The Immigration Act 2014: “Not On the List You’re Not Coming In; Landlords Forced to Discriminate”

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Immigration status; Landlords’ duties; Race discrimination; Residential tenancies; Tenants

The number of “illegal immigrants” living in the UK has long been seen as a political hot potato, with politicians on one side of the spectrum using the immigrant as a “political football” and, on the other side, afraid to engage. Until now, that is. The Immigration Act 2014 came into force on May 14, 2014, with the objective of imposing mandatory “immigration status” checks by landlords on residential tenants with “residential tenancy agreements” of less than seven years, due to come into force in full during 2015 (ss.20–37).

Government ministers, including James Brokenshire MP, the Immigration and Security Minister at the time of the implementation, claim that the checks will “make it more difficult for immigration offenders to stay in the country” and will benefit “those communities blighted by illegal structures and overcrowded houses”.¹ Perhaps more unapologetically, the Home Secretary, Theresa May MP, stated quite categorically that the purpose of the new Act, including ss.20–37, was to create a “hostile environment” for migrants coming to and living in the UK.²

This paper will seek to critically analyse the new provisions and draw conclusions as to whether these provisions are likely to provide a tangible benefit, or whether at best they suffer from a complete “lack of clarity” or, at worst, the “inter-coalition conflict and widespread concern [for] ethnic minorities and migrant communities” was wholly justified.

In the dark days of the 1960s, before the raft of anti-discrimination legislation in the following decade, it would not be surprising to see signs adorning landlords’ windows and doors brazenly stating “No Blacks, No Dogs, No Irish”. Bigotry and overt racism had no need for subtlety, as McCleod puts it, “it was allowed to roam free and unashamed”.³ With legislation such as the Race Relations Act 1976, the Human Rights Act 1998 and the more recent Equality Act 2010, all of this seemed...

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to be consigned to the dustbin of legal history—until, however, the “rancid debate” which introduced the Immigration Bill, which became the Immigration Act 2014 after receiving Royal Assent on May 14, 2014. This Act, according to Baroness Lister, potentially has the effect of “diminishing us all” by plunging us back into the “stinking gutter of xenophobia”.

The Bill

When the Bill was published, Home Secretary Theresa May MP stated categorically that it was designed to “create a really hostile environment for illegal migrants”. Throughout a rigorous consultation period, the Bill was described by its opponents as a “proposal [which] smacks of political posturing rather than a seriously thought through policy”, the result of which will be to impose such a burden on landlords that they may well end up as “scapegoats for the UK Border Agency’s failings”. O’Callaghan points out that the Bill (and subsequent Act)

“deliberately identifies ‘soft’ targets and will be used as a ‘weapon’ which may result in ‘discriminatory lettings’ with landlords turning away ethnic minority tenants ‘regardless of their status’.”

Robinson and Ogilvie of Liberty do not mince their words. The provisions of the Bill, they say in their report for the Committee Stage Briefing on Pt 3, Ch.1 of the Bill, are “offensive unworkable and will lead to discrimination” and, echoing Alan Ward, the Chairman of the Residential Landlords Association (RLA), suggest that as the “failing immigration service continues to flounder” the Government’s aim to outsource certain immigration controls to private citizens is no more than an “abdication of responsibility”.

They go on to say that the “folly” of the landlord checks requirements was “laid bare in numerous powerful contributions” across party lines during the Second Reading debate, and they reiterated Baroness Hamwee’s concern in regards to the initial proposed pilot scheme, that this should not be “simply the first phase of a predetermined rollout”. The authors illustrate at length the salutary tale of Mark

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[12] Relating to the subject of this paper—residential tenancies.
[14] By Peers such as Baroness Smith, and Lord Rosser, Lord Stevenson and Lord Best.

Harper, the former Immigration Minister who, in his own words, “took the Immigration Bill through Parliament in autumn 2013”.\textsuperscript{16} Harper was compelled to resign after failing to carry out proper and thorough employment immigration checks, eventually discovering that his cleaner “did not in fact have indefinite leave to remain”.\textsuperscript{17} Robinson and Ogilvie seem only too eager to point out that this “discovery” and subsequent resignation occurred just prior to the Second Reading of the Bill, and appositely demonstrate the total “unworkability of in-country, layperson, immigration control”, where despite “assiduous efforts … with expert guidance and support at his disposal” Harper was unable to accurately determine the immigration status of his employee. They argue that, as such, it is wholly “inconceivable that millions of landlords, with no expertise or experience of immigration law, will fare any better”.\textsuperscript{18}

On May 12, 2014, as part of the final stages of the Bill’s passage, it was debated further in the House of Lords. Even with the rhetoric on all sides, even with the “inter-coalition conflict and widespread concern … for ethnic minorities and migrant communities”, the Bill emerged “relatively unscathed”.\textsuperscript{19} It was confirmed, however, that there would be a pilot in one geographical area—the West Midlands—an area “big enough to allow for a proper evaluation before national roll-out”. It was also confirmed that some concessions had been reached, such as exemptions on the tenant status tests for lettings to students, homeless hostels and refuges for female victims of violence and for other “vulnerable people in immediate need” along with a “Home Office hotline” and a consultative group (including the RLA) to advise on legislation and codes of practice.\textsuperscript{20} It seems, though, that the concern voiced by Baroness Hussein-Ece at the Second Reading, that “we could well end up with a situation of ethnic profiling … damaging to race relations and community cohesion”,\textsuperscript{21} failed to make a significant impact. However, it is also rather telling that one of the concessions by the time the Bill received Assent was to require the Home Secretary to produce an accompanying Code of Practice as to how landlords should avoid a breach of the Equality Act 2010. Robinson and Ogilvie point out that this “tacitly accepts that the policy will encourage unlawful discrimination”.\textsuperscript{22}

The Bill received Royal Assent on May 14, 2014, and amongst the “77 clauses … designed to make fundamental changes to our immigration system”\textsuperscript{23} the requirements for a residential landlord to carry out immigration status checks (ss.20–37) came into force on December 1, 2014; with the promise by Immigration

\textsuperscript{16}Cited by Robinson and Ogilvie.
\textsuperscript{17}R. Robinson and O. Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.
\textsuperscript{18}R. Robinson and O. Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.
\textsuperscript{20}Grove-White, “What you need to know about the Immigration Bill”.
\textsuperscript{21}Hansard, HL Vol.752, col.494 (February 10, 2014).
\textsuperscript{22}Robinson and Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.
and Security Minister James Brokenshire MP that the measures would be “introduced quickly and effectively”.  

The law

The relevant provisions relating to the residential landlord immigration checks can be found at Pt 3 Ch.1, and begin at s.20 by defining a “residential tenancy agreement”. It is instantly noteworthy, and supports the “lack of clarity” suggested by O’Callaghan, that a “tenancy” for the purposes of this Act “includes” a licence. It was Lord Hoffman, in the now infamous ruling in the case of Bruton, who was subsequently criticised for blurring the lines between a lease and a licence, creating the “non-proprietary lease”. As purely a side-issue, but right from the outset, s.20(3)(a) seems to at least potentially add fuel to the fire beneath the “feudal phoenix” by including “lodgers” as tenants. It is also abundantly clear though, that this is no simple drafting error. To include “tenants” under a licence agreement—though a legal misnomer in itself—means that landlords, even resident landlords, will be unable to revert back to the pre-Street v Mountford position, where landlords could label agreements “licences” to circumvent the statutory strictures of Rent Act legislation. There will be no room for manoeuvre here. Landlords will be caught by s.20 whether the tenancy is a tenancy or whether it is a licence, provided the tenant occupies the property as his or her “only or main home”. Even this is highly problematic, as the factual analysis of whether it is a de facto “only or main home” “will be decided on a case by case basis”. The Code of Practice, rather remarkably, also points out that if the landlord’s own “adult child” after studying or working abroad returns to the family home and pays towards their “board and lodging” (hence becoming a lodger), it is also “advisable to conduct right to rent checks” on that family member if the landlord/parent is in any doubt as to their immigration status!

The “right to rent”

It is, however, s.21 that begins to set out the persons “disqualified” for occupying under such a residential tenancy agreement. In the words of Hyatt, it seems that anyone with a “precarious” immigration status may be “disqualified”. Section 21 states that a person is disqualified if he or she is not a “relevant national”, and

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24 Brokenshire, Home Office, “Immigration Bill becomes law”.
25 Immigration Act 2014 s.20(3)(a).
29 As Lord Templeman illustrated in Street v Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877 HL.
33 Immigration Act 2014 s.21(1)(a).
does not “have a right to rent” the premises. Section 21 then continues to explain that a person does not have a right to rent if they require leave to enter or to remain in the UK but does not have that permission or their right to enter or remain is subject to a condition which prevents them occupying the premises.

As such, the new provisions as s.21 may be summarised as essentially creating three classes of potential tenant defined entirely by their immigration status. First, those with an unlimited “right to rent”, including British citizens, EEA and Swiss nationals, or persons with a right of abode or indefinite leave to remain. Secondly, persons with a “limited right to rent”, such as persons entitled to enter or remain in the UK due to their EU status, or those who may have been granted leave to enter or remain for a limited time period. Thirdly, persons who have “no right to rent”, namely persons who require permission to enter or remain but do not have such permission, or persons whose permission to enter or remain is subject to a condition preventing them from occupying a premises.

The refusal

As such, the residential landlord must not lease any premises to a “disqualified adult” under the provisions set down in s.22. This includes tenants or “other adults” named or otherwise in the tenancy agreement who are disqualified at the start of the tenancy or tenants who have a limited right to rent and at a later date become “disqualified” due to their immigration status changing.

In as simple terms as possible, there are two possible contraventions of the provisions here—known as “pre-grant contraventions” and “post-grant contraventions”. The former can best be described as when the landlord enters into a tenancy agreement to someone in the “third category”—someone with “no right to rent”. The latter occurs when a person with limited right to rent subsequently becomes disqualified but continues to occupy. Hence the reality is that the landlord does not just have an obligation to check at the start of a tenancy, but to keep a close eye on their tenant’s immigration status as an ongoing concern. As Hyatt rightly suggests, landlords must also ensure that their tenant’s “right to occupy” does not “lapse”—a burden that suggests that landlords must “keep a record of their tenant’s status and preserve documentation of their efforts” or face the civil penalty of up to £3,000 as set down by s.23 of the Act, unless they can demonstrate that an agent is responsible for the contravention rather than themselves (under ss.24–25). It should be noted that there are many other nuggets within the provisions outside of those discussed here, such as that at s.23(3)(b), which sets down that “successor landlords” may also shoulder the liability for a post-grant contravention.

It is unsurprising that it has been widely suggested that landlords will aim to cover their own backs by opting for tenants with “British-sounding names over

34 Immigration Act 2014 s.21(1)(b).
35 Immigration Act 2014 s.21(2)(a).
36 Immigration Act 2014 s.21(2)(b).
37 Immigration Act 2014 s.21(5)(a)–(c).
38 Immigration Act 2014 s.22(4)(a)–(c).
39 Immigration Act 2014 s.22(5)(a)–(c).
40 Immigration Act 2014 s.22(10).
41 Immigration Act 2014 s.22(10).
more exotic ones”. Even the Church of England has warned that the Act is “highly divisive” and is likely to create “a border in every street”, mainly due to private landlords failing to understand the complexities of the legislation. Hence, in order to at least attempt to alleviate the concerns as to the practicalities of implementation, two Orders also came into force on December 1, 2014: the Immigration (Residential Accommodation) (Prescribed Cases) Order 2014 (SI 2014/2873); and the Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014 (2014/2874). The former sets out additional circumstances as to when a residential tenancy agreement will be treated as being formed; and the latter, more importantly, seeks to inform the landlord as to the “prescribed requirements” for the identity checks.

The “prescribed requirements”

The onerous duty on the landlord, then, is initially (up to 28 days before the start of the tenancy) to check the immigration status of their tenant, but then to continue to track the tenant’s ongoing status. The Code explains that if “follow-up checks” reveal that the occupier no longer has the “right to rent”, then the landlord must not simply evict, but rather “make a report to the Home Office” giving full details and copies of all documentation retained by the landlord.

As such, the Order and accompanying Code of Practice prescribe a list of documents that must be requested, verified, retained, and copied or recorded to ensure full statutory compliance. The Order sets down three ways for landlords or their agents to ensure compliance:

1) obtain one document from a preferred list of eight confirming that the occupier or prospective occupier has a right to rent, including a British passport, EEA or Swiss passport or national identity card, permanent residence document issued by the Home Office to an EEA or Swiss national, unexpired biometric immigration document issued by the Home Office indicating that the person named has indefinite leave to remain in the United Kingdom/no time limit on their stay in the United Kingdom or certificate of registration or naturalisation as a British citizen etc.

2) obtain two documents from a list of 10 lesser-weighted documents including government department letters, birth/adoption certificate, current driving licence, current firearm certificate or similar document.

3) obtain a Positive Right to Rent Notice for the occupier or prospective occupier from the Landlord Checking Service. This applies where the occupier or prospective occupier informs the landlord or agent: (a) that they have an outstanding application to vary their leave to enter or remain in the United Kingdom or have an

43 Caton, “Will the new immigration bill create a ‘border on every street’?”.
administrative review or appeal pending against a decision on that application,

(b) that they are an asylum seeker or have an appeal pending against a determination made by the Secretary of State in respect of their claim for asylum,

(c) that they have made an application for a residence card or derivative residence card within the last six months,

(d) that they are a person to whom the Secretary of State has granted permission to occupy premises.}\(^{45}\)

However, this is only the start of the process. The landlord must then take steps to verify the documents, ensuring that the documents themselves are genuine, and that the documents refer to the tenant themselves. The landlord must then ensure that clear, legible, unalterable copies are kept; the date the copies were taken must also be recorded; and these copies must be securely retained for at least one year after the tenancy ends. The landlord must also carry out the same procedure for any additional occupants of the property at the time the residential tenancy begins. The Home Office Code of Practice explains all of these procedures in some detail; and with a potential fine of up to £3,000, landlords cannot afford to take them lightly.\(^{46}\) The Home Office glibly informs landlords that carrying out these “simple documentary checks” will ensure avoidance of liability for the penalty.\(^{47}\) In the second Code of Practice, specifically detailing the civil penalty scheme, the Home Office refers to the carrying out of these “simple” checks as being sufficient to “establish a statutory excuse” against liability, helpfully pointing out that landlords can get “off the hook” by appointing an agent who will then “be the liable party in place of the landlord”.\(^{48}\) However, in para.1.3 the Home Office makes it clear that although this is a “statutory code” it does not impose “any legal duties on landlords, nor is it an authoritative statement of the law”: rather, a Code which will, if ignored, be used as evidence in any proceedings.\(^{49}\)

It is unsurprising that the opposition from landlords and the RLA includes the argument that, to say the least, “immigration documents are not often straight forward to interpret”—as Mark Harper found to his great personal and professional cost. As Diane Abbott MP has warned, the real effect of this onerous burden on landlords is likely to be that “landlords will not want to take the chance of letting to someone who ‘might be’ an illegal immigrant” regardless of the Code’s suggestions on how to avoid such discrimination.\(^{50}\) The Home Affairs Select Committee, in their report into the work of the UK Borders Agency, also drew attention to the risk that the “right to check” provisions might well


\[^{46}\text{Sharan, “The Immigration Act 2014: Residential Tenancies”.}\]

\[^{47}\text{Home Office, “Code of Practice on illegal immigrants and private rented accommodation — Civil Penalty Scheme for Landlords and their Agents” (2014).}\]

\[^{48}\text{Home Office, “Code of Practice on illegal immigrants and private rented accommodation — Civil Penalty Scheme for Landlords and their Agents”.}\]


“produce a bonanza for unscrupulous landlords who already operate outside the law, driving more people into the twilight world of beds-in-sheds and overcrowded houses.”

It was, however, decided that a pilot scheme in the West Midlands would begin from December 1, 2014, when the legislation came into force, before the potential national roll-out of the scheme.

The pilot

Not least due to the fact that the Bill proved “highly controversial within the private rental sector”, with concerns raised by organisations such as the RLA, it was agreed that a pilot would run for six months from December 1, 2014 within the West Midlands to all properties occupied by tenants under residential tenancy agreements of any “tenancy” below seven years, but including sub-lets, lodgers and licensees, granted on or after December 1, 2014, in line with the legislative provisions. It was announced by James Brokenshire MP in September 2014 that the pilot would be launched in Birmingham, Walsall, Sandwell, Dudley and Wolverhampton as part of a “phased introduction” across the UK. Brokenshire promised that landlords would have “all the advice and support they need in advance of the checks going live on 1 December”, also stating confidently that this should not be a problem as

“many responsible landlords already [check identity and citizenship] as a matter of routine and most legal renters will have the correct documentation ready to hand.”

It is difficult to assess as to whether this was an opinion based on factual evidence, wishful thinking or simply a “gross sweeping statement”. What is clear, however, is that critics such as the West Midlands representative of the National Landlords Association, Mary Latham, suggest that the local pilot scheme will see landlords renting to “low-risk” tenants or those whose right to live in the UK is “clear-cut”.

The pilot ran until the end of May 2015, at which point an Advisory Panel set up by the Home Office was to evaluate the scheme to assess its effectiveness and to analyse as to whether the scheme has managed not to “exacerbate problems of discrimination and homelessness”. The pressure group Movement against Xenophobia (MAX) explains that it is working closely with other groups such as Shelter, the National Union of Students, the Chartered Institute of Housing and

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53 Hyatt, “Residential landlords and obligations under the Immigration Act 2014”.

54 Hyatt, “Residential landlords and obligations under the Immigration Act 2014”.


56 Brokenshire, “West Midlands to be first landlord ‘right to rent’ check area”.

57 Brokenshire, “West Midlands to be first landlord ‘right to rent’ check area” (2014).


the Birmingham branch of the Coventry Law Centre to monitor the scheme by way of inviting responses to a survey from both landlords and tenants subject to the pilot. The Guild of Residential Landlords recently published some rather telling early feedback from the pilot scheme. They have taken evidence collated by the Joint Council for the Welfare of Immigrants (JCWI) which suggests that landlords are “turning away tenants they feel will not easily pass an identity check” and also charging “extra fees of up to £100” to carry out the necessary checks. They cite a JCWI spokesperson as stating that “landlords have told us that they are unlikely to let someone view a home who might have problems with their documentation”, and that this has a major impact even on British nationals who do not have a passport or other relevant documentation. The spokesperson pointed to a case where an American citizen had reported that her British husband was invited to view a property where, only days earlier, she had been told that it was unavailable. The issue of possible discrimination has also been highlighted by an industry watchdog, Property Industry Eye, which also reported on the JCWI findings, quoting policy director Saira Grant as stating that the impact on migrants and those without passports is that discrimination is being “encouraged”.

Some of the blog’s responses clearly demonstrate the viewpoints of a number (admittedly small) of landlords:

Comments

1. ray comer

“One has to ask why a legitimate tenant would have any problems identifying themselves? passport, id card, FO documentation — any legitimate tenant should have these to hand.

Typical of Shelter to look at it from entirely the wrong angle”

2. seenitall

“So if we have two tenants one with a EU passport and one with a non Eu passport but with a 12 month visa and 9 months left to run which are we going to go with? Clearly the EU passport holder as its less admin work and risk for us as an agency. Why should we have to monitor and keep ongoing checks on the visa status of a tenant, why should we bear the risk of a £3000 per tenant — much better to just let to EU passport holders or those with an indefinite permission to stay.”

61 “Right to Rent checks — Our Survey”, MAX.
63 Guildy, “Right to Rent Landlords Hike Fees in Pilot Areas”.
65 The blog responses are taken from the responses to the article by Renshaw.
3. marcH

“Once again Shelter (and others) are directing their fire at the wrong target. Landlords and agents didn’t ASK for yet another layer of bureaucracy which is risky (£3000 fines and harassment by disappointed applicants) time-consuming and expensive to administer. Why don’t these goody 2-shoes organisations take this entire subject up with the government and leave us bl**dy well alone ??”

4. seenitall

“We are coming down to the view that unless a tenant has a EU passport or indefinite right to stay we wont let to them. its too much hassle and risk. It business not personal."

5. Neilw

“I do not see what the big issue is here. I already take photo copies of original passport visa etc and we use a professional referencing company to carry out a full profile check. The only additional work is clicking on to the GOV link to their web site to input data on passport & visa. This gives an immediate response and you diarise expiry dates….no big deal in time or cost.

However I do feel the GOV is targeting the wrong market…..illegal immigrants already come in under the radar and occupy properties you are unlikely to find in the High Street Agents shopfront. Illegal immigration and properties are in the same supply chain with the same people running them.”

Overall, though evidence gathered as yet is limited as to the impact of the pilot, the fears propounded by Robinson and Ogilvie of Liberty that the right to check provisions are “offensive, unworkable, and will lead to discrimination in practice” seem to be thus far borne out.

**Discrimination**

The Code of Practice, which aims to assist landlords in avoiding “unlawful discrimination”, suggests that though these checks must be carried out, “[landlords] must also ensure that they act in accordance with their obligations under equality legislation”.

This 16-page document informs the landlord that it is “unlawful to discriminate in letting practices on the basis of race, which includes colour, nationality and national or ethnic origins”. This, of course, does not seem to sit

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66 Robinson and Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.

67 Home Office, “Code of Practice for Landlords — avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector”.

68 Home Office, “Code of Practice for Landlords — avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector”.

well with the provisions of ss.20–37. According to Robinson and Ogilvie, this is precisely what landlords are being encouraged to do. However, the Code goes on to explain to landlords that it is only unlawful discrimination if the landlord refuses to let to, or carry out checks on a person who they believe is not a British citizen—this, they say, constitutes direct discrimination. It helpfully reminds landlords that “the majority of people from ethnic minorities in the UK are British citizens”, 69 and even with those who are not, the majority have the right to be here as do the “vast majority” of non-EEA nationals. It warns landlords that it should not be “assumed” that just because a person is from an ethnic minority or that they “speak with a particular accent” they have no right to be in the UK.

So, what is the answer? According to the following paragraph of the Code, landlords should simply obtain their “statutory excuse” by checking documents both initially and ongoing “for all persons who will use the premises they let as their only or main home”. 70 This, says the Home Office, will suitably and effectively “protect them from liability for a civil penalty if the person is an illegal immigrant” whilst at the same time “demonstrating consistent, transparent and non-discriminatory letting practices”. 71 The Code then goes on over the next 10 pages to set down the law on discrimination under the Equality Act 2010, explaining both direct and indirect discrimination. Hence, it suggests that if the checks are carried out on all prospective tenants then there can be no claim of direct discrimination. However, one point is missed here. The Home Office explains that “indirect discrimination [occurs when] a provision, criterion or practice, although applied equally, would put persons of a particular racial group at a particular disadvantage compared with other persons … unless the provision, criterion or practice is objectively justifiable (appropriate and necessary).” 72

Landlords should surely be made aware, then, that the “checks for all” advice may still constitute indirect discrimination in exactly the same way that the requirement to wear uniform which did not include a turban, in the celebrated case of Mandla v Dowell-Lee, 73 was held by the House of Lords to indirectly discriminate against the schoolboy Gurinder Singh Mandla. Though the provision prima facie was aimed at all schoolboys, boys of Sikh ethnicity were particularly disadvantaged. It is not too taxing to see how the Home Office advice of “checks for all” could constitute indirect discrimination in much the same manner. It will of course need a test case to rule on, first, whether the checks do particularly disadvantage certain groups; and, secondly, whether the practice can be justified by the Home Office. Certainly Baroness Lister, in her speech during the Second Reading, cited the view of the UN High Commissioners for Refugees, who warned the provisions would “lead to further stigmatisation of, and discrimination against, refugees and asylum

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69 Home Office, “Code of Practice for Landlords — avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector” (emphasis added).
70 Home Office, “Code of Practice for Landlords — avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector”.
71 Home Office, “Code of Practice for Landlords — avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector”.
seekers”. She further points to the view of the Joint Committee on Human Rights, cautioning that
“a disqualification from renting or occupying … on grounds of immigration status will heighten the risk of wider, even if unintentional, racial discrimination in lettings.”

Going further, the Baroness also points to the possible rise in homelessness for those who have lost their right to remain, but face “genuine barriers” to leave, suggesting that this could even be tantamount to inhuman and degrading treatment, and as such a breach of Art.3 of the ECHR/Human Rights Act 1998.

At para.8 of their report, Robinson and Ogilvie also argue that “regular and routine identity checking” will affect the civil liberties of all, but will be “most keenly felt by ethnic minorities or those who appear to be from outside of the EEC by reason of name, skin colour or accent.”

This supports the argument that the provisions may well fall foul of the “provisions rule” of indirect discrimination. The authors also reiterate that just because the Home Office has provided the Code of Practice, “contravention of the Code … will not make a person liable” and, as such, residential landlord organisations are “united in warning that discrimination will take place in practice”. Rather than accurately check the immigration status of prospective tenants, Robinson and Ogilvie point to the fact that many lettings agents have “acknowledged the likelihood that landlords will attempt to protect against liability by discriminating”.

Caton cites Dr Hywel Francis MP, chair of the Joint Committee on Human Rights, who suggests that “creating a hostile environment for illegal immigrants … will lead to breaches of human rights and unjustified discrimination in practice” and points out that the Bill had already been pronounced by the JCHR to be “in direct contravention of the Equality Act”.

The conclusions drawn, therefore, borne out somewhat by the initial evidence from the pilot, is that there may well be “outright discrimination against ‘foreigners’ partly through ignorance and partly through an abundance of caution [resulting in] misery for landlords and potential tenants alike.”

It seems entirely possible, given the early indications, that the right to check provisions, proudly announced by Theresa May MP with the objective of creating a “really hostile environment for illegal migrants”, may well result in a descent into the “stinking gutter of xenophobia” as suggested by Baroness Lister. From
a more pragmatic perspective, as Robinson and Ogilvie suggest, it seems that at best, the provisions are wholly unworkable, especially “given the chaotic administration and record keeping of the Home Office and the UKBA”, and that the helpline being able to provide landlords with the relevant information necessary to avoid liability is “fanciful”. It would seem that, as the two authors suggest, the scheme is replete with “myriad complications and difficulties”; and landlords will surely be “bewildered by the complexity of it”. Perhaps more worryingly, the right to check provisions require that identity and legal status checks are carried out “in-land”, away from the point-of-border entry. As Robinson and Ogilvie suggest, this seems to be an “unprecedented shift” in policy and practice. It remains to be seen as yet, whether the national roll-out will go ahead as relatively unscathed as the Bill went through Parliament. If so, the Act, as O’Callaghan has suggested, may well be used as a weapon; and the creation of a “hostile environment” will be a reality.

84 Robinson and Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.
85 Robinson and Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.
86 Robinson and Ogilvie, “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords”.