ILPA proposed amendments and briefing to amendments tabled for House of Lords Committee Stage of the Immigration Bill on 18 January 2016: Part Two

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ***For further information please get in touch with Alison Harvey, Legal Director or Zoe Harper, Legal Officer, on 0207 251 8383, Alison.Harvey@ilpa.org.uk; Zoe.Harper@ilpa.org.uk***

This briefing proposes amendments. We shall produce a briefing to amendments tabled.

PROPOSED AMENDMENTS

ILPA supports the repeal of the provisions of the right to rent scheme established by the Immigration Act 2014 and opposes the extension of the scheme by this Bill and will be briefing to the "sunrise" amendments tabled. The amendments that follow draw attention to specifics.

PROPOSED NEW CLAUSE BEFORE CLAUSE 13

At page 8, line 30, before clause 13, insert

(*) Persons disqualified by immigration status or with limited right to rent

(1) The Immigration Act 2014 is amended in accordance with subsections (2) to (3).
(2) Leave out section 21(3).
(3) After section 21(2) insert:

(3A) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if:
(a) the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement; or
(b) P has been granted immigration bail; or
(c) P is to be treated as having been granted immigration bail.

Purpose
To ensure that persons seeking asylum who can afford to rent privately, persons with outstanding applications and persons with outstanding appeals or judicial reviews are able to rent.

Briefing

ILPA has raised with the Home Office our concerns about persons seeking asylum who wish to rent privately. Provision is made in Schedule 3 to the Immigration Act 2014 for accommodation for persons seeking asylum provided by the Secretary of State under section 95 of the Immigration and Asylum Act 1999 to be excluded from the scheme and similarly for accommodation provided for those whose claims have failed and who are accommodated under section 4 of the 1999 Act. No provision is made for asylum seekers who make their own arrangements for accommodation. It was suggested at the integration subgroup that this will be addressed by the Secretary of State's exercising her discretionary powers on a case by case basis through the checking helpline: the landlord/landlady rings the helpline and, without being told that person X is seeking asylum, is given the green light to rent to person X. This is inadequate to address the problem because:

i) Discrimination is likely to occur at an earlier stage; you will not be offered the property at all. If I do not turn up with my British citizen passport (and photocopies of same) in my hand, there is a strong chance I shall not get offered the property. But even if I overcome this, why should the landlady/landlord pick up the helpline when all the available evidence is not ambiguous but points clearly to my not having a right to rent?

ii) The all clear from the helpline, without a clear rationale to back it up being explained to the landlord/landlady and at odds with what is said in the guidance (which will all point to the person's not having a right to rent) is unlikely to reassure a landlord/landlady. The duration of the right to rent for example will be unclear, there will be worries that the reply is an error; in short it will look too risky to take the person on as a tenant.

iii) There is a danger that landlords and landladies will seek to extrapolate from what the helpline has told them, assuming that because person X has a right to rent, so does person Y.

If a person cannot find a landlord/landlady prepared to rent to him/her, even though in theory this should be possible, s/he is likely to satisfy the definition of destitution under the 1999 Act and thus become the responsibility of the Home Office, an outcome the Home Office is unlikely to desire both in itself and for the precedent it sets.

The response we were given by the Home Office was that the Home Office is reluctant to provide persons seeking asylum with a document that would confirm their right to rent because of concerns about fraud. The Home Office has (understandable) concerns about identifying persons, whether explicitly or indirectly, as seeking asylum. However, he saw our point that a person seeking asylum is in a very different position from a person whose documents are with the Home Office because they are applying for an extension of leave. A person seeking asylum does not have leave, and everything the landlord/landlady is reading about the scheme is telling him/her that such persons do not have a right to rent.

Other persons on immigration bail are entitled not to be removed from the UK whilst their applications or appeals are outstanding. These people include those whose fresh applications are being considered by the Home Office and people whose appeals or judicial reviews are outstanding.

If the Bill is enacted, these persons would be classed as being on 'immigration bail' rather than having leave to stay in the UK. Without leave, they would not have the 'right to rent'.

The upshot is that all these persons, under the new Bill, would be unable to rent a property to accommodate themselves and their families, despite not being liable to be removed from the UK. Landlords who do rent to them would face fines and criminal sanctions, and would be given power to evict them.

The practical outcome of the 'right to rent' provisions as they stand is that those who are participating in legal proceedings and who have made valid applications to stay in the UK may be found homeless, or renting from unscrupulous or exploitative landlords/landladies.

The proposed amendment is for people who have been granted immigration bail and "those treated as being granted immigration bail". The latter is intended to include those persons who will be so treated by virtue of Paragraph 10 of Schedule 5 to the current Bill which deals with transitional provisions.

Applications for leave to remain can take up to six months to process, sometimes even longer, particularly where a complex human rights claim is made. After a decision by the Home Office, an appeal or Judicial Review may be lodged to challenge any potential unlawful decision.

By the time an application is decided and appeal rights are exhausted, a person could have been left homeless for years.

It is trite to say that those without anywhere to live will be unable to participate effectively in the application process or in their own legal proceedings.

Clause 13 Offence of leasing premises

PROPOSED AMENDMENT

Page 11 line 7, leave out lines 7 to 14 and replace with

(4) Sections 33A to 33C do not apply in relation to a residential tenancy agreement or a renewed agreement entered into before the coming into force of section 12 of the Immigration Act 2014.

Purpose

To ensure that none of the criminal offences are committed in respect of tenancies entered into (or, in the case of renewed tenancies, first entered into) before the offences come into force and thus to ensure that there is no retrospective element to these criminal penalties.

Briefing

The Minister said in the Public Bill Committee

> …, *the offences do not apply retrospectively.* The *criminal behaviour for which a landlord may be liable to prosecution would be their behaviour in renting to someone disqualified from renting or their failure to notify the Home Office that someone is disqualified from renting after the point when the offence came into force. A landlord can be prosecuted, however, for renting to someone disqualified from renting when the tenancy agreement was entered into before the offence came into force. The burden would be on the prosecution to prove that a landlord knew*

or had reasonable cause to believe that they were renting to a disqualified person. The amendment would serve to put any rogue landlord who could establish that a tenancy started before the offence came into force beyond the reach of prosecution. [1]

The notion that these are protective measures is not sustainable. A landlord or landlady renting out overcrowded and insanitary accommodation would be liable for prosecution for this, as would one forcing a tenant to pay an exorbitant rent by threats. If such landlords and landladies are not being prosecuted at the moment, that is not for want of offences with which they could be charged.

The Minister's attention was drawn to the comments of the Residential Landlords' Association as to what was likely to happen on the date when the provisions came into effect

> "*….all law-abiding landlords will want to carry out checks for themselves on date X, when it comes into force. It then spells out the implications of that. First, the provision will place a huge burden on landlords—particularly those with multiple properties, who will have to contact each and every tenant to carry out the check. Secondly, it is concerned that "the structures in place to provide support to landlords, unless properly resourced, will not cope."*
>
> *It references a response to a written question tabled by the hon. Member for Paisley and Renfrewshire North. It says that the Minister*
>
> > *"indicated that there are just 2 full time equivalent members of staff handling incoming calls to the landlord helpline."*
>
> *It then points out the potential for chaos. It cites the 2011 census figures, which show that*
>
> > *"16.5% of tenants in private rented housing do not hold any passport*
>
> *…It also points out that many landlords, having done the checks, will feel compelled to report to the Home Office anybody they feel is of concern to them, which could be many thousands of individuals. It asks for two things—first, a simple, readily identifiable document that it can use; and, secondly, for the Government to outline what plans they have to increase the resources available. ".* "[2]

His response was to point out[3] that landlords and landladies were not obliged to make checks when the provisions come into effect. But the Residential Landlords Association's point is about what landlords and landladies will want to do, to protect themselves from the threat of prosecution.

The Minister undertook to write to the Residential Landlords Association[4].

The House of Lords' Select Committee on the Constitution drew attention to the provisions in is 7th report of session 2015-2016[5] saying

> *… clause 1[4] might be considered to have retrospective effect, in that it can cause criminal liability to accrue on the basis of an arrangement that was entered into prior to the entry into*

[1] Col 247-248.
[2] Col 270 -271
[3] Col 272
[4] Public Bill Committee col 272.
[5] HL Paper 75, http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/75.pdf

force of the provision; albeit that liability would only arise if occupation pursuant to that arrangement persisted following the coming into force of clause 1[4].

The Committee's conclusion was that overall the effect of the clause is to impose criminal liability only in respect of landlords and landladies' conduct following the entry into force of the provisions and therefore it determined that the provisions did not raise rule of law concerns. They do however create the problems for landlords and landladies described above and put them at risk of criminal penalties. They thereby create problems for tenants because they increase the risks that landlords and landladies will move to force them to quit to protect themselves from perceived risks of prosecution.

Clause 14 Eviction and Clause 15 Order for Possession of a dwelling house

PROPOSED AMENDMENT STAND PART

Purpose: To remove clauses 14 and 15 from the Bill and thus maintain the status quo.

Clause 14 creates two new routes by which a landlord can recover possession. The first is that Secretary of State will serve notice on the landlord or landlady, informing them that a person without a "right to rent" lives in the property The landlord/landlady is then given power to terminate the tenancy by giving at least 28 days written notice to the tenants. The notice will be enforceable "as if it were an order of the High Court" (s.33D(6)). There will be no need to obtain an order for possession

Clause 15 contains the text of the two new mandatory grounds for possession. It also contains a new power to allow a court to transfer the tenancy from a person who has no right to rent into the name of someone who does.

Briefing

It is unprecedented in housing law that a landlord or landlady's notice to quit can be enforced as though it were an order of the High Court. The provision appears to have been drawn from parallels with other civil penalty schemes, such as that for fines (civil penalties) for landlords and landladies themselves in section 31 of the Immigration Act 2014, where provision is made for a fine to be enforced as if it were a debt due under a court order. But there is an enormous difference between having a fine enforced as though it were a debt due under a court order (which is already innovative) and having a notice to quit so enforced; between having a payment due under a statutory scheme and a notice given by a private individual so enforced.

The provisions are bizarre and appear unworkable. The Secretary of State must name the occupiers in her notice, yet the persons to be named are the persons whom the landlord/landlady as opposed to the Secretary of State, knows to be occupying the premises.

The criminal offences proposed in the Bill give landlords and landladies an additional incentive not to rent to persons without a right to rent or indeed to persons whom they perceive might not have a right to rent. The provisions on eviction do something new; they create new powers in housing law of summary eviction without proper safeguards. ILPA is thus inclined to regard them as the provisions in this part of the Bill likely to have the most grave consequences.

The power to evict under this provision allows for a rapid and summary eviction process and, by new subsection 33E(4), excludes the residential tenancy agreement from the safeguards of the Protection from Eviction Act 1977. The landlord/landlady's notice to the tenant seems intended, whatever form it takes, to have the effect of terminating the underlying tenancy and removing all security of tenure. Families with children may be evicted under this provision. This is likely to have a significant impact on children's social services, housing and homelessness departments. Local authorities will bear the responsibility of supporting and housing families where they are evicted by landlords/landladies who are not required to follow the normal eviction processes with the safeguards that these include.

Under the provisions of the Bill, a landlord/landlady can use "self-help" to recover possession, i.e. personally turn up and throw occupiers onto the street or can call on (and pay) a High Court Enforcement Officer (previously called a High Court Sheriff) to do so. There are clear risks in self-help, of potential violence and damage to property, for both landlord/landlady and tenant. The powers to put people out on the street can be used against families with children. We commend the analysis in briefing of the Housing Law Practitioners' Association.[6]

Clause 16 Extension to Wales, Scotland and Northern Ireland

PROPOSED AMENDMENT

Page 16, line 43, leave out from line 43 to page 17 line 25 and replace with

(1) Immigration Act 2014 is amended as follows:

(2) In section 76 *Extent* after subsection (2) insert

(2A) Sections 20 to 37 and Schedule 3 extend to England only unless an order is made under this section but no order may be made under this section: -

(a) Extending the provisions to Scotland without the consent of the Scottish Ministers;
(b) Extending the provisions to Wales without the consent of the Welsh Assembly;
(c) Extending the provisions to Northern Ireland without the consent of the Northern Ireland Assembly.

Purpose

To remove the power to extend by regulation the provisions of this Act on residential tenancies beyond England and to restrict the provisions of the Immigration Act 2014 pertaining to England unless the devolved administrations consent to their further extension.

Briefing

The right to rent provisions have so far only been extended to Birmingham and the surrounding areas so there is no difficulty in restricting the "extent" section of the 2014 Act at this time. The provisions in the current Bill do not extend beyond England but there is power for the Secretary of State to extend them by secondary legislation. The advantage of this is that insofar as they are incompatible with human rights they could be struck down, rather than just declared incompatible, but the disadvantage is that they are not subject to the same detailed scrutiny by

[6] Available on ILPA's website at http://www.ilpa.org.uk/resources.php/31491/immigration-bill-house-of-commons-committee-stage-briefing-from-the-housing-law-practitioners-associ

parliament as the provisions for England and Wales. The way the provisions have been written is perhaps the sign of a rushed Bill. The Explanatory Note records the view that a legislative consent motion would not be required for this. If, contrary to ILPA's view, it is desired to extend these provisions this should be done on the face of primary legislation.

Anne McLaughlin MP of the Scottish National Party explained that

> *…the Minister refused a meeting with the Scottish Government Minister for Housing and Welfare, who has significant concerns not just at a policy level but at an implementation level.*[7]

Although immigration is a reserved matter the right to rent scheme impacts upon areas within the competence of the devolved administrations including matters pertaining to housing, town and country planning and economic development. It is therefore desirable that the devolved administrations can control the extension of the right to rent scheme, in its entirety to their areas.

Driving

PROPOSED AMENDMENT

Page 20, Line 2, at end insert

( ) Where a driving licence is returned to the holder under subclause (6) the Secretary of State shall pay compensation to the person whose licence is returned.

( ) No payment of compensation be made unless an application for such compensation has been made to the Secretary of State before the end of the period of two years beginning with the date on which the licence is returned.

( ) But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so.

( ) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

( ) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

( ) In assessing so much of any compensation payable as is attributable to suffering, harm to reputation or similar damage, the assessor must have regard in particular to—

[7] Public Bill Committee, col 301

(a) the conduct of the person to whom the notice was given
(b) the conduct of the immigration officer

( )If the assessor considers that there are exceptional circumstances which justify doing so, the assessor may determine that the amount of compensation payable is to be a nominal amount only.

(*) The total amount of compensation payable must not exceed the overall compensation limit. That limit is—
(a) £10,000 in a case in which there is no element for loss of earnings
(b) £50,000 in any other case.

() The Secretary of State may by order made by statutory instrument amend subsection (*) so as to raise any amount for the time being specified as the overall compensation limit.

( )No order may be made under subsection ( ) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.

Purpose
To provide for statutory compensation to the person whose licence is seized in circumstances where a decision is taken not to revoke the licence or an appeal against revocation of the licence is determined in favour of the holder.

Briefing

The Bill would create a new strict liability criminal offence of driving whilst not lawfully resident in the UK.

Powers that would enable police, immigration officers and other persons (unspecified) authorised by the Secretary of State to enter premises to search for and seize driving licenses and to search persons for these would sit as well in the enforcement section of the Bill. The test is one of reasonable grounds for believing, rather than knowledge that a person is in possession of a driving licence and that the person is not lawfully resident in the UK. Premises owned or occupied by the person could be searched, but so could the premises in which they were encountered, either without prior authorisation from a senior officer. The authorised person could seize and retain driving licences. There is an obligation to return them only where it is decided not to revoke the licence or the person wins their appeal against revocation of the licence. Normal powers to have access to and copy seized material do not apply. The Explanatory Note states that this is so that a person cannot make use of a photocopy to secure goods and services, but there are also questions about whether there can be a fair appeal when a person cannot examine the evidence held against them.

Immigration officers and constables will have powers to impound vehicles which are owned by the person suspected of not having leave or vehicles which that person has driven. Vehicles can be disposed of.

The provisions are modelled on the statutory compensation scheme for miscarriages of justice under the Criminal Justice Act 1988.

Provision for statutory compensation is designed to ensure that the powers are not exercised in an oppressive manner by immigration officers.

Bank accounts

Schedule 4- Bank Accounts

PROPOSED AMENDMENT

Page 90, line 16 at end insert

> ( ) If evidence is provided to or obtained by the Secretary of State which demonstrates that a person determined to be a disqualified person is not such a person, the Secretary of State must immediately, remove the persons details from the data which is shared with banks and must notify the bank or building society that the person is not a disqualified person."

Purpose: To require the Secretary of State must take corrective action if s/he is provided with evidence that a person is not a disqualified persons or happens on such evidence.

Briefing

Robert Buckland QC MP, the Solicitor General, wrote to Albert Owen MP, chair of the Public Bill Committee on 4 November 2015 about the bank account provisions of the Bill. He stated that

> *If, despite all the checks, a person still considers that they are lawfuly present and that incorrect information has been provided, they will be given the information they need to contact the Home Office swiftly so that any error can be rectified. As is currently the case with data provided to CIFAS, the Home Office will be able to correct any error in real time so that the person's details will be immediately removed from the data which is shared with banks. In the unlikely event that an account is closed by mistake, the situation regarding the person's status can be swiftly rectified in this way without the serious consequences for the individual that have been envisaged.*

This amendment provides an opportunity for that assurance to be placed on record. If the response of the Minister is that this cannot be done "immediately" because it will take time to evaluate the evidence as to whether the person is a disqualified person, then the amendment provides an opportunity to probe how long he thinks this will take.

PROPOSED AMENDMENT

Page 92 line 40, after "so," insert "in writing within two working days"

Purpose
Places a time limit of two working days on the requirement that a bank notify an account holder of the reasons why the account has been closed.

PROPOSED AMENDMENT

Page 92, line 44, after "so, insert "in writing within two working days"

Purpose
Places a time limit of two working days on the requirement that a bank notify account holder of the reasons why it has prevented the account from being operated by or for the disqualified person.

Briefing

The Bill on its face contains no time limit. If a person is to be able to challenge the closure of a bank account before damage is done then notification, with reasons, must be made promptly.

Banks and building societies will be required periodically to check the immigration status of holders of some 76 million existing accounts and to notify the Home Office if an account holder does not have the correct legal status. In the absence of legal status accounts can then be frozen or closed.

Banks are already required to perform checks on the identity and residence,[8] and the effect of the 2014 Act on new accounts is that an individual cannot open an account if she or he requires leave to remain in the UK but does not have it.[9]

What is new in the Bill is that these checks will be made on existing accounts with all the existing linkages that will have built up around them (e.g. rent, mortgages, utilities, benefits, child maintenance, disability support, salaries, savings etc).

Shortcomings in Home Office information, with the out of date databases and problems of manual data entry previously described by the Home Secretary, and poor quality decision-making, will inevitably result in mistakes. In addition a person may also become an overstayer by

[8] By virtue of the Third and, now, Fourth, Money Laundering Directives; with the Proceeds of Crime Act 2002 (POCA) as amended by the Serious Organized Crime & Police Act 2005 supplementing the 'anti-terror' measures already in place.
[9] Section 40 of the Immigration Act 2014, supplemented by Immigration Act 2014 (Bank Accounts)(Amendment) Order 2014; the Immigration Act 2014 (Bank Accounts)(Prohibition on Opening Current Accounts for Disqualified Persons) Order 2014; and the Immigration Act 2014 (Bank Accounts) Regulations.

a minor mistake in an application or over a deadline, or being unable to apply for further leave due to exploitative individuals having control over their immigration status document or passport.

An overstayer attempting to fix these mistakes with a new application will be prevented from doing so because immigration forms require payment and invite applicants ("visa customers" in the new lingo) to use debit and credit cards. Where no fee is paid the application is declared invalid. With frozen or closed accounts, this encourages the creation of a subclass of people in the UK who will become dependent on criminal loan sharks, and other exploitative individuals exercising control to migrants caught in these situations.

The impact assessment has recognized at paragraph 64 that firms are more risk adverse, that certain categories of customers find it difficult to open bank accounts.[10] These provisions will have a disproportionate impact on certain racial groups, with severe consequences for individuals whose bank accounts are wrongly closed or frozen mistakenly creating many other associated problems such as homelessness and adverse impact on children. Such measures could contribute to a climate of misunderstanding and ethnic profiling.[11]

There are provisions for appeals against freezing orders but there are no similar appeal provisions against the decision to close accounts. There are also no safeguards to retrieve funds from accounts subsequently found to be closed in error; no provisions for loss of interest on those funds, and no compensation provisions for the associated problems arising from closed accounts (e.g. loss of salary/benefits that could not be credited to the account; repossession of a house due to failure to keep up with mortgage payments etc.).

While an account holder can appeal a freezing order, there is no compensation for losses that arise should the freezing order be overturned. There should be strict timetables for appeals to be heard and, as the individual would not have access to her or his funds, provisions should be made for legal aid funding to cover representation at the appeal.

While these provisions focus on those who do not have legal status, the definition of disqualified persons does not exclude, and therefore provide protection, to those who have an outstanding immigration appeal or continuing legal challenge to their legal status.

The provisions also do not protect individuals who choose to leave the UK after their leave has run out. Such individuals may have saved up funds derived during periods of lawful employment. These individuals will find themselves prevented from accessing their lawfully derived money.

According to the impact assessment, in which it is acknowledged that numbers of are very rough estimates indeed, numbers of genuinely affected accounts are anticipated to be small, c 900 matches per year after the first year are anticipated. The rewards of the procedure appear disproportionately small compared to the effort involved.

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[10] Immigration Bill: tackling existing current accounts held by illegal migrants, 03 August 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf

[11] Alabama's HB56 2011 has very similar powers and brought with it a huge increase in discrimination. The most high provide examples include the false arrest of a Mercedes Benz executive and a Japanese Honda worker (http://www.msnbc.com/msnbc/undocumented-workers-immigration-alabama).

This measure will instead have a substantial negative impact in practice, impeding or excluding the access of lawful migrants and citizens to accounts, to add further to problems of exploitation and criminal activity. Those determined to evade controls are likely to circumvent these provisions by establishing and accessing overseas accounts.

With the associated consequences of freezing or closing an account, the proposals may potentially engage Articles 6 (the right to a fair trial), 8 (right to respect for private, home and family life), and Article 1 Protocol 1 (protection of property) as well as Article 14 (right to non-discrimination in the enjoyment of Convention rights) of the European Convention on Human Rights.

B***ank accounts***

Schedule 3 Paragraph 40G Closure of accounts not subject to freezing orders

PROPOSED AMENDMENT

Page 72, Line 7, at end insert –

(8A) The Secretary of State shall provide any individual she determines to be a disqualified person with the information resulting from her checks under 40C(1) that led to this determination.

(8B) The Secretary of State shall provide an individual she determines to be a disqualified person, and any person or body by or for whom the relevant account is operated, with compensation in accordance with **[new clause (*)],** where that determination is found to have been incorrect.

PROPOSED NEW CLAUSE

Page 72, Line 13, insert the following new clause

(*) Compensation

(1) This section applies where:

(a) a person is determined by the Secretary of State (following a check under 40C(1)) to be a disqualified person;

(b) the Secretary of State provides notification to the bank that the person is a disqualified person under section 40C(3) or 40D(7);

(b) the bank closes an account or prevents an account being operated in compliance with section 40G; and

(c) the determination by the Secretary of State under 40C(1) is found to have been incorrect.

(2) Where subsection (1) applies, the Secretary of State shall pay compensation to:

(a) a person incorrectly determined to be a disqualified person;

(b) any person or body by or for whom the relevant account is operated.

(3) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State before the end of the period of two years beginning with the date on which the information resulting from its checks under 40C(1) is provided to the person incorrectly determined to be the disqualified person.

(4) But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so.

(5) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(6) If the Secretary of State determines that there is a right to such compensation, the sum of £10,000 is paid.

Purpose

To make provision for statutory compensation from the Secretary of State to compensate the holder of a bank account where their account is closed or suspended by their bank in reliance on incorrect information provided by the Secretary of State as to the status of the account holder as a disqualified person.

Briefing

These provisions are designed to ensure that individuals are compensated for losses and harm caused by the closure or suspension of their bank accounts as a result of mistakes made by the Secretary of State in identifying the account holder as a disqualified person.

Under 40C(3) the Secretary of State may choose not to apply to the Court for a freezing order in respect of an account and instead notify the bank that the account holder is a disqualified person placing the bank under a duty to close the account or to prevent that account from being operated. There will therefore be no independent oversight by a Court or any other mechanism of the notification by the Secretary of State that leads to an account being closed or prevented from being operated. There will therefore be no opportunity for an individual to challenge the closure of their account or to challenge incorrect or unreliable information that has led to the closure of that account.

Throughout the Bill, it is assumed that Home Office information databases are consolidated, correct and up-to-date and that Home Office staff will provide correct information to banks as to whether an individual is a 'disqualified person' for the purpose of holding a current account.

In ILPA's experience, however, these remain significant and ongoing problems within the Home Office. The following case examples, drawn from experience of the Home Officer Employers' Checking Service, highlight some of the problems in Home Office record-keeping and in the accuracy or reliability of information provided by the Home Office:

A worker was suspended by their employer because an application was still not showing on the database against which the Home Office makes its checks despite the payment for the application having been taken more than three years previously. The employer was told that she did not have permission to work.

In March 2014 a man made an application on form FLR(O) for further leave to remain. The application was rejected shortly afterwards as being invalid because the Home Office said that it was made on the wrong form. It was however the correct form so, after correspondence failed to resolve the issue, his legal representatives issued a pre-action protocol letter. As a consequence of that letter the Home Office conceded the application had been made on the correct form and would be considered. However the Home Office computerised records did not show that the client's application was pending until the beginning of September by which time the man's employer had made a check with the Employment Checking Service which stated that he had no right to work. He lost his job.

A family member of an EEA national was refused a certificate confirming permanent residence, in circumstances where there should have been no doubt that she had a right of residence under European Union law. She was told by the Home Office that she had no status.

The Parliamentary and Health Service Ombudsman upheld a complaint by an EEA national who was unable to prove his right to work whilst UK Visas and Immigration dealt with his application for a permanent residence card after exercising EU treaty rights in the UK as a worker for five years. After submitting his application in May 2012, the individual was sacked from his job in July 2012 when the Employer Checking Service told his employer that it could not confirm his right to work.[12]

Under the provisions of the Bill, individuals whose bank accounts are closed by the Secretary of State will have no means of preventing the closure or the suspension of their account and, at the same time, no form of redress against the Secretary of State if their account is closed or suspended by their bank in reliance on inaccurate information provided to it by the Secretary of State.

The new paragraph 40G(8A) proposed enables the person identified by the Secretary of State as a disqualified person to receive the information that formed the basis of that assessment so that the individual has the opportunity to correct any inaccuracies. The individual concerned would not otherwise receive this information from the bank. Without this duty, the Secretary of State may delay in responding to enquiries and rectifying mistakes made, causing increased disruption to the individual whilst their bank account is closed or suspended.

The new clause proposed, allowing for the provision of compensation, enables some form of redress and restitution for persons affected by the closure or suspension of the bank account and incentivises good administration on the part of the Secretary of State.

[12] Examples excerpted from: *Response of the Immigration Law Practitioners' Association to the Department of Communities and Local Government consultation Tackling Rogue Landlords and improving the private rental sector*, 20 August 2015, http://www.ilpa.org.uk/resources.php/31308/ilpa-response-to-the-department-of-communities-and-local-government-consultation-on-tackling-rogue-l

The statutory compensation scheme proposed above is based on the provisions under s.133 Criminal Justice Act 1988 for compensation for miscarriages of justice. The sum of £10,000 is proposed for the purposes of debate and could be changed.

When the provisions on residential tenancies were introduced in the 2014 Act, provision was made for landlords and agents to have a statutory excuse to the payment of a penalty notice where the eligibility period in relation to the limited right occupier had not yet expired. The eligibility period was set out at section 27(4) of the Act:

> *(4) The length of an eligibility period established or renewed under this section in relation to a limited right occupier is the longest of the following periods—*
> *(a) the period of one year beginning with the time when the prescribed requirements were last complied with in relation to the occupier;*
> *(b) so much of any leave period as remains at that time;*
> *(c) so much of any validity period as remains at that time.*

This period recognised the importance of allowing landlords and, arguably tenants, a period of time after leave may have expired to make arrangements to either resolve their status or leave the UK. This provision specifically enabled landlords to benefit from the 'longest' of the relevant periods.

The new provisions on evictions will empower a landlord to evict a person within the eligibility period if they have been notified by the Secretary of State that a person or persons who are occupying their premises are disqualified from renting under the 2014 Act. Where the person's leave has only just come to an end, the landlord or landlady is likely to receive the notice when the tenant has no leave, and thus to be committing a criminal offence the moment they receive the letter.

Once a person's leave to enter or remain in the UK has ended they have 28 days in which to lodge a fresh application. Where a valid application is made within this time frame, their overstaying will not impact the substantive consideration of their application.

With the removal of appeal rights for most application types and the limited nature of administrative review, an individual may find themselves without leave to remain following the refusal of an application where they are able to show they satisfy the requirements of the Immigration Rules but have made a mistake in their application leading to the refusal.

It is these people who will most commonly utilise the 28 day 'grace period' incorporated into the immigration Rules to rectify this mistake with a fresh application. Although individuals only have 28 days within which to make such an application, those submitted by post will likely not be decided within that 28 day period.

By way of example, UK Visas and Immigration advises on the gov.uk website that a decision on most points based system application will take eight weeks to be made.

This amendment provides a period in which tenants can seek legal advice, take steps to rectify their immigration status by the submission of a further (permitted) application and/or make arrangements to leave the UK should they determine that they have no further basis to remain.

In the absence of such protection, individuals will, in practice, be unable to seek the legal redress foreseen by the 28 day application grace period as it will not be practical to await the outcome of an application without a home.

In the Evaluation of the Right to Rent scheme prepared in response to the pilot scheme in the West Midlands, 109 'illegal migrants' were identified. Of this number, four had an outstanding judicial review, one had made further representations that were being considered, fifteen were being progressed as family cases, twenty eight had outstanding cases, including asylum claims and nine had been granted leave to remain in the UK. This represents 57 of the 109 'illegal migrants' which is 52% of the total. This is a significant figure. As these people are not subject to removal during this period and many may, and indeed some did, obtain the right to remain, it is unclear why they should be subject to eviction proceedings while awaiting the outcome of their legal challenges and/or fresh applications. This amendment provides a buffer period while these applications and challenges proceed.

Further, under the administrative review provisions introduced by the 2014 Act, a person's leave extended under section 3C of the Immigration Act 1971 automatically ends where an administrative review is rejected. They therefore find themselves automatically without leave to enter or remain. Individuals need a period of time in which to seek legal advice where appropriate and thereafter either make arrangements to leave the UK or to make an application to regularize their status.