

MACFARLANES

RIGHT TO RENT CHECKS BY LANDLORDS

OVERVIEW

The Right to Rent scheme (the "Scheme") was introduced by the Immigration Act 2014 (the "2014 Act"). It was initially trialled in the West Midlands as part of a pilot scheme. On 1 February 2016, the Scheme was rolled out across the UK.

Under section 22 of the 2014 Act, a landlord must not authorise an adult to occupy property as their only or main home under a residential tenancy agreement unless the individual has immigration permission or a right to be in the UK.

Landlords found to be allowing an adult to occupy a property who does not have the right to do so could be fined up to £3,000 for each illegal occupier. However, they are able to establish a statutory excuse and therefore, not be liable to pay a fine if they can show that they checked certain documents relating to the individual prior to the start of the residential tenancy agreement.

The UK Government has recently announced in the Immigration Bill 2015/2016 (the "Bill") new measures to bolster the Scheme which proposes heavier sanctions such as increased fines and criminal sanctions for repeat offenders, punishable by up to five years' imprisonment.

Who is a landlord?

Landlord means a person who lets or licenses accommodation for use by one or more adults as their only or main home. This includes people who take in lodgers and can include tenants who sublet their rented property.

References to "landlords" also include agents who have accepted responsibility for complying with the Scheme. Therefore, "landlords" can be defined very widely.

What is a residential tenancy agreement?

A residential tenancy agreement (an "Agreement") is a tenancy that grants a right to occupy a property for residential use in return for a payment of rent (which includes any sum paid in the nature of rent and does not have to be a market rent) and is not an excluded agreement. This can include leases, licences, sub-leases, sub-tenancies or agreements for any of those things (whether written or oral).

However, if no rent is payable on the property, the Scheme does not apply. Therefore, there is no need to conduct right to rent checks on house guests, provided they are not paying rent.

What is an excluded agreement?

Excluded agreements are accommodation which falls outside the scope of the Scheme. They include:

- ◆ accommodation provided by local authorities under a legal duty;
- ◆ social housing where the landlord has already been required to consider a person's immigration status before allocating them a property;
- ◆ accommodation in care homes, hospitals and hospices;
- ◆ refugee and homeless hostels managed by voluntary organisations, charities and social landlords or those that are run on a non-commercial basis and whose operating costs are provided either wholly or in part by a government department or agency or a local authority;
- ◆ student accommodation;
- ◆ mobile homes that are used as a permanent residence, except where the mobile home owner is letting out their home to someone else;
- ◆ accommodation provided by an employer. Please note that it would only cover the employee and not the employee's partner or adult children if they were to live in the property;
- ◆ accommodation which have leases of seven years or more in England and Wales; and
- ◆ holiday accommodation, as long as it is not being used as an only or main home and is used on a short-term basis (i.e. less than three months).

Who needs to be checked?

Landlords will not need to check the immigration status of existing tenants as long as the Agreement started before the Scheme was introduced. Renewals of Agreements made before the Scheme was introduced are also not affected as long as the renewed Agreement is made between the same parties and for the same property, without a break in the tenancy.

Otherwise, landlords will need to check the immigration status of all adults who will occupy a property as their only or main home, regardless of whether they are on the Agreement.

A property will be considered a person's only or main home if:

- ◆ it is the only property they currently live in; or
- ◆ if they have multiple properties, their personal, legal or family ties to that property are such that it is where they live their settled day-to-day life in the UK. These ties can be established if:
 - the person uses the property as their primary correspondence address and/or for official purposes; or
 - they use the property regularly for general domestic purposes.

If a landlord is unsure whether a prospective tenant will be using the property as their only or main home, it is always recommended that they carry out the necessary checks.

In some cases, it may be impractical for landlords to check the documents. In these circumstances, the landlord can enter into a conditional Agreement on the basis that the individual provides evidence of their right to be in the UK before they start occupying the property. For example, a conditional Agreement may be suitable for individuals living abroad who wish to secure accommodation before coming to the UK or individuals who are temporarily in the UK on a Visit Visa and will be returning to the UK once they have obtained a longer term visa.

Who has a right to occupy the property?

The following have a right to occupy a UK property:

- ◆ Those with an unlimited right to live in the UK:
 - British citizens
 - EEA and Swiss nationals
 - People with right of abode in the UK
 - People who have been granted Indefinite Leave Remain in the UK (also known as settlement and permanent residence)
 - Those who have no time limit on their stay in the UK.
- ◆ Those with a time-limited right to live in the UK:
 - People with valid leave to enter or remain in the UK for a limited period of time, e.g. they hold a visa for a limited period of time
 - People entitled to enter or remain in the UK by virtue of their relationship with an EEA or Swiss national who is exercising EU treaty rights in the UK

- People with an on-going immigration application or appeal with the Home Office.
- ◆ Those with discretionary right to live in the UK – this can be granted by the Home Office to people whose immigration status would otherwise leave them with no right to live in the UK.
- ◆ Children - the Scheme does not apply to those under the age of 18. However, landlords should check to ensure that any children occupying the property are under 18 years old and checks must be done when a child turns 18 years old.

If an individual does not fall within the above categories, they do not have immigration permission to be in the UK and do not have a right to occupy UK property.

How to do the checks and establish a statutory excuse?

The procedure for carrying out right to rent checks is as follows:

- ◆ Landlords must establish how many adults will live in the property as their only or main home. If there is any doubt as to whether a person is occupying the property as a main home, the landlord should assume that they are, even if they are not named in the Agreement.
- ◆ Landlords must obtain original documents which must be checked in the presence of the holder. Typical documents include a passport, national identity card, Biometric Residence Permit, visa endorsement in a passport, or certificate of registration or naturalisation. There is a full list of acceptable documents in the Home Office Code of Practice and User Guide.
 - Where a person has no time limit on their stay in the UK, checks may be undertaken at any point before the Agreement is granted.
 - Where a person has a time-limited right to remain in the UK, checks should be undertaken not more than 28 days before the Agreement comes into effect. The landlord will need to conduct follow-up checks in 12 months' time or shortly before the person's permission to be in the UK is due to expire or shortly before the immigration status document is due to expire, whichever is later. Therefore, the landlord must keep track of the individual's time-limited right to remain in the UK and conduct further checks at the appropriate time.

- ◆ Landlords must make a clear copy of each document and keep a record of the date the checks were made. This must be kept for at least one year after the Agreement comes to an end.

Where a person cannot provide the landlord with any of the specified documents but claims to have an on-going immigration application or appeal with the Home Office, or their documents are with the Home Office, or they have been granted a right to rent on a discretionary basis, the landlord should use the online Landlords Checking Service. This service should provide a response within two working days.

If the landlord establishes that a person does not have a right to be in the UK, they must not rent to that individual or allow that individual to occupy the property.

If an individual is already occupying a property and during a follow-up check, cannot produce a document evidencing their right to rent and this is confirmed using the Landlords Checking Service, the landlord must report this online to the Home Office as soon as reasonably practicable. Currently, there is no requirement for the landlord to evict the individual.

In some cases, individuals who come to the UK regularly on Visit Visas may wish to rent a property so that it is always available to them whilst staying in the UK. As Visit Visas are temporary in nature and only granted up to six months per visit, landlords would need to conduct checks every 12 months. In practice, the Agreement should stipulate that the tenant must produce their documentation every 12 months or if they are outside of the UK on the Agreement's anniversary, they must provide documentation on their next visit prior to occupying the property.

Who should do the checks?

The responsibility under the Scheme generally lies with the landlords and, as discussed above, landlords can be defined very widely.

There are circumstances in which responsibility for compliance with the Scheme can be transferred to another person and such person may carry out the checks instead. For example, many landlords use the services of an agent to let or manage their property. The agent appointed must act in the course of business but does not have to be a letting or managing agent. The scheme allows landlords to agree with an agent in writing who is responsible for fulfilling the requirements of the Scheme. Landlords and agents must keep a written agreement which clearly states the agents' responsibilities and limitations under the Scheme. For example, the written agreement could state

that the agent would be responsible for the initial right to rent checks but not for follow-up checks or may provide a timeframe in which they would hold such responsibilities.

If a landlord acquires a property with sitting occupiers, the new landlord should ensure that the transferring landlord has undertaken the necessary checks and retained a copy of the documentation. The new landlord should hold a copy of the documentation and is responsible for undertaking follow-up checks, if necessary.

What is the civil penalty?

A landlord would receive a civil penalty if they are found to be providing accommodation to an illegal occupier and had not carried out the required checks.

The level of the penalty will depend on a number of factors including whether the landlord has previously been in breach of the Scheme. For a first offence, the maximum penalty is £1,000 for each illegal occupier. The maximum penalty increases to £3,000 per illegal occupier for subsequent breaches.

If a landlord did carry out the necessary checks correctly, they will have a statutory excuse against liability for paying the fine.

Immigration Bill 2015/2016

The UK Government has announced that a new Immigration Bill (the "Bill") will be put before Parliament containing several new measures to expand on the provisions of the 2014 Act. These provisions include:

Eviction of illegal tenants

It is proposed that the Home Office will issue a notice to landlords where a tenants' immigration permission has expired. In those circumstances, landlords will be required to bring the Agreement to an end and evict the tenant. New rules will make it easier to evict such tenants (for instance, by enabling landlords to evict tenants without a court order in certain circumstances). It is not yet clear whether landlords would be expected to bear the costs of evictions.

New sanctions

The UK Government plans to impose heavier fines and criminal sanctions for landlords who repeatedly breach their obligations under the Scheme or who fail to take action to evict illegal tenants. It is proposed that the criminal offence would be punishable by up to five years' imprisonment. In addition, it is proposed that landlords and letting agents who repeatedly breach their obligations under the Scheme may be banned from letting or managing residential property.

CONCLUSION

Despite some commentators questioning the effectiveness of the Scheme, particularly following the outcome of the initial pilot Scheme, it was implemented across the UK on 1 February 2016. There have been some serious concerns that landlords would be dissuaded from renting to those who do not have an unlimited right to live in the UK. However the UK Government has published codes of practice on avoiding discrimination to address this potential issue. It will be interesting to see how the Scheme will be enforced and how helpful the UK Government will be in assisting landlords with implementing the Scheme.

Looking at the issue of immigration compliance monitoring more broadly, one of the aims of the 2014 Act is to tackle illegal immigration. The 2014 Act builds on the UK Government's view that those who may benefit from the UK immigration system must do their part in policing it. Since the late 1990s, employers have had to check and monitor their employees' right to work in the UK and the 2014 Act extended this monitoring obligation not only to landlords but also to banks and certain government bodies. The current Bill goes even further with provisions not only to increase the potential penalties that landlords may face but also to impose heavier burdens on those already subject to immigration compliance responsibilities.

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