyone in the UK is legally allowed to be here, this proposal smacks of political posturing rather than a seriously thought through policy.*
>
> *"For a Government committed to reducing the burden of regulation it is ironic that they are now seeking to impose a significant extra burden on landlords making them scapegoats for the UK Border Agency's failings.*

The article describes the Home Office as giving assurances that it will take a "light touch" approach to regulation. This terminology is familiar to us from the employers' civil penalty and sponsor licensing schemes. In our experience it means different treatment for different employers with no objective basis for this. Home Office enforcement of employer sanctions has come under considerable scrutiny[22] and we have no doubt that this scheme will be scrutinised to see whether this is enforcement in name only.

The Home Office's light touch approach toward employers has been criticised by the Chief Inspector of Borders and Immigration[23] and by the Home Affairs Select Committee[24]. Once

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[20] This was discussed at length in the context of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the specific context of whether social workers could be given an exemption under the Act. See the letter of 5 October 2012 from Clyde James, Office of the Immigration Services Commissioner to Rebecca Handler of the Legal Strategy Team in the Immigration and Border Policy Directorate of the Home Office.
[21] Available at http://news.rla.org.uk/landlords-oppose-governments-immigration-plans/ (accessed 12 August 2013). The report defines "recent" as having arrived within the last five years.
[22] UK Border Agency's operations in the North West of England An Inspection of the Civil Penalties Compliance Team – Illegal Working March - April 2010, Chief Inspector 18 November 2010. See also *Inspection of Freight Searching Operations at Juxtaposed Controls in Calais and Coquelles, the report of a pilot inspection contained in the Chief Inspector's 2008-2009 Annual Report.* See also the Home Affairs Select Committee Fourth Report of session 2013-2014, *The Work of the UK Border Agency (October-December 2012),* HC 486 p*ublished 13 July 2013.*
[23] UK Border Agency's operations in the North West of England An Inspection of the Civil Penalties Compliance Team – Illegal Working March - April 2010, Chief Inspector 18 November 2010. See also *Inspection of Freight Searching Operations at Juxtaposed Controls in Calais and Coquelles, the report of a pilot inspection contained in the Chief Inspector's 2008-2009 Annual Report.*
[24] Most recently in its Fourth Report of session 2013-2014, - *The Work of the UK Border Agency (October-December 2012),* HC 486 | *Published 13 July 2013.*

the legal powers are in place it is easy to change from light touch regulation to greater enforcement, albeit at enormous cost.

The prohibition of discrimination, harassment and victimisation under the Equality Act 2010 applies to the characteristic of race in the let of small premises but otherwise it will be lawful to discriminate in the disposal (etc.) of tenancies in small premises. A visa may reveal other things about a person, for example that they are in a civil partnership and thus their sexual orientation. **What is to prevent a landlord or landlady in "small premises" discriminating on the grounds of sexual orientation"?**

As to discrimination on the grounds of race, this may be very difficult to prove unless advertisements bar particular nationalities as there are a multitude of reasons that an individual can advance for not sharing their home with another person and the burden of proving that it was not one of the these but the lodger's nationality that led to the refusal of a particular lodger or licensee (or tenant) is a heavy one. A claim against a landlord or landlady for discrimination is brought in the county court but no statistics are available to show how often such cases succeed. **The Minister could be asked that the Home Office obtain and publish information on whether there have been any and/or any successful claims against landlords and landladies of small premises under the Equality Act 2010.**

Arrangements where an owner occupier takes in a paid lodger are often very informal. The sums of money changing hands can be very low. The arrangements are often at the lower end of the rental market. Lodgers or licensees have less protection from eviction under the Protection from Eviction Act 1977 than those who are sole occupants of property under a formal tenancy. The chances of a landlord or landlady's taking fright and putting lodgers who are ill-placed to find alternative accommodation onto the street, retaining deposits including money deposited against payment of any possible fine under these measures, are high.

Provision needs to be made for those without leave. If an employee becomes an overstayer s/he can stop work. The equivalent in this regime is to become homeless. *Inter alia*, we do not consider that making the children of those here without leave homeless is compatible with the duties of the Home Office under section 55 of the Borders, Citizenship and Immigration Act 2009. Nor has any adequate consideration been given to the result burden on local authority social services departments who often bear the burden and cost of accommodating otherwise homeless unlawfully present migrants.

ILPA members are lawyers accustomed to checking clients' entitlements. It is not infrequent for persons with lawful leave and British citizens leading chaotic lives, including those who have mental health problems, to find it extremely difficult to lay their hands on documents evidencing entitlements. These are people who already find it difficult to secure private rented accommodation.

Employers take many hours to familiarise themselves with immigration documents, even where there is a lawyer to explain it to them. There are many variations on the basic theme of passports, visa stamps, EEA passports, identity cards and biometric identity documents. It is not just a question of "familiarisation" – a system of record keeping needs to be set up, and questions arise when documentation is not straightforward, as is frequently the case.

And immigration law keeps changing; keeping up to speed and understanding the implications of changes are a huge challenge. For landlords and landladies, as for smaller

employers and those with a low turnover of staff, it is not a case of familiarising themselves once and then being experts; it is more likely to be something they have to re-learn each time they do it. We logged on today (1 April 2014 to count the number of Statements of changes in the past year there was one laid that very day, correcting another laid on 13 March 2014. In the past year there have been 12 statements of changes: one per month. The one laid today comes into force on 6 April. It corrects a Statement of Changes not yet in force, laid on 13 March 2014. Specialist lawyers struggle to keep up.

In the year to July 2013 there were statements of changes in July 2012 (twice), September, November, December (twice), January, February, March (twice), April and July 2013. These run in total (inclusive of explanatory notes, but exclusive of explanatory memoranda and amended guidance) to some 740 pages. A number were brought in with little or no notice. For example the January changes were published on 30 January and came into force on the 31st. The second December changes were printed on 20 December (the Thursday before the Christmas, with Christmas day falling on the Tuesday) and came into force on New Year's Eve. The first December changes were printed on 12 December and came into force on 13 December amending the rules previously laid which had been due to come into force on that date. The September 2012 changes were printed on 5 September and came into force on 6 September. The second July changes were brought into force "with immediate effect" on 20 July 2013, *inter alia* amending rules laid on 9 July 2013. Even where a longer lead in time was given, rules did not always appear at once on the Home Office website and only those scouring the parliamentary lists of publications were aware that they exited at all.

Landlords and landladies do retain liabilities when they instruct a letting agent. Under the Equality Act 2010, section 109 the principal is vicariously liable for the prohibited conduct of their agent. Thus the landlord or landlady is liable if the letting agent refuses to let to a particular prospective tenant because of race, sex, sexual orientation, etc. or treats a prospective tenant less favourably, regardless of whether the landlord instructed the letting agent to discriminate or knew that the agent was discriminating. Section 110 of the Act makes the agent liable if they do something which would be prohibited conduct if done by the principal.

In our experience, many employers are failing to carry out the annual checks even though they may be aware of the need to do so. The reasons for this are that it is administratively inconvenient for those who employ large numbers of migrant workers. Employers ask why they need to do these checks when the individual still has leave to remain for a number of years and nothing has changed.

Many lets are for a period of six months. It would be oppressive for those letting property and tenants and intrusive for tenants, to require landlords to check documents every six months. How could it be established that a landlord or landlady had not simply taken a pile of photocopies at the beginning of the tenancy and signed one every six months?

We consider that the likelihood of a landlord or landlady's failing to make an adequate check is high. We consider that even where they use their best efforts to make an adequate check the likelihood of their getting it wrong are high. We consider that this is in very large measure due to the complexity of immigration law, the plethora of documents to be checked and the inadequacy of Home Office systems. Landlords and landladies should not be penalised for the shortcomings of the Home Office.

Costs of checks are likely to be passed on to tenants making it harder to find accommodation in the private rented sector. Tenants may be required to deposit a sum

equal to the maximum possible penalty with a landlord or landlady along with any other deposit required for the property. We have already seen instances where persons under immigration control have been asked for £3000 deposits. This would put those put rental properties beyond the reach of some tenants. For many of those who could pay, it would tie up a considerable part of their available capital, and deny them the use of that sum or any interest on it. Tenants and potential tenants should not be penalised for the shortcomings of the Home Office.

It takes time for landlords and landladies to familiarise themselves with data protection obligations. Landlords and landladies', including private individuals who are landlords and landladies, obligations under the Data Protection Act 1998 include:

- to register with the Information Commissioner's Office (ICO) as a data controller;
- to implement appropriate technical and organisational security measures against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and not to keep personal data for longer than is necessary for the purpose for which it was originally collected.

While the proposals will not add any new obligations that do not already exist, the proposals will increase the amount of personal data that landlords and landladies hold about their tenants meaning that it is more likely that a breach will occur.

Although there is not currently a mandatory notification obligation under the Data Protection Act 1998, the Information Commissioners' Office recommends that serious breaches should be notified to it. This might affect landlords and landladies who hold personal data of a large number of tenants or in some circumstances smaller landlords and landladies. Under the proposals for a European Data Protection Framework[25], notification of breaches to the Information Commissioners' Office and in some cases to the data subject will be mandatory. This would affect private landlords and landladies as well as companies.

In the experience of ILPA members also practising in housing law and their colleagues, "keep records" is a rather grandiose term for what often happens in practice. A tenancy agreement may be kept while the tenancy is current; it may not always be easy to locate. In the case of lodgers and tenants there may be nothing in writing at all. How long it is retained will very often depend simply on when an individual landlord or landlady is motivated to sort out papers and thinks "I do not need that any more". As a consequence tenants face a greater risk of identity theft and fraud and landlords and landladies of breaching their statutory obligations under the Data Protection Act 1998 and any contractual obligations under the tenancy agreement.

[25] See the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Safeguarding Privacy in a Connected World - A European Data Protection Framework for the 21st Century*, Brussels, 25.1.2012 ,COM(2012) 9 final enclosing in particular *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, Brussels, 25.1.2012, COM(2012) 10 final, 2012/0010 (COD) {SEC(2012) 72 final} {SEC(2012) 73 final}, in which draft articles 28 and 29 are relevant.

If landlords and landladies retain personal data any longer than the specified 12 months the tenant would be entitled to complain to the Information Commissioner's Office that their personal data had been held for longer than is reasonably necessary and legally allowed.

As to destruction, what guarantee is there that the landlord or landlady will dispose of documents safely in a way that does not put the tenant at risk of identity fraud?

What of families with older children? The Home Office consultation paper that while landlords and landladies need not check children they may have "to satisfy themselves that the people concerned are children." It is a complicated matter, with potentially grave consequences, to have professional social workers call into question a child's age, as is set out in ILPA's *When is a child not a child Asylum, age disputes and the process of age assessment*[26]. To set up a scheme where private landlords and landladies are doing so can only run counter to the Home Office's duties under section 55 of the Borders Citizenship and Immigration Act 2009 to safeguard and promote the best interests of a child. It may also lead to families with older children being regarded as unattractive tenants.

Finally
The Committee on Delegated Powers said:

> ***Clause 29 (2) - "De-hybridising" provision***
> *10. Clause 29(2) provides that, where the draft of an instrument containing an order under or in connection with Chapter 1 of Part 3 would be a hybrid instrument under the standing orders of either House, it is to proceed in that House as if it were not a hybrid instrument. It is not immediately clear which particular affirmative order making power this is intended to apply to, and nothing is said in the memorandum to indicate the reasons for its inclusion.* ***It is the usual practice of this Committee to draw de-hybridising provisions to the attention of the House so that it can satisfy itself that other mechanisms are available to protect the private interests that would otherwise be protected by the hybrid instrument procedure. In this particular case we also recommend that the Minister be asked to explain why a de-hybridising provision is considered necessary.*** *There is no obvious reason for its inclusion and we do not consider it is appropriate for such a provision to be included unless the powers to which it relates can reasonably be expected to be exercised in a way that would trigger the hybrid instruments procedure.*

The inadequacy of reasoning may be one reason why the Committee said in that report:

> *In a number of respects the quality of the memorandum fell short of the standard the Committee expects. We repeat, therefore, the hope that we expressed in our 12th Report (HL Paper 72) that, in future, the Government will devote greater care to the preparation of these important explanatory documents.*

GOVERNMENT AMENDMENT 25 Lord Taylor of Holbeach

Purpose

Makes provision for a pilot of a scheme on residential tenancies in one or more areas, although all detail is left to secondary legislation

[26] Heaven Crawley for ILPA, May 2007.

Briefing
We do not support the proposal in amendment 25 for a pilot the terms of which, set out in secondary legislation, could be exactly the same as those on the face of the Bill. For those in the affected area the consequences of a pilot are likely to be those highlighted in debates as consequences of the scheme, save that affected persons may be able to move away from the affected area, making it likely that the pilot will not demonstrate all the problems that arise from the scheme. Debates to date have demonstrated that the scheme proposed is undesirable and unworkable.

Schedule 3 Excluded Residential Tenancy Agreements

GOVERNMENT AMENDMENTS 26, 27, 28, 29 Lord Taylor of Holbeach

Purpose
Amendment 26 widens the exclusion for student accommodation from halls of residence to accommodation used wholly or mainly for students

Amendment 27 widens the exclusion for halls of residence so that all halls of residence are covered.

Amendment 28 is consequential on **Amendment 29** which provides an exclusion for accommodation arranged throughout he university

Briefing
These amendments will mean that all students whose accommodation is arranged through the university are exempt from the scheme. It is only by exclusion of types of accommodation that there can be exemptions from the scheme, as everyone, including British citizens, must prove their status if renting accommodation that falls within the scheme. See our briefing to amendment 23. For those students renting in the excluded accommodation, the exemption may work. We say may because "wholly or mainly" is a test that may not always be easy to apply in practice as the composition of the tenantry of a building may change over time. What the amendment does not do is to provide any relief for students wishing to occupy accommodation not arranged through the university.

Clause 31 General Matters

GOVERNMENT AMENDMENT 41 Lord Taylor of Holbeach

Purpose
Requires that any Code of Practice on the setting of a penalty be laid in draft before parliament, but as far as we can see does not require the affirmative procedure as recommended by the Committee on Delegated Powers in the absence of any Government explanation as to why a distinction from the equivalent code in respect of employment should be made.

The Delegated Powers Committee said

> *Clause 27 requires the Secretary of State to issue a code of practice … Under subsection (2) the code is required to specify the matters which the Secretary of State must take into*

account when determining the amount of a penalty. The code may also contain guidance about other matters…

6. Under clause 27(6) the Secretary of State must lay the code of practice before Parliament, but apart from that there is no provision for parliamentary scrutiny. The memorandum explains the lack of any further scrutiny on the basis that the parameters for the code will have been set out in the primary and other secondary legislation. However, we note the approach adopted here is inconsistent with that adopted for the employment provisions of the Immigration, Asylum and Nationality Act 2006. That Act contains a similar regime for the payment of penalties, in that case by employers who employ persons who do not have a valid leave to enter or remain in the UK. Section 19 of the 2006 Act requires the Secretary of State to publish a code which sets out the factors which the Secretary of State will consider in determining the amount of the penalty. However, in that case the code is required to be laid in draft before Parliament and to be brought into force by an order subject to the negative procedure.

7. The Home Office does not explain in the memorandum why a lower level of parliamentary scrutiny applies to the code under clause 27. In both cases, the provisions of the code will affect the level of the penalty that the Secretary of State will impose in particular cases. In relation to the code of practice under clause 27, its contents are also likely in practice to affect the circumstances in which a person is liable to pay a penalty; for example, the code is likely to set out the reasonable enquiries that a landlord must make in order to avoid liability for occupiers not named in the residential tenancy agreement. ***In the absence of any explanation from the Home Office for the difference in treatment, we recommend that the level of parliamentary scrutiny applied to the code of practice under clause 27 should be no less than that applied to the equivalent code under section 19 of the Immigration, Asylum and Nationality Act 2006****. Further, given that the role played by the code of practice under clause 27 is wider than that of the code under section 19 and is liable to affect the circumstances in which a person is held liable to a penalty,* ***we recommend that the order bringing into force the first code under clause 27 should be subject to the affirmative procedure.*** [27]

Any explanation given by the Minister should be considered and he should be asked why it is felt that this obviates the need that the regulations be subject to the affirmative procedure.

Clause 32 Discrimination

GOVERNMENT AMENDMENTS 43-45

Purpose

Give effect to the recommendation of the Delegated Powers Committee that the Code should be laid in draft before parliament and come into force in accordance with the negative procedure.

Briefing

This amendment addresses the recommendation of the Committee on Delegated Powers. What is does not do is to offer any protection against discrimination.

[27] 22nd Report: Six Bills considered, Delegated Powers and Regulatory Reform Committee.

The Committee said

> *8. Clause 28 requires the Secretary of State to issue a code of practice setting out what a landlord or landlord's agent should or should not do to ensure that, while avoiding the liability to pay a penalty, they do not contravene equality legislation so far as it relates to race. The code must be laid before Parliament but otherwise there is no parliamentary scrutiny. Again, this contrasts with the position under the employment provisions in the Immigration, Asylum and Nationality Act 2006, where the equivalent code under section 23 of that Act must be laid in draft and the order bringing it into force is subject to the negative procedure.*
>
> *9. The Home Office explains in its memorandum that laying the code before Parliament is considered sufficient because of the stringent consultation requirements that apply. For our part, we do not accept that consultation is an alternative to parliamentary scrutiny. In any event we note that similar consultation requirements apply to the code under section 23 of the Immigration, Asylum and Nationality Act 2006. The fact that a breach of the code under clause 28 is a matter that a court or tribunal may take into account suggests that the code is liable to affect the circumstances in which a landlord or agent will be found to have infringed equality legislation.* ***This in our view makes the negative procedure more appropriate, and accordingly we recommend that the same procedure should apply to the code under clause 28 as applies to the equivalent code under section 23 of the Immigration, Asylum and Nationality Act 2006.***

On the face of the Bill there is absolutely no penalty for discrimination by a landlord, landlady or other person letting accommodation. Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is possible to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality Act 2010. Under the Equality Act s.136, in the county court the burden of proof shifts from the claimant to the defendant once the claimant has established a *prima facie* case that discrimination has taken place. Giving the code publicity will assist tenants in establishing this prima facie case, although we still consider that they will struggle. The Government consultation paper stated:

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. Checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 201020) on all adults who will be living at the property.*

This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

A fine of three thousand pounds for letting to a person with no right to rent is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair.

In other words, a landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration

control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory?

All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. Ms Caroline Kenny of the UK Association of Letting Agents, giving oral evidence to Public Bill Committee [28] made clear that the major concerns of her association about the provisions were concerns about the effect on ethnic minorities. She said (col 54):

> ***"Caroline Kenny:*** *It is illegal and abhorrent, but we can envisage a stage where more landlords will ask their agents not to show their properties to people of ethnic minorities. That is what we are extremely worried about…"*

Richard Jones of the Residential Landlord Association said in his evidence:

> ***Richard Jones****: …Landlords will shy away from individuals who are here perfectly lawfully to start with, and they will effectively discriminate against them. If you are faced with two tenants, one of whom has full status and one of whom is of limited status, you will not let to the one who has the limited status. It may well be that they have limited leave to remain, and that leave may well be extended without any difficulty, but the landlord will shy away from that potential tenant for that reason.*

In all these circumstances we are under no illusion whatsoever that a Code of Practice will resolve the problem of discrimination to which this clause will give rise. However, for the lucky few who are able to bring a challenge, a clear, accurate Code of Practice targeted specifically at landlords and landladies and their obligations under the Immigration Act might encourage country court judges, who must sit with lay assessors who are knowledgeable about race discrimination, at least in some cases, to consider awarding aggravated damages as well as compensation for loss and injury to feelings.

[28] http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm