

June 2017

Briefing note: The right to rent scheme and asylum support



These provisions apply to England only and unless indicated otherwise for tenancies entered into from 1st February 2016.

WHY IS THIS AN ISSUE?

1. On the 1st February 2016 the government rolled out a scheme in England linking the right to rent to a person's immigration status. As of that date, asylum-seekers and refused asylum-seekers do not have an automatic right to rent. On 1st December 2016 the scheme was modified so as to make it easier for landlords to evict people without the right to rent and introduced new criminal convictions for landlords contravening the scheme.
2. In summary, asylum-seekers and refused asylum-seekers will probably face a number of problems:
 - Discrimination and/or additional hurdles to go through in order to find accommodation meaning they find it very difficult or impossible to find somewhere to live;
 - Reliance on more expensive or insecure accommodation resulting in them becoming destitute more quickly;
 - Difficulties in persuading friends and family to house them or provide the relevant evidence to show destitution.
3. It is therefore important for the advice sector to be aware of how the right to rent provisions operate so they can help their clients argue they are entitled to asylum support.

RELEVANT LEGISLATION

4. The scheme is governed by:
 - Immigration Act 2014 (the 2014 Act) which was amended by the Immigration Act 2016.
 - Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014 (the Order).

There is also extensive government guidance listed at the end of this briefing.

THE RIGHT TO RENT SCHEME

What is the right to rent?

5. As of 1st February 2016 a landlord (or their agent) must not allow an adult to occupy residential premises in England as their only or main home if they do not have a right to rent¹. The Home Office may grant people permission to rent if they do not have an automatic entitlement².
6. Certain people have a permanent or time-limited right to rent, and they are:
 - British, EEA and Swiss nationals³
 - People with leave to enter or remain in the UK (indefinite or time-limited), as long as the period of leave is not subject to the condition that they don't have a right to rent⁴
 - People with an enforceable EU right⁵
7. A breach of this provision is subject to a civil penalty (on the landlord) of up to £3,000 for each adult found to be occupying the accommodation without a right to rent⁶. This part of the scheme only applies to tenancies in England entered into on or after 1st February 2016⁷.
8. The penalty can be avoided if the landlord can show they have carried out the relevant checks⁸. A landlord will need to:
 - Enquire who will be living in the property and check that all adults have a right to rent by asking for certain documents⁹ (there are prescribed lists, see Article 4 and List A and B of the Order)
 - Verify the authenticity of these documents (in a prescribed way¹⁰)
 - Keep records relating to their tenants' right to rent for a year after the tenant has ceased occupation¹¹
 - Carry out ongoing checks, if necessary, and notify the Home Office if these checks reveal an occupier who does not have a right to rent.
9. Checks should be carried out before entering into the tenancy but no more than 28 days before the tenancy starts¹². For those with a permanent right to rent, no further checks need to be carried out¹³.

¹ Immigration Act 2014 s22(1)

² IA 14 s21(3)

³ IA 14 s21(5)

⁴ IA 14 s21(4)

⁵ IA 14 s21(4)

⁶ IA 14 s23(2)

⁷ IA 14 s35

⁸ IA 14 s24 and s26

⁹ Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014 art3

¹⁰ I(RA)(PRCP) Order 14 art5

¹¹ The limitation period for issuing a penalty is in s28(5) of the Act and see also para 5.1 at "Steps 2 to 4" of the Code of practice on illegal immigrants and private rented accommodation (the Code of practice)

¹² IA 14 s24(4) and I(RA)(PRCP) Order 14 art8. But if the person is not in the country the checks need to be carried out before they occupy the accommodation (see sub-para Timing at 5.1 of the Code of Practice)

¹³ see List A at para 5.2 in the Code of Practice

However for those with time-limited leave, the situation is more complex. Once initial checks have been carried out, a landlord will be able to rent them the property for one year or until their leave expires (whichever is longest)¹⁴. So, for example, a person with a student visa that runs out in 6 months' time will be able to rent for a year before further checks are carried out. But if the visa is valid for 2 years, they will be eligible to rent during that whole period and further checks should not happen in that time. Before the end of the year or period of leave, the landlord will need to carry out new checks¹⁵.

10. When the landlord renews the checks, they must notify the Home Office as soon as reasonably practicable if they find an adult living there who does not have the right to rent, as otherwise they risk a fine¹⁶, and from 1st December 2016 could be subject to criminal proceedings .
11. All adults occupying the property are subject to these checks, including people not named on the tenancy or contributing to rent payments¹⁷. So for example, a couple made up of one British person and one asylum-seeker will both be subject to the right to rent checks even if the idea is that the asylum-seeker will not pay rent or be on the tenancy agreement.

Which kinds of tenancies are affected?

12. The definition of tenancies for this purpose is broad and includes tenancies, sub-tenancies, licences, and sub-licences¹⁸. This means that as long as rent of any amount¹⁹ is paid by anyone in exchange for accommodation then the provisions of the 2014 Act apply.
13. The law is primarily targeted at the private rental sector so certain types of tenancies are excluded²⁰:
 - Accommodation provided under s4, s95 and s98 Immigration and Asylum Act 1999
 - Housing provided by local authorities or others nominated by them to fulfil statutory housing duties (both allocations of social housing and provision for homeless people)
 - Accommodation provided to homeless people by the local authority under a statutory duty
 - Hostels and refuges
 - Care homes
 - Hotels and holiday accommodation **which are not used as a main residence**
 - Hospitals and hospices
 - Tied accommodation (accommodation provided by an employer to an employee)
 - Long leases of 7 years or more

¹⁴ IA 14 s27(4)

¹⁵ IA 14 s27

¹⁶ IA 14 s24(6) and 26(6)

¹⁷ IA 14 s22(4)(c)

¹⁸ IA 14 s20(3)

¹⁹ IA 14 s20(2)

²⁰ IA 14 s20(6) and schedule 3

- Student accommodation where the student has been nominated for accommodation by an educational institution
- Mobile homes

14. Hotels and B&Bs: A key test is whether or not this accommodation is used as a person's only or main residence²¹. Paragraph 3.3 of the Home Office's Code of practice on illegal immigrants and private rented accommodation (the Code of practice) explains what that means. At para 3.4 the Code of practice also clarifies that if a person lives (ie they have nowhere else to go) in a hotel or guest house their status will need to be checked for the purpose of the scheme. The guidance details that bookings that are open-ended, keep getting extended or are for more than three months would tend to indicate that right to rent checks need to be carried out.

Criminal offences for landlords and agents

15. The Immigration Act 2016 introduced new offences for landlords and agents who let adults without the right to rent occupy their premises. The government has indicated that these changes are aimed at tackling rogue landlords who consistently flout the right to rent provisions. The majority of landlords who fall foul of the rules will be dealt with through the civil penalties regime²². If successfully prosecuted however, landlords and agents could face a fine and/or up to five years in prison.
16. Whereas the civil penalties scheme and the requirement to carry out checks (introduced under the 2014 Act) apply to tenancies entered into on or after 1st February 2016, the criminal offence of knowingly allowing a person without the right to rent to occupy the premises applies regardless of when the tenancy was granted²³. However, the offences do not apply to excluded tenancies mentioned in para 13 above²⁴.

Power to evict

17. The Immigration Act 2016 in effect obliges a private landlord to end the tenancy where there is a breach of the right to rent provisions (this was not the case under the initial scheme). If a private landlord finds out that a person without the right to rent is living in their property, they may face criminal conviction if they do not notify the Home Office at the appropriate time and then proceed with an eviction if they can²⁵.

²¹ IA 14 s20(4).

²² See Immigration Act 2016 Factsheet – Residential tenancies

²³ Other offences only apply to tenancies granted from 1st December 2016 see IA 14 s33A(1) and s39

²⁴ IA 14 s33A and s20(2)

²⁵ Taking reasonable steps to end the tenancy upon receiving notice for the Home Office that an occupier doesn't have the right to rent is a defence IA 14 s33A(6)

18. Evicting tenants will now be easier. Firstly, the 2016 Act creates a power for private landlords to evict a tenant (or multiple tenants) if the Home Office notifies them that **all** the people occupying the property do not have the right to rent. The landlord will have to give the tenant 28 days written notice²⁶. The Protection from Eviction Act 1977 does not apply so landlords will be able to evict a tenant without having to obtain a possession order. After the 28 days have expired, the landlord can either evict the tenants him/herself or use High Court officers to do so²⁷.
19. If not all the adults living in the property are disqualified from renting (for example, one occupant is British), then a court order is needed to end the tenancy. Most private tenants have a type of tenancy called an assured shorthold tenancy. This can easily be terminated through service of the correct notice and appropriate court proceedings. This has not been changed by the Immigration Act 2016. However, the 2016 Act amends housing law to add a ground for possession for occupants where the landlord has received a notice from the Home Office that there are “disqualified people” living on the premises. This is mandatory, so that the courts will have no choice but to evict the occupiers regardless of their personal circumstances, provided the landlord and the Home Office have followed the correct procedure²⁸. If there are other people, not disqualified, occupying the accommodation the court can consider transferring the tenancy to them if this new ground for possession is used²⁹.
20. More information on the right to rent scheme is available on the [Housing Rights website](#). Information on the general process of eviction can be found on [Shelter’s website](#).

DO ASYLUM-SEEKERS AND REFUSED ASYLUM-SEEKERS HAVE THE RIGHT TO RENT?

21. Since 1st February 2016 asylum-seekers and refused asylum-seekers do not have the automatic right to rent as they do not have leave to remain in the UK. However, they may be treated as having a right to rent if they are given permission to do so by the Home Office³⁰.
22. **Asylum-seekers:** The Order specifically mentions asylum-seekers as a category of people who would be granted permission to rent as long as they are not appeals rights exhausted³¹. Landlords need to obtain a Positive Right to Rent Certificate by contacting the Landlord Checking Service. If they don’t receive answer within 48 hours, the landlord can assume that the person has the right to rent without the certificate having been issued³².

²⁶ The 2016 Act specify what kind of notice needs to be given, see IA 14 (as amended) s33D. See also, Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc) Regulations 2016.

²⁷ IA 16 s40(5)

²⁸ IA 14 (as amended) s33E, Housing Act 1988 (as amended) Ground 7B in Part 1 of Schedule 2, Rent Act 1977 (as amended) Case 10A in Part 1 of Schedule 15.

²⁹ s.10A Housing Act 1988 as amended by Immigration Act 2016

³⁰ IA 14 s21(3)

³¹ I(RA)(PRCP) Order 14 Art4(b)(i)(bb)

³² I(RA)(PRCP) Order 14 Art 6

23. **Refused asylum-seekers:** For refused asylum seekers the situation is not straightforward. The Home Office will have to grant a refused asylum-seeker permission to rent before a Positive Right to Rent Certificate is issued³³. The Home Office confirmed in response to a freedom of information request made by the Kent Law Clinic that there is no process for applying for permission: *“it is not a question of a migrant making an application for permission to rent, but rather a status the Secretary of State may consider affording on a case by case basis”*³⁴. But the Home Office’s A short guide on the right to rent (the short guide) explains that a person can make an enquiry through their *“established contact points with the Home Office, such as at a reporting event, interview appointment or through the team dealing with their case”*³⁵. Presumably this enquiry will be treated as a request for confirmation that a person has the right to rent and the individual will receive an answer from their point of contact. The landlord should then be able to get the necessary confirmation from the Landlord Checking Service.

24. The short guide provides a list of people for whom permission will usually be granted. This includes refused asylum-seekers who:

- Have made further submissions (on protection grounds **only**, so not those with outstanding Article 8 applications) that have been outstanding for more than 5 days
- Have permission to proceed on a judicial review that is being treated as suspensive of removal
- Are on immigration bail with a residency restriction
- Are taking all reasonable steps to leave
- Are co-operating with the Family’s Returns Process
- Victims or potential victims of slavery.

Broadly this reflects the criteria for support for refused asylum-seekers under the proposed new system created by the Immigration Act 2016. In exceptional circumstances (if it helps Home Office progress someone’s case, they are vulnerable, or to avoid a breach of human right) they would consider other categories of people.

IMPLICATIONS FOR ASYLUM SUPPORT APPLICATIONS

Those with means to rent

25. Asylum-seekers and refused asylum-seekers with funds³⁶ at their disposal will be expected to use those to support themselves in the UK. However, thanks to this scheme they could face a number of problems:

- Obtaining permission to rent: asylum-seekers should not have a problem with this, but for others it is not very clear how they must do this (see paras 22-24 above).

³³ I(RA)(PRCP) Order 14 Art 4(b)(i)(dd)

³⁴ See <https://www.whatdotheyknow.com/request/information-about-how-to-apply#incoming-776153>

³⁵ A short guide, p.10

³⁶ Please refer to the Home Office guidance [Assessing Destitution](#), particularly para. 2.1 for information on what assets and income are relevant to the test of destitution. At the time of writing this policy is being amended but we have been advised that the archived version on the website should still be referred to.

- Finding a landlord willing to take them on as tenants given the additional hurdles they face, particularly as the scheme places the burden on the landlords not the tenants.
- Finding their funds deplete more quickly than anticipated because they are staying in more expensive temporary accommodation like hotels. This should not cause a problem with the Home Office when later applying for support once they have become destitute. The Home Office's policy says that average local B&B rate (as opposed to market rent) is taken into consideration by caseworkers when deciding if a person is destitute³⁷ (and therefore looking at how quickly they have depleted their funds).
- Refused asylum-seekers who are not on the list of people who might exceptionally be granted permission (see para 24 above) will probably not get permission. If they do not have permission or entitlement to asylum support, they may find themselves completely destitute despite having funds to support themselves.
- Potentially find themselves in exploitative situations, as they have no option but to turn to those who are not afraid to flout the law.

26. Asylum-seekers and refused asylum-seekers, particularly new arrivals or those facing an immediate housing crisis, will probably seek to access hotel accommodation first. However, the scheme catches people using hotels or B&Bs as their only or main residence. Home Office guidance explains that checks should be carried out by hotels (see above at para 14) and we have received reports of asylum-seekers having difficulties in finding hotel accommodation. The reasons given by hotels for refusing bookings seemed to centre on individuals' lack of ID so it is not clear that this is necessarily a direct result of the right to rent scheme.

27. If an asylum-seeker has permission to rent but cannot find accommodation, advisers will need to argue that although a person has financial resources they are still destitute because they do not have "the means of obtaining" accommodation within the next 14 days³⁸ as a result of this scheme. Applicants will need to provide evidence of reasonable attempts to find accommodation.

28. In s95 cases³⁹ the asylum support system provides for some flexible support arrangements and advisers may need to remind the Home Office of this. For instance, advisers could rely on regulation 16 of the Asylum Support Regulations 2000 which gives the Home Office the power to grant s95 support to asylum-seekers whilst requiring them to make contributions towards their support. Regulation 12 allows the Home Office to take into account income and assets that the applicant has when determining levels of support and Home Office policy refers to partial grants of support. So for example

³⁷ Assessing Destitution para 4.3

³⁸ Immigration and Asylum Act 1999, s95(3)

³⁹ The rules described in this paragraph don't apply to s4 cases which can only be provided as a package of accommodation and financial support.

a person on s95 support could be accommodated but not receive subsistence payments (see paragraph 5 of the [Assessing Destitution](#) policy).

Destitute clients staying with hosts for free (families, friends, charitable hosting schemes)

29. The consequence for hosts of allowing a guest with no right to rent to stay with them depends on who owns the accommodation. If the host owns the accommodation then they should have no problems if they let a person stay with them provided no rent, of any amount, is paid.
30. If the host is a tenant, then they could face eviction for allowing someone to live with them who does not have the right to rent (see paras 17- 19 above). Or, they may find themselves in difficulties with their landlord who would need to go through additional hurdles to avoid a civil penalty for allowing someone without the right to rent to live in their property.
31. The potential impact on this kind of support arrangement is that people may be unwilling to let friends/relatives stay with them for very long and destitute asylum-seekers or refused asylum-seekers will run out of informal options more quickly. This could lead to an increase in applications for asylum support, and in increase in street homelessness amongst those who do not qualify for support.
32. In addition, as is already the case for people allowing guests to stay illicitly in their asylum support accommodation, clients will probably find it increasingly difficult to get destitution evidence as those that are allowing people to stay with them may not put it in writing for fear of putting themselves in trouble. Therefore advisers should be prepared to explain to the Home Office the connection between the right to rent scheme and a lack of evidence regarding past addresses as it will assist with credibility issues.

Subsistence-only s95 applicants

33. Asylum-seekers applying for subsistence-only s95 support might also be affected. If their host owns the accommodation then there should be no problem. But if they entered into a tenancy with a private landlord after 1st February 2016 and only have a limited right to rent the landlord will need to carry out further checks within a year of the tenancy starting or when the hosts' leave runs out. At that point, the asylum-seeker (and any other adult dependants living there) will also be subject to checks. Likewise, if the landlord somehow finds out that a person without the right to rent is staying in their property, the provisions of the scheme will also bite.
34. If their claim is still outstanding the private landlord should be able to get a Positive Right to Rent Certificate from the Home Office (see para 22 above). However, if they are now appeals rights exhausted and the Home Office does not grant them the right to rent, they will need to leave. The hosts risk being evicted too if the landlord decides to terminate the tenancy.

35. Hosts who are council tenants will not be as concerned as they do not have to prove their right to rent and their tenancies are specifically excluded from all the right to rent provisions. For housing association tenants the position is more complicated and may depend on how they obtained their tenancy and what type of tenancy they have⁴⁰.
36. Given the added problems for hosts and landlords of allowing an asylum seeker on subsistence-only support to stay with them, it could be that fewer people are able to rely on this form of support during their asylum claim. For those that do apply it may be advisable for them to seek permission from the Home Office to rent so as to protect themselves and their hosts (see paras 22-24).

POTENTIAL DISCRIMINATION

37. The government's evaluation of their right to rent pilot (which ran in the West Midlands prior to the national roll out in February 2016) found a risk of discrimination. It may be that individuals have the right to rent or could get it but are unable to find a landlord because they are facing discrimination. Advisers who come across such examples should get in touch with JCWI who are monitoring the situation (see www.jcwi.org.uk).

LEGISLATION, GUIDANCE AND OTHER USEFUL RESOURCES

Legislation

- Ss 20-37 and Schedule 3, Immigration Act 2014
- Ss 39-41 Immigration Act 2016 (which amends the Immigration Act 2014)
- Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014
- Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc) Regulations 2016

Government guidance

- Code of practice on illegal immigrants and private rented accommodation, 25 May 2016 (the Code of practice)
<https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice>
- Code of Practice for Landlords: avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector, Oct 2014
<https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice>

⁴⁰ Secure tenancies (granted before 1989 to housing association tenants) are not affected by the 2016 eviction provisions. HA tenancies granted via homelessness or allocations procedures are excluded from the 2014 Act, but the eviction procedures of the 2016 Act and the criminal liabilities may apply.

- Right to Rent Documents Checks: a User Guide, Dec 2016
<https://www.gov.uk/government/publications/right-to-rent-document-checks-a-user-guide>
- Gov.uk quick guide to the right to rent scheme, 22 March 2017: <https://www.gov.uk/check-tenant-right-to-rent-documents>
- A short guide to the right to rent, June 2016
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529155/A_short_guide_on_right_to_rent_v2.1.pdf
- Immigration Act 2016 Factsheet – Residential tenancies, July 2016
[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537218/Immigration Act - Part 2 - Residential Tenancies.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537218/Immigration_Act_-_Part_2_-_Residential_Tenancies.pdf)
- Immigration Act 2014: Guidance on taking reasonable steps to end a residential tenancy agreement within a reasonable time, December 2016 <https://www.gov.uk/government/publications/ending-a-residential-tenancy-agreement-draft-guidance>

Home Office evaluations of the Right to Rent pilot

- <https://www.gov.uk/government/publications/evaluation-of-the-right-to-rent-scheme>

Voluntary sector guides

- JCWI: They have a toolkit for tenants and an evaluation of the scheme
<https://www.jcwi.org.uk/hostile-environment-undocumented-migrants>
- Housing rights information: <http://www.housing-rights.info/private-rented-sector-advising-migrants.php>
- Shelter:
https://england.shelter.org.uk/housing_advice/private_renting/right_to_rent_immigration_checks