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Tackling the DCLG discussion paper on the private rental sector, rogue landlords and immigration

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Property: On 3 August 2015 the Department for Communities and Local Government (DCLG) published a technical discussion paper. The deadline to respond to this is 27 August 2015. In this paper DCLG consults on a number of proposed measures that will apply to landlords in the private rental sector. The proposals include blacklisting or banning rogue landlords, rent repayment orders and abandonment. A separate discussion document proposing an extension of mandatory licensing for Houses in Multiple Occupation is also promised shortly. Barrister and expert in housing law, Sam Madge-Wyld from Arden Chambers in London comments on these proposals from DCLG.

Original news

In its Press Release to accompany the issue of this technical discussion paper, the DCLG minister Greg Clarke MP proposed a number of measures some of which his department proposes and others which the Home Office will bring forward in a new Immigration Bill. A technical discussion paper has been issued with a very tight deadline for responses of just over 3 weeks. The paper proposes a number of measures including requiring landlords to check a tenant's immigration status (the so called "right to rent" check) and evicting those tenants who no longer have a right to remain in the UK. Financial measures are proposed which would allow local authorities to recover housing benefit where properties have not been maintained. The DCLG says it wants to deal with "rogue" landlords who it claims exploit vulnerable people and correspondingly making money out of illegal immigrants.

The measures are controversial not least because they shift responsibility from policing immigration away from the Home Office or UK Border Agency and on to private sector landlords. The proposals would only apply to properties in England

What are the key features of these proposals?

The DP proposes that in future landlords will be required to ensure that the people they rent their properties to are legally entitled to be in the country. It proposes to extend across the country a pilot scheme from the West Midlands in which landlords were required to conduct "Right to Rent" checks on their tenants' immigration status before offering a tenancy agreement. The DCLG will want to require all landlords to meet their basic responsibilities as landlords. The focus of this is those who rent out dangerous, dirty or overcrowded properties.

The paper previews measures which the Home Office is said to be including in a forthcoming Immigration Bill. This Bill, if enacted, would enable landlords to evict tenants more easily by allowing them to end a tenancy when a tenant's leave to remain in the UK ends. This may be permitted without a court order. This will be triggered by a notice issued by the Home Office confirming that the tenant no longer has the "right to rent" in the UK. A landlord would then be expected to take action to ensure that the tenant/occupant leaves the property.

The DCLG also says it wants to deal with landlords who make money out of illegal immigration by exploiting vulnerable people. It says forthcoming legislation will propose a new criminal offence targeted at landlords or agents who fail to conduct the "right to rent" checks or fail to take steps to remove illegal immigrants from their property. These offences will carry a penalty of a fine and/or a prison sentence of up to 5 years imprisonment.

There are 5 other proposals from the DCLG:

- a new “fit and proper person” test for landlords to ensure they do not pose a risk to the welfare or safety of tenants. This will apply to properties that have to be licensed.
- extending Rent Repayment Orders so local authorities can claim back rent payments from landlords who have received Housing Benefit system where they have failed to ensure the property has been maintained to a good standard,
- enabling local authorities to issue penalty notices for certain civil offences,
- permitting the sharing of Tenancy Deposit Protection data to help councils enforce measures aimed at landlords who have knowingly rented out unsafe or overcrowded property, and
- enabling landlords to recover possession without a court order of abandoned properties.

How will the new proposals in the Immigration Bill build on the relevant Immigration Act 2014 provisions and the pilot?

The Immigration Act 2014 sought to prevent people, without leave to remain in the UK, from being granted tenancies. It does not, however, bring existing tenancies to an end in circumstances where a tenant lost the “right to rent” because his leave to remain had been curtailed or expired. The new Immigration Bill will, through the service of a notice by the UK Border Agency stating that a tenant no longer has a right to rent, bring these tenancies to an end and require landlords to take reasonable steps to evict those tenants. Such tenancies will also be excluded from the Protection from Eviction Act 1977 and this will mean that landlords will be required, or at least try, to remove such tenants without first obtaining a court order.

What are the main practical concerns raised by the Immigration Bill?

Even with such little detail, it is easy to foresee some obvious difficulties.

Firstly, most reputable landlords don’t want to evict people without a court order. Richard Lambert, the chief executive of the National Landlord’s Association, told the Today programme on 3 August 2015 that he was worried of illegal immigrants “barricading themselves in” and “defending themselves with all the force they can muster. It could put people in potential danger.” Accordingly, it is more likely than not that unless the occupiers leave their accommodation voluntarily most landlords will resort to the courts anyway.

Secondly, the scheme, which requires the arbitrary removal of residential occupiers from their homes without giving a court the opportunity to consider the proportionality of their eviction, would almost certainly be contrary to Article 8 of the ECHR.

Thirdly, it is unclear whether there will be a right of appeal against the service of a notice by the UKBA and if so to whom. Presumably, there will have to be a right of appeal or else the remedy would be judicial review. In drafting the appeals process, the Government would be wise to recall the recent quashing by the High Court and Court of Appeal of the fast-track asylum appeals process on the grounds that the process was unfair, in part because of its speed (*Detention Action v. First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin)). If there is going to be a proper and fair appeals process, by the time it has been concluded a landlord could, in all likelihood, have simply served a section 21 notice and used the accelerated procedure under Part 55 of the CPR.

Finally, regulation without enforcement is meaningless. In the West Midlands pilot, only seven landlords have been prosecuted for renting to people without a right to rent. The proposals to increase the use of civil penalties or rent repayment orders, the proceeds of which can be retained by local authorities, may incentivise local authorities to bring more prosecutions. It remains to be seen, however, if cash strapped local authorities have sufficient staff to do so.

What would this mean for non-EU nationals with EU rights of residence (especially those with derived rights such as *Zambrano* or *Ibrahim/Teixeira* carers)?

This should, in principle, not affect non-EU nationals with a derived right residence, e.g. *Zambrano* or *Teixeria* carers as they all have a right to rent under the Immigration Act 2014 and, so long as they continue to have a right of residence, they will not be served with a notice.

In practice, however, once the Immigration Act 2014 is rolled out nationally, they are more likely to be affected than other foreign nationals with a right to rent as they may not always have the documentary evidence to prove their right to rent. In the absence of such proof, any prudent landlord, who does not consider himself an immigration law expert, is likely to decide not to take the risk of renting a property

to anyone that cannot prove their right to rent. In practice it is even likely to affect foreign nationals with all the necessary documentary evidence as some landlords will undoubtedly take the view it is not worth the risk in the event that the documents are fake. These concerns are supported by the findings from the pilot where a large number of landlords refused even to let properties to non-white British nationals.

Finally, the Government often conveniently neglects to mention that there are a number of foreign people in the UK who work, many for large multi-national companies. Lots of these people have no intention of settling in the UK and rent their homes. Sometimes, through an oversight or error, their leave to remain comes to an end while they are still working for their employer. In principle, their landlords can evict these people without any notice either.

Do you imagine these proposals will go through in their current form?

As I have already indicated above, I believe that these proposals, along with the Immigration Act 2014, are seriously flawed. However, in the absence of any meaningful opposition and a Government keen to be seen as tough on immigration, I would be very surprised if these proposals did not become law.

What action should lawyers be taking at this time?

Presently, lawyers who represent landlords or property managers should be making their clients aware of these changes. This applies especially for landlords that let to large numbers of foreign nationals.

*Interviewed by David Bowden of David Bowden Law (www.DavidBowdenLaw.com).
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