A summary of the key practical implications of the Immigration Act 2014
Introduction

The Immigration Act 2014 (IA 2014), which gained royal assent on 14 May 2014, will introduce a raft of substantial changes to UK immigration law, and marks a significant step in the Coalition government’s ongoing programme to reform the immigration system. The government has used the IA 2014 to try and address what it sees as the biggest failings of the current system, from tightening procedures to counter ‘sham marriages’ through to simplifying appeals and removal procedures. The government has also taken the opportunity to enact into primary legislation its view as to what ‘public interest’ considerations immigration judges should take into account when deciding whether or not a person’s removal or deportation would constitute a legitimate interference with their right to a private and family life under art 8 ECHR.

As the Immigration Bill progressed through Parliament much press attention was focused on several perhaps more newsworthy issues, such as the provisions drafted with the explicit intention of creating a ‘hostile environment’ for non-EEA nationals without leave to be in the UK (including the introduction of landlords’ immigration checks for residential tenancies) and the last-minute addition of the controversial deprivation of citizenship clause. This meant that much of the Bill seemed to pass through the various stages of scrutiny without notice by the wider public, or significant amendment. Where there were changes, including the addition of certain procedural protections or oversight, this was often thanks to the efforts of the Immigration Law Practitioners’ Association (ILPA) and other lobbying groups.

For immigration lawyers, the biggest story of IA 2014 is the radical set of changes being made to appeal rights. In particular, from the relevant commencement date, all persons making an application for leave to remain or entry clearance under the Immigration Rules will not have a right of appeal to an independent tribunal, unless they have made a human rights or protection (ie asylum) claim. Instead, they will have to apply for an administrative review of the decision, by which the Home Office, as one solicitor put it recently, will ‘mark its own work’ (albeit via a separate team). A similar system already exists for entry clearance applications submitted under the Points-Based System. The fallback remedy of judicial review (JR) will remain, and was given prominence in the government’s appeals impact assessment, but JR has significant costs implications (as the loser must pay both sides’ costs) and the grounds of challenge are limited to public law heads of review rather than a full merits review.

But there is so much more. For this briefing, Lexis®PSL Immigration has asked a group of expert practitioners to summarise and examine the implications of the changes in eleven key areas covered by IA 2014. Their responses are set out in this briefing, together with a selection of links to important source materials. We have also included, for subscribers to Lexis®PSL Immigration, links to relevant News Analysis pieces, Practice Notes and other materials on the service.

We have not included in this briefing any details of the changes to the legislative structure underpinning the charging of fees in immigration and nationality applications, nor the new provisions which will extend the entitlement to register as a British citizen to many persons born before 1 July 2006 to a British father who was not married to their mother. On fees, IA 2014 has swept away the previous system of annual charging and the previous bases of charging, to allow for fee levels to be changed at any point in the year, and a wider set of factors to which the Secretary of State should have regard when setting fees. This will allow the Home Office to bring new services on-stream quicker, but could also mean fees going up higher, and more often.

We would additionally note that:

- Very much of the detail as to how the provisions will be implemented remains as yet unpublished, whether as secondary legislation, codes of practice, guidance or otherwise. In some cases, this includes key considerations which will affect how tactical decisions should be taken. For example, how/where a human rights claim will need to be made. It seems that the government wants an applicant to make a choice from the outset: are you applying under the Immigration Rules, or are you making a human rights application? And the intention appears to be that you can’t chop and change later on. So, what happens if you have an arguable case under both? How do you best protect your position? And how will challenging a refusal in a family application work, where the applicant considers that they have met the Rules? With the government’s stated view that art 8 is in most cases now incorporated in the Rules, should a challenge take the form of an administrative review or an appeal?
- IA 2014 must be seen as a package of measures. Once a person’s administrative review procedure ends without success, they will no longer have leave under the Immigration Act 1971, s 3C (IA 1971). So, as much as they may wish to apply again if that is open to them, or to make a human rights application, or to apply for JR, the hostile environment contained in IA 2014, Pt 3 will kick in. They may have nowhere to live, they may lose their job, their NHS healthcare provision may end, their driving licence may be revoked, they may be subject to removal. Such issues will have to play a part in deciding how and whether to challenge refusals. Will other protective measures need to be taken, such as taking our private health insurance to cover any period without leave (if that is not to be outlawed)? And, of course, the hostile environment will apply just as much to persons who apply for up to 28 days after the expiry of their previous leave, as is allowed in most categories of the Rules.
- When looking at particular issues, do not forget to check the preceding consultations and the various preparatory/background documents published by the Home Office before the Bill was laid and during its progress (factsheets, statements of intent, impact assessments, human rights memoranda etc). These often give a good idea about how the government envisages that the changes will work in practice, and their possible weak spots, including any problematic jurisprudence that the Bill’s drafting team have tried to comply with when drafting the Bill.

- Section 71 provides that IA 2014 does not limit any duty imposed on the Secretary of State or other person by the Borders, Citizenship and Immigration Act 2009, s 55—ie the duty to safeguard and promote the welfare of children who are in the UK.

*Practitioner interviews by Guy Skelton and Kate Beaumont.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

**Selected further reading**

- [Immigration Act 2014 (Legislation.gov.uk)](https://www.legislation.gov.uk/)
- [Immigration Act 2014 (Lexis®PSL)](https://www.lexisnexis.co.uk/)

*Collections: Immigration Act 2014 (GOV.UK), which includes background documents on each Part and:*

  - Factsheet: Immigration Bill overview
  - European Convention on Human Rights Memorandum
  - Delegated powers memorandum
  - Overarching impact assessment

*Consultation: Immigration fees and charging consultation response (GOV.UK)*

- [Factsheet 17: Fees (GOV.UK)](https://www.gov.uk/)
- [Fees impact assessment (GOV.UK)](https://www.gov.uk/)
- [Lexis®PSL Immigration Practice Note: The duty to safeguard and promote the welfare of children](https://www.lexisnexis.co.uk/)

---

**Immigration Act 2014 analysis**

**CONTENTS**

- Page 3  **REMOVAL**—Daniel Sills, barrister at 1 Pump Court
- Page 4  **ENFORCEMENT POWERS**—Daniel Hayes, immigration solicitor at Turpin & Miller LLP
- Page 6  **BAIL AND DETENTION**—Jeremy Chipperfield, barrister at Mansfield Chambers and iBarristers.com
- Page 8  **BIOMETRICS AND EMBARKATION CHECKS**—Rose Carey, partner and head of the immigration group at Speechly Bircham LLP
- Page 11  **APPEALS**—Eileen Bye, partner at Luqmani Thompson & Partners
- Page 14  **RESIDENTIAL TENANCIES**—Marian Dixon, partner and head of business immigration team at Wright Hassall
- Page 16  **ACCESS TO SERVICES**—Alex Russell, associate at Mills & Reeve LLP
- Page 18  **PREVENTION OF ILLEGAL WORKING**—Annelabel Mace, partner in the labour and employment practice group and head of the UK immigration team at Squire Patton Boggs
- Page 20  **MARRIAGE AND CIVIL PARTNERSHIP**—Katie Newbury, solicitor at Kingsley Napley LLP
- Page 23  **OISC-REGULATED ADVISERS**—Ian Westwood, director at the Westwood Organisation
- Page 24  **DEPRIVATION OF CITIZENSHIP**—Eric Fripp, barrister at Lamb Building
Removal

Daniel Sills, barrister at 1 Pump Court

What are the main provisions about removal?

The main provision on removal is IA 2014, s 1 which amends the Immigration and Asylum Act 1999, s 10 (IAA 1999) dealing with administrative removal. The key provision states:

‘10 Removal of persons unlawfully in the UK
   (1) A person may be removed from the UK under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the UK but does not have it.’

It is part of a series of measures that represent the latest in a long line of efforts by the government to simplify and streamline the procedures for decision-making, appeals and removal. The complications arising from the current system have been considered recently in cases such as Adamally and Jaferi (s 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC), and Patel v Secretary of State for the Home Department [2013] UKSC 72, [2014] 1 All ER 1157 and were described by Lord Neuberger in his judgment when the latter was heard in the Court of Appeal as ‘an impenetrable jungle of intertwined statutory provisions and judicial decisions’ (Patel v Secretary of State for the Home Department [2012] EWCA Civ 741, [2012] 4 All ER 94 at para [40]).

The government’s Factsheet on Removal directions, published in December 2013, stated that the provision aims to introduce a ‘single decision encompassing both a person’s immigration status and their removability’. The ‘single decision’ will apply to:

• people who make applications to the Home Office for leave to remain in the UK
• people who have not made an application, but where the Home Office receives information (eg from a sponsor) that leads to the person’s leave being curtailed or revoked, and
• people unlawfully in the UK who are encountered by immigration officers

The new IAA 1999, s 10(1) means that once a decision is made that a person who requires leave to enter or remain in the UK ceases to have it, they become liable to removal. As such, no additional removal decision will be required.

This measure needs to be considered together with the reforms on appeals and appealable decisions. It appears to combine at least three formerly appealable decisions under the Nationality, Immigration, and Asylum Act 2002, s 82 (NIAA 2002) into one decision which would only be appealable if a protection or human rights claim has been made—or, in the case of overstayers, a protection, human rights claim or EEA application is made following receipt of notice of liability to removal—as per IA 2014, Pt 2.

IA 2014, s 1 also provides for removal of the person’s family members, provided they meet three conditions (including that they fall within the stated definition of family member) and that they have been given written notice of the intention to remove them.

IA 2014, ss 2 and 3 deal with the removal of children and families. IA 2014, s 2 provides for a grace period of 28 days from the day on which relevant appeal rights are exhausted during which a child and in some circumstances their parent(s) (or carer, if they are living in the same household) cannot be removed.

IA 2014, s 3 places the Independent Family Returns Panel (IFRP), initially set up in 2011, on a statutory basis. It places a statutory obligation on the Secretary of State to consult with the panel when removing or detaining children together with a parent or carer. The purpose of the IFRP is to ensure that the best interests of children are taken into account when they are subject to removal action.

What matters will be left to secondary legislation?

Further details on the IFRP will be left to secondary legislation. IA 2014, s 3(4) provides that regulations may make provisions about additional functions, status and constitution, appointment of members, and remuneration of the panel.

Draft regulations on removal of family members, defining family members and providing for details of the notice required, were published previously. Since their publication, the definition of family member has been added to IA 2014, s 1 (new IAA 1999, s 10(3)).
Are any of these changes welcome?
The added protections put in place by IA 2014, ss 2 and 3 for children facing removal are to be welcomed. Simplification of the decision and removal procedure would be welcome. These are not, however, the first attempts to do this. If the measure succeeds in that aim then it will be welcome to that extent.

Are any of these changes cause for concern?
The changes brought about by IA 2014, s 1 reduce the procedural protections for migrants with extant leave to remain, reducing the number of decisions required before their removal can be enforced from two to one. However, the far more significant erosion of procedural rights that migrants face is in relation to the mass removal of appeal rights.

How will these changes be rolled out?
The date for commencement is yet to be appointed. However, the IFRP is already in operation as a matter of policy.

What should immigration advisers be doing to prepare for the changes?
They should ensure they are familiar with the IFRP and the policy set out at the Enforcement Instructions and Guidance, Chapter 45 (EIG) which deals with the IFRP. It has already been very important for migrants to raise relevant issues at the earliest opportunity. The importance of this is likely to increase with these reforms.

It is also possible that the procedural protections relating to removal more generally contained in the EIG will come under review at some point in the not too distant future.

Selected further reading
Factsheet 1: Removal directions (GOV.UK)
Draft regulations: removal of family members (GOV.UK)
Enforcement Instructions and Guidance, Chapter 45: families and children
Lexis®PSL Immigration Practice Note: Administrative removal
Lexis®PSL Immigration News Analysis: Patel Challenging refusals to vary leave to remain
Lexis®PSL Immigration News Analysis: Thapa Out of country, out of mind: removals for breach of condition

Enforcement powers
Daniel Hayes, immigration solicitor at Turpin & Miller LLP

What are the main provisions about powers of immigration officers?
IA 2014 will:
• provide immigration officers with new search powers, and
• extend their power to use ‘reasonable force’ to a wider set of circumstances
These changes are contained within IA 2014, Sch 1, as enacted by IA 2014, s 4.

What matters will be left to secondary legislation?
At the time of writing, none of the powers are reduced to secondary legislation.
Guidance on the use of search powers is likely to be updated by Home Office officials.

Are any of these changes cause for concern?
Extension of the use of reasonable force
The extension of the use of ‘reasonable force’ to any power given across the Immigration Acts has not been explained at all, and is a concern. It has not been said why this was necessary, or what problem the legislation is addressing.
Until now, the use of reasonable force has been confined to powers exercised under IA 1971 or IAA 1999. These include:

- entering and searching premises for persons suspected of a range of immigration offences
- searching for and seizing evidence with a warrant where they have reasonable grounds to believe one or more of a range of immigration offences have been committed, and
- conducting examinations as to a person’s immigration status at port of entry, or after entry (if they have information in their possession that causes them to suspect that a person is in the UK unlawfully)

IA 2014, Sch 1, para 5 will amend IAA 1999, s 146(1) to provide a general power for immigration officers to use reasonable force when exercising any powers under the ‘Immigration Acts’.

The current definition of ‘Immigration Acts’ is found in the UK Borders Act 2007, s 61 (UKBA 2007) which lists nine separate pieces of legislation and which can subsequently be amended.

The Explanatory Notes and the European Convention on Human Rights memorandum accompanying the Bill provided very little commentary on the impact of this change, leaving a record of its use to be highlighted on a case-by-case basis.

It is already known that the use of force by the Home Office or its contractors has been improperly applied in some high profile cases. The deaths of Alois Dvorzac, Jimmy Mubenga and Joy Gardner are already an indication that Home Office officials may not be competent in all cases to apply force in the exercise of immigration powers. The extension is worrying.

**Searching detained persons**

The extended immigration search powers covering those in detention contained in IA 2014, Sch 1, para 2 now mirror provisions used for those who are arrested under IA 1971, Sch 2, para 25B. The power is intended to be used for safety reasons or to prevent escape. It should not be used as a fishing expedition related to potential immigration breaches/some other reason. The power can be exercised when the immigration officer ‘has reasonable grounds to believe’ the person has items which would cause harm or be used to escape. The worrying potential for the use of this power as a tool of intimidation is ever-present and unlikely to be monitored.

**Entry and search of premises**

IA 2014, Sch 1, Pt 3 will enable immigration officers to apply for a warrant to search the premises of a third party, including a relative or a partner, where a person has been detained under IA 1971, Sch 2 provided that certain conditions apply. These conditions include where it is not practicable to communicate with any person entitled to grant entry to the premises, or where the purpose of a search may be frustrated or seriously prejudiced unless an immigration officer arriving at the premises can secure immediate entry.

Immigration officers can currently enter and search premises which are occupied or controlled by a detained person, or in which that person was when he was arrested, or immediately before he was arrested, if they have reasonable grounds for believing that there are ‘relevant documents’ (as defined) on the premises.

They will now also be able to retain any documents found in the search of relevant premises where there are reasonable grounds for believing that the arrested person may be liable for removal and that retention of the document may facilitate their removal.

The key problem with this change appears to be the ‘reasonable grounds’ test, which is likely to lead to speculative searches of third party homes, which could include those of British citizens.

**What should immigration advisers be doing to prepare for the changes?**

The EIG, Chapter 61 gives instructions on when it is reasonable for the Home Office to use force. According to the EIG, the use of force must be proportionate, lawful and necessary. These principles should be applied where a representative suspects a case of ‘unreasonable force’.

There are few cases on the legality of the exercise of search powers/use of force in immigration cases. These changes are unlikely to lead to new litigation. However, they could usefully provide other avenues of challenge. It is worth considering the interplay between these search powers, the EIG and the Police and Criminal Evidence Act 1984 (PACE 1984). The High Court carried out a similar exercise in R (on the application of S) v Secretary of State for the Home Department [2014] EWHC 50 (Admin), [2014] All ER (D) 18 (Feb) (para [284]).

Whether the Home Office has ‘reasonable grounds’ to search a third party’s premises (perhaps a relative) for relevant documents might also lead to interesting arguments about the admissibility of the evidence.

For example, the burden of proof in immigration decisions based on the general grounds for refusal in the Immigration Rules rests upon the respondent to the civil standard, but requires cogent evidence because of the nature of the accusations (see Khawaja v Secretary of State for the Home Department and another appeal [1983] 1 All ER 765, para...
The examination of a person is a mix of criminal and civil statutory procedure. The EIG are a summary of these powers, when they are to be used and the rights an appellant has during the process. The EIG incorporate some provisions of the PACE 1984 codes (for example see R (on the application of S) v Secretary of State for the Home Department [2014] EWHC 50 (Admin), [2014] All ER (D) 18 (Feb) (paras [281]–[288])).

If there is a breach of the relevant PACE 1984 codes, the evidence is not excluded altogether, unless the interviews were oppressive (see Poonam v Secretary of State for the Home Department [2013] EWHC 2059 (QB), [2013] All ER (D) 305 (Jul) (paras [30]–[33])).

Exploring the use of force or the powers exercised when gathering evidence will be an important starting point for assessing the admissibility of evidence or the lawful exercise of a power prior to removal.

**Selected further reading**

Factsheet 2: Powers of immigration officers (GOV.UK)

Enforcement Instructions and Guidance, Chapter 61: arrest teams, operational procedures

Lexis®PSL Immigration Practice Note: Entry, search and seizure powers of immigration officers

**Bail and detention**

Jeremy Chipperfield, barrister at Mansfield Chambers and iBarristers.com

What are the main provisions about bail and detention?

IA 2014, s 7 deals with bail and IA 2014, ss 5 and 6 relate to detention.

Bail

Section 7 prevents repeat bail applications within 28 days and imposes restrictions on the grant of bail where there are directions for removal within 14 days. Both changes have effect by amendments to the IA 1971, Sch 2 (‘Administrative provisions as to control on entry’).

Section 7(2) creates new sub-para (4) to IA 1971, Sch 2(2). The effect is that where directions require the removal of a person within 14 days of her bail decision, she must not be released on bail without the consent of the Secretary of State.

Section 7(3) applies after the First-tier Tribunal (Immigration and Asylum Chamber) has refused bail under IA 1971, Sch 2, para 22. It provides that any further bail application by the same applicant that is made within 28 days of that refusal must be dismissed without hearing unless the applicant ‘demonstrates to the tribunal that there has been a material change in circumstances’.

Section 7(6) provides that Tribunal Procedure Rules must secure that where the First-tier Tribunal have refused bail pending appeal (under IA 1971, Sch 2, para 29), any further bail application by the same applicant that is made within 28 days of that refusal must be dismissed without hearing unless the applicant ‘demonstrates to the tribunal that there has been a material change in circumstances’.

Detention

Section 5 imposes restrictions on time and place of detention of unaccompanied children pending removal or detention decisions. Amendments are made to paras 16 and 18 of, and para 18B is added to IA 1971, Sch 2 (in the section, ‘Detention of persons liable to examination or removal’).

‘Unaccompanied children’ are defined as persons under 18 not accompanied (while in detention) by a parent or other individual with care of them (new para 18B(7)).

Unaccompanied children who are reasonably suspected of being liable to removal directions (under paras 8–10a or 12–14) pending removal or a decision to detain may only be detained:

- at short-term holding facilities (STHF), except where they are being transferred to or from a STHF, or being taken to any place pursuant to para 18(3)—ie for any purpose connected with the operation of IA 1971, and
- for a maximum of 24 hours, and only so long as two conditions are met:
(i) either (a) directions are in force requiring that the person be removed from the STHF within the relevant 24-hour period or (b) a decision is likely to result in directions

(ii) the immigration officer authorising the detention reasonably believes that the child will be removed from the STHF within the relevant 24-hour period in accordance with the directions

The relevant 24-hour period starts when the child is first detained in a STHF.

Section 6 introduces ‘pre-departure accommodation’ for families. It amends IAA 1999 by adding definitions of: ‘detained children’ (detained persons under 18); and ‘pre-departure accommodation’ (a place used solely for the detention of children and their families for not more than 72 hours, or seven days where the longer period of detention is authorised personally by a Minster). Pre-departure accommodation is also specifically excluded from the definition of “STHF”.

A new s 157A is added extending the application of specified existing provisions relating to removal centres to pre-departure accommodation. It also provides for the Secretary of State: by regulation, so to extend other provisions; and to make rules for the regulation and management of pre-departure accommodation.

What matters will be left to secondary legislation?

In addition to those mentioned above, s 7(6) amends IA 1971, Sch 2, para 33 to provide that the Tribunal Procedure Rules must make provision with respect to applications to the First-tier Tribunal under paras 29–33 (grant of bail pending appeal; restrictions on grant of bail; forfeiture of recognizances; breach of bail bond (Scotland); and arrest of appellants released on bail) and the provisions preventing repeat bail applications under IA 1971, Sch 2, para 29.

Are any of these changes welcome?

The move away from holding unaccompanied minors in immigration removal centres and the limitation on the period for which they can be held at port prior to removal will be widely welcomed, but falls short of the government’s previously stated commitment to end the detention of children for immigration purposes.

Are any of the changes cause for concern?

In the past, guidance to immigration judges has indicated that when bail applications are made within 28 days of a previous refusal the judge might expect to see further grounds and/or some change in circumstances. However, immigration judges have generally been willing to consider all the relevant circumstances of any bail application before them (even if this includes the fact that there are no significant changes since a recent refusal). They have remained open to the grant of bail in appropriate cases. Such appropriate cases will now be dismissed without hearing and this will lead to the unnecessary deprivation of liberty.

The effect of the limitation on repeat bail applications is to reduce reliance on independent and impartial decision-making and favour that of the Home Office which, judging by the content of many bail summaries is not infrequently based on errors of fact and improper considerations.

The existence of removal directions and proximity of the specified date has always been an important consideration for immigration judges dealing with bail applications. The effective prohibition on bail in 14-day removal cases is an unnecessary step which prevents an independent decision on bail even in the most exceptional and compelling circumstances.

Many people are detained under immigration powers for months at a time, some of them suffering from mental or physical health problems. It is not unusual for detention to span long periods during which no progress is made in dealing with detainee’s immigration, asylum or human rights issues or removal arrangements. Judicial involvement is an important safeguard against such oversight, inefficiency and error. It is regrettable that IA 2014 aims to limit the role of the courts, and legal representatives in preventing the unnecessary loss of liberty.

What are the implications for lawyers and their clients at bail applications?

Where, on the day of a bail application, new allegations or detrimental assertions arise which cannot properly be addressed immediately, the implications will be far more significant under the new rules. Not only affecting any application made on the day—it may cost the applicant 28 days further detention. It is more important than ever to resist the admission of late and undisclosed evidence or assertions. Failing that, inevitably consideration will be given to withdrawing the application until the new material can be addressed.
Do you have any predictions for possible future developments?

The European Convention on Human Rights, art 5(4) (ECHR) provides:

‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

In its Memorandum on the compatibility of the Immigration Bill with the ECHR, October 2013, the Home Office remind us that bail applications in the First-tier Tribunal are not the means by which the lawfulness of detention may be reviewed for the purposes of art 5(4).

‘Rather, the lawfulness of detention may be reviewed by applications for judicial review or habeus corpus applications’ [para 26]

Perhaps there is a class of application, formerly dealt with conveniently by way of application to the First-tier Tribunal, which may now require application to the High Court.

Selected further reading

European Convention on Human Rights memorandum (GOV.UK)
Factsheet 1b: Ending the detention of children for immigration purposes (GOV.UK)
Factsheet 3: Bail (GOV.UK)
Statement of intent on bail
Lexis®PSL Immigration Practice Note: Temporary admission and bail

Biometrics and embarkation checks

Rose Carey, partner and head of the immigration group at Speechly Bircham

What are the main provisions about biometrics and embarkation checks?

IA 2014 makes some interesting changes in relation to the collection of biometric information and embarkation checks by third parties. There are already powers to collect biometric information provided by NIAA 2002 and UKBA 2007 but the changes seek to widen those powers and enable biometric information to be taken from persons not currently required to provide it. Powers to conduct embarkation checks are provided for in IA 1971 but were phased out in 1998 and IA 2014 seeks to reintroduce those checks but also increase their scope.

Biometric provisions

Biometric information is the collection of biometric data such as fingerprints and digital photographs. NIAA 2002, s 126 makes provision for the submission of biometric information as part of a valid immigration application and UKBA 2007, ss 5–15 provide for the issue of biometric residence documents (Biometric Residence Permits (BRP)) for applicants making their applications for further leave to remain or indefinite leave to remain in the UK.

IA 2014 provides for non-EEA national family members of EEA nationals, persons transiting the UK and applicants for British citizenship to provide their biometric information. An immigration officer also has the power to require a person to provide biometric information, usually fingerprints, for the purpose of verifying that person’s immigration status. This power can only be exercised where the immigration officer has reason to believe that person may be liable to removal. Immigration officers can link the biometric information to a travel document so as to facilitate their removal from the UK.

The relevant sections of IA 2014 are set out below.

IA 2014, s 8 enables biometric information to be captured for transit visas and applications by family members of non-EEA nationals.

IA 2014, s 9 provides for an immigration officer to collect biometric information in relation to a person liable to detention under IA 1971, Sch 2, para 16.

IA 2014, s 10 provides for the provision of biometric information as part of an application for British citizenship by registration or naturalization—it also provides for photographs to be retained even after that person has become a British citizen until they have obtained their first British passport.
IA 2014, s 11 allows for an application requiring the submission of a biometric document, to be disregarded or refused if that document is not provided.

IA 2014, s 12 amends the definition of biometric information contained in UKBA 2007, s 15 as follows:

‘(1A) For the purposes of section 5 “biometric information” means—

(a) information about a person’s external physical characteristics (including in particular fingerprints and features of the iris), and

(b) any other information about a person’s physical characteristics specified in an order made by the Secretary of State

(1B) An order under subsection (1A)(b)—

(a) may specify only information that can be obtained or recorded by an external examination of a person

(b) must not specify information about a person’s DNA.’

IA 2014, s 13 amends IA 1971, Sch 2, paras 4 and 18 to ensure that children under the age of 16 are not required to provide biometric information unless authorisation is obtained from a chief immigration officer (CIO). This would arise where the immigration officer is assessing the person’s identity and immigration status and also where a person may be detained to assess their identity and immigration status. Where authorisation is provided by the CIO the biometric information must be provided in the presence of an adult who is the parent, guardian or someone with responsibility for the child at that time.

IA 2014, s 14 provides for the use and retention of biometric information. It creates a new UKBA 2007, s 8 which requires the Secretary of State to make provision about the use and retention of biometric information provided pursuant to regulations made under UKBA 2007, s 5. The regulations must provide that the biometric information is only retained if necessary to retain it for immigration and nationality purposes. The regulations will also need to allow for the use of biometric information that has been retained for a widely drawn range of non-immigration purposes such as the prevention of crime, the protection of national security and ‘for the purpose of ascertaining whether a person has acted unlawfully, or has obtained or sought anything to which the person is not legally entitled’. The regulations must also include provision for the destruction of biometric information where it is no longer necessary to retain the information or the person is a British citizen or commonwealth citizen with the right of abode. A person whose biometric information has been destroyed is entitled to request confirmation of this.

New regulations will be required to complement IA 2014, s 14.

**Embarkation checks**

There is currently a system of exit checks using the electronic capture of departing passengers’ data and through intelligence led embarkation controls although neither is particularly effective or accurate. The new provisions enable the Secretary of State to delegate checks to third parties known as ‘designated persons’. Such designated persons will be chosen by the Secretary of State and will include port operations staff and carriers.

IA 2014, s 67 provides that IA 2014, Sch 8 shall have effect. Schedule 8 contains the relevant paragraphs relating to embarkation checks. This Schedule amends IA 1971, Sch 2 which relates to administrative provisions as to control on entry. The main paragraphs are set out below.

IA 2014, Sch 8, para 2 allows for the powers of examination exercised by an immigration officer to be exercised by a designated person. This examination includes consideration as to whether the person entered the UK lawfully, if they have breached conditions of leave and if they are to be readmitted to the UK.

IA 2014, Sch 8, para 3 enables a designated person to require information and documents relevant to an examination. The passenger is under a duty to provide the immigration officer or the designated person with all such relevant information in his possession. This paragraph also provides for the passenger to provide the immigration officer or designated person with a specified document such as a passport or another relevant document. The immigration officer has the powers to conduct a search of the passenger and their belongings whether or not they conducted the initial examination, and to examine and retain the passport or other relevant document. A designated person has the power to examine and retain the passport or other relevant document and they must provide the document as soon as reasonably practical to an immigration officer. The immigration officer is to treat this document as though he had been provided with the document or found the document himself on examination. The passenger is required to provide their biometric information where this is necessary to establish whether the passport or other document relates to them.

IA 2014, Sch 8, para 4 relates to the requirement for passengers to provide embarkation cards when required by the Secretary of State—this will enable such cards to also be produced to a designated person on request.

IA 2014, Sch 8, para 5 inserts a new IA 1971, Sch 2, para 5A to make provision for designated persons. The Secretary of State has the power to designate a person and apply limitations as to their functions or the period of time that may serve as a designated person. The designation could be for a permanent or fixed period of time, and can be withdrawn or varied by the Secretary of State. A person will be designated only if the person:
“(a) is capable of effectively carrying out the functions that are exercisable by virtue of the designation
(b) has received adequate training in respect of the exercise of those functions, and
(c) is otherwise a suitable person to exercise those functions’

IA 2014, Sch 8, para 6 inserts a new IA 1971, Sch 2, para 5B which enables the Secretary of State to direct carriers and port operators to make specific arrangements for the exercise of functions by designated persons. Carriers or port operators may be required to make arrangements for designated persons to examine passengers on a specific route or from a specific port which will be specified by the Secretary of State with details of the route, specific times and dates and the function to be exercised.

IA 2014, Sch 8, para 7 makes it an offence for a carrier or port operator to fail to comply with a direction issued by the Secretary of State under IA 1971, Sch 2, para 5B without reasonable excuse.

Are any of these changes welcome?
This is an effort by the government to be seen to be in control of immigration not just in terms of numbers but also in relation to the identity of applicants and their immigration history in the UK. The government intends on reducing net migration. One of the criticisms of estimating net migration is the lack of exit checks which may be remedied by these new measures on embarkation. Embarkation checks may go some way to assisting with calculating net migration.

Are any of these changes cause for concern?
There is a risk that requiring non-EEA national family members of EEA nationals to provide biometric information could slow down the processing of their applications which in some cases can exceed the six months allowed by law for the application to be processed. Adding a further dimension to the application procedure may result in further delays. It also seems a bit ridiculous to expect British citizenship applicants to provide their biometric information when most of that information will be destroyed once they have applied for their British passport which most citizenship applicants do as soon as they receive citizenship. Most citizenship applicants will be resident in the UK and registering either on the basis of ancestry or due to residence which means that they would have provided their biometric information previously with an immigration application.

There is a risk with embarkation checks that the designated persons will not be as experienced or knowledgeable as immigration officers and may overreach their powers. There is also the risk that the personal data of passengers may not be dealt with in accordance with data protection requirements. Designated persons, carriers and port operators will need to ensure that they have sufficient data protection policies in place to deal with these new responsibilities. Embarkation checks will place a lot of responsibility on carriers and port operators as it is likely that in practice immigration officers will be more concerned with who is entering the UK and the burden of embarkation checks will fall on the designated persons.

How will these changes be rolled out?
These provisions in IA 2014 will come into force when the Secretary of State appoints a date for them to come into force, which will require a commencement order.

What are the implications for lawyers and their clients?
Persons who have breached immigration law in some way or the conditions of their leave, and where this has not be drawn to the attention of the immigration authorities previously, may then come to the attention of the immigration authorities on leaving the UK. In particular those who have overstayed their visas may be brought to the attention of the immigration authorities on embarking and this then may cause problems with future UK immigration applications (particularly if a person is issued at the time with a removal decision).

As such it is possible that immigration lawyers will see an increase in the number of requests for assistance by persons who have been or may be refused entry clearance under para 320(7B) of the general grounds for refusal.

Clients who make EEA family member applications or citizenship applications who travel after the application is filed, will need to be aware that they will need to return to provide biometric information. At the moment it is not possible to file these applications by appointment with the UK immigration and nationality authorities and the request for biometric information is likely to be sent several weeks after the applications have been filed. A delay in providing biometric information could lead to a delay in the processing of the applications.
Selected further reading

Factsheet 4: Biometrics (GOV.UK)
Statement of intent on biometrics (GOV.UK)
Factsheet 16: Embarkation checks (GOV.UK)
Lexis®PSL Immigration Practice Note: Biometric Residence Permits
Lexis®PSL Immigration Practice Note: Biometric Residence Permits-compliance requirements
Lexis®PSL Immigration Practice Note: Mandatory grounds for refusal and re-entry bans

Appeals

Eileen Bye, partner at Luqmani Thompson & Partners

What are the main appeals provisions about?

IA 2014, Pt 2 takes a scythe to appealable decisions in the NIAA 2002, Pt 5 which is the asylum and immigration appeals structure. Appealable decisions listed in NIAA 2002, s 82 will be pared down to the fundamental rights protected by the UK’s international obligations. Limited grounds of appeal will be handcuffed to the appealable decisions (new NIAA 2002, s 84) and grounds must first be considered by the Secretary of State, not raised for the first time on appeal (new NIAA 2002, s 85). Where an appeal right survives, more people can be removed to exercise it from abroad (new NIAA 2002, ss 92 and 94B). As expected, ECHR art 8 is now shrink-wrapped in the statute to give force to the Secretary of State’s view of the public interest expressed in the 2012 Immigration Rules.

How will the new regime be rolled out?

The new appeals regime will be commenced by order at a date yet to be fixed by the Secretary of State, possibly as soon as October 2014. Changes will not be retrospective, so decisions made pre-commencement will retain existing appeal rights. There is some corresponding addition to Special Immigration Appeals Commission (SIAC) review in national security cases.

What will the new grounds of appeal be?

Under the new NIAA 2002, ss 82 and 84, a person may appeal to the First-tier Tribunal only where the Secretary of State has made one of the following decisions and on the related grounds in brackets:

- to refuse a protection claim (where removal might breach the Refugee Convention or humanitarian protection obligations, or be unlawful under the Human Rights Act 1998, s 6 (HRA 1998) (public authority not to act contrary to ECHR))
- to refuse a human rights claim (where the decision might be unlawful under HRA 1998, s 6)
- to revoke protection status (where the decision might breach the Refugee Convention or humanitarian protection obligations)

‘Humanitarian protection’ is to be construed as in the Immigration Rules. IA 2014, Pt 2 repeals NIAA 2002, ss 83 and 83A which gave differing appeal rights to asylum refusals or revocations where the person had other leave to remain.

Swept away are all the other immigration decisions, listed in NIAA 2002, s 82, which could be appealed to a tribunal for independent scrutiny—including refusal of a certificate of entitlement to right of abode. Grounds no longer include that a decision is not in accordance with the law and discrimination. For those with a residual appeal right to the tribunal, IA 2014 attempts to clamp down what the tribunal can scrutinise.

A new NIAA 2002, s 85(5) bars the tribunal from considering a new matter ‘unless the Secretary of State has given the Tribunal consent to do so’, if the matter has not previously been considered in the decision or in an appellant’s response to a NIAA 2002, s 120 statement, in which any additional grounds have to be stated.

This controversial limitation gives the Secretary of State, a party to the appeal, a questionable veto over what the tribunal can consider. The Secretary of State has indicated that guidance would be published on how this will work.
What is happening about the venue for appeals?

The nature of the decision and the grounds affect whether someone who still has an appeal can exercise it in-country or only after removal. NIAA 2002, s 92 and a new NIAA 2002, s 94B relate to appeals which can only be ‘brought or continued’ outside the UK. This applies to appeals started outside the UK and those started in the UK but which do not suspend removal. The Secretary of State can already certify as non-suspensive asylum or human rights appeals deemed to be ‘clearly unfounded’ including where removal is to a safe third country.

New NIAA 2002, s 94B introduces a new category to certify a human rights claim. For those liable to deportation under IA 1971, s 3(5)(a) (deportation deemed conducive to the public good) or IA 1971, s 3(6) (court recommendation for deportation following conviction), a human rights claim can be certified as not unlawful under HRA 1998, to include the grounds that the person ‘would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country [of destination]’. This applies before or during the appeal process. It does not give relief to others at risk of ‘serious irreversible harm’, such as the appellant’s family in the UK.

Appeals of those removed under certification are not treated as abandoned.

What changes are being made in relation to the adjudication of ECHR, art 8 claims by a court or tribunal?

The vehicle for giving statutory force to the Secretary of State’s take on ECHR, art 8(2) public interest qualifications, where a court or tribunal is determining whether a decision breaches the art 8 right to respect for private and family life, is a new NIAA 2002, Pt 5A. NIAA 2002, Pt 5A prescribes a list of general considerations (NIAA 2002, s 117B) and additional considerations in foreign criminal cases (NIAA 2002, s 117C).

In all cases the court or tribunal must, in particular, have regard to the public interest in:

• maintenance of effective immigration controls
• persons seeking entry or stay being able to speak English, to be less of a burden on taxpayers and better able to integrate, and similarly
• financial independence of applicants

In observing the Secretary of State’s prescription, ‘little weight should be given to’:

• a private life, or a relationship with a qualifying partner, established when the person is in the UK unlawfully, or
• a private life established when the person’s immigration status is precarious

There is some relief for some children. The public interest ‘does not require the person’s removal’ where ‘the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK’. This applies only in non-deportation cases.

In deportation cases, relief is very limited. For ‘foreign criminals’ (non-British, convicted and sentenced to at least 12 months’ imprisonment, or involving an offence that has caused serious harm, or a persistent offender), deportation is in the public interest and the more serious the offence the greater is the public interest in deportation. Deportation is required, subject to two exceptions which might benefit people with less than four year custodial sentences:

• exception 1 applies where the person has been lawfully resident in the UK for most of his or her life, is socially and culturally integrated, and ‘there would be very significant obstacles to [his or her] integration into the country [of proposed deportation]’
• exception 2 applies where the person has a ‘genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of [the person’s] deportation on the partner or child would be unduly harsh’

Advisers will notice that, in yet another mutation, the wording is similar but not identical to what went before quite recently in revised Immigration Rules 398 and 399A (deportation and art 8). Presumably there will be more rule changes.

A ‘qualifying child’ means a British citizen or a child living for a continuous period in the UK of seven years or more, and ‘qualifying partner’ means a British Citizen or someone settled (NIAA 2002, s 117D, Interpretation). Partners with refugee status or humanitarian protection have been left out of the exception.

Those with sentences of four years or more will need ‘very compelling circumstances’ over and above the two exceptions (s 117C(6))—rather than the ‘exceptional circumstances’ of para 398.

The Home Office anticipates this will reduce the number of appeals heard from 70,000 to 40,000 per annum, because fewer people will have appeal rights and because many of those who do have a right of appeal, but it is only exercisable from abroad, will not bother or will not have the means.
What remedy will there be for those who will now be denied a right of appeal?

Filling the scrutiny gap will be administrative review, which means review by the Secretary of State’s own officials, ‘under the Immigration Rules’. New rules are anticipated. Advisers have experience of administrative review with Points-Based System entry clearance refusals.

The scope of administrative review, in the statement of intent, covers only alleged caseworking errors—only those which could have made a difference to the decision—and once only (unless the Home Office on review puts forward a different basis of refusal).

No new evidence can be submitted unless it demonstrates that previously submitted documentation is genuine and meets the rules. Listed caseworking errors include:

- failure to consider all the evidence submitted
- failure properly to exercise any discretion
- credibility, and
- documents not meeting the requirements or not considered to be genuine

As with appeals, time limits will be ten days to apply for administrative review or two days for detainees. Application forms for review will carry a charge, which is likely to be similar to the HMCTS charge for an appeal being heard on the papers (currently £80), with a refund if overturned. IA 1971, ss 3C and 3D are being amended so that status for in-time review applicants will be protectively frozen, to maintain existing leave and conditions until the application is determined, any appeal (see IA 2014, Sch 9, Pt 4).

Refusals will be reviewed by a different person, within specialist administrative review teams. The service standard to decide is 28 days.

The Secretary of State is to ask the Chief Inspector of Borders and Immigration to review how it works within 12 months of commencement.

The Home Office, in the impact assessment, considers that caseworker error is operative in around 60% of points-based scheme allowed appeals. This is a justification for proposing that internal review should cure most errors.

Of appeals determined by the tribunal, around half of managed migration and entry clearance appeals are upheld, and about a third of deportation and other appeals are upheld. By comparison, entry clearance reviews yielded a 21% overturn rate according to the statement of intent. This suggests that a significant proportion of decisions by the Secretary of State are wrong, or not in accordance with the law, for the range of reasons currently open to the tribunal to consider, and for the more limited range of caseworking error open to internal reviewers. There is no basis for assuming Home Office reviewers, subject to the same managerial norms, will take a leap forward in competence, efficiency or independent objectivity. The lack of remedy is likely to increase pressure on the more elastic administrative review criteria and, ironically, on judicial review.

But neither of those two alternatives are sufficient remedy since neither provides a review of the merits of the decision.

What are the key practical implications of these changes?

There is not much for advisers to look forward to in what the Home Office sees as streamlining the determination journey and others see as digging up the road, particularly when this coincides with legal aid loss and judicial review obstacles. Advisers might press for decisions now, to preserve existing appeal rights. Front loading applications will be more important than ever, to ensure that all relevant information is before the Home Office at the outset, in the hope of engineering a decision that is in accordance with the law in the first place. There will be pressure to:

- declare any protection and human rights issues at the earliest stage
- engage a right of appeal
- obviate the Secretary of State seeking to vacate the appeal because a new matter has been raised, and
- avoid certification under NIAA 2002, s 96 (negating matters that could have been raised earlier)

Experience gives no ground for optimism that administrative reviews will be turned around within the target 28 days, or that Home Office consideration of new matters, withdrawn from the tribunal to permit primary consideration by the Home Office, will be considered promptly. The limited acknowledgement of the interests of some children is difficult to square with the statutory obligation to safeguard and promote the welfare of all children to which some Home Office caseworkers remain oblivious. How the courts will interpret this new invasion of their judicial independence, the bottlenecking into residual redress as appeal rights are closed off, as well as what is unlawful under ECHR—which remains subject to accumulated case law—remains to be seen. Faced with the new bureaucracy of administrative review, advisers may start a new log of how it meets expectations of streamlined efficiency, for submission to the Chief Inspector in his 12-month review. IA 2014, Pt 2 may be seen as reductive not only of clients’ legal rights and access to independent judicial scrutiny, but also of transparent constitutional checks on how the executive works. Those checks have been the best guarantee of efficiency.
Residential tenancies

Marian Dixon, partner and head of business immigration team at Wright Hassall

What are the main provisions about residential tenancies?

IA 2014, s 22 sets out the duty that ‘a landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status’. If landlords are found to be in breach of this then they could face a civil penalty of up to £3,000 per adult. IA 2014 includes provisions covering the circumstances under which a landlord or their agent will be excused from paying a civil penalty (including when follow-up checks will be required in order to maintain an excuse), how they may object or appeal against a civil penalty and how a civil penalty may be enforced.

The provisions will not come into force across the country until what is effectively a pilot scheme has been undertaken in one or more geographical areas, with an anticipated start date in October 2014. The pilot should run for a period of at least six months and then a report, focusing on issues of discrimination, should be presented thereafter. The government will issue codes of practice for landlords, including one to assist in the prevention of any discrimination or racial profiling.

What matters will be left to secondary legislation?

As a result of the pilot scheme and the reports laid before Parliament scheduled for 2015, all issues arising from the pilot scheme, including possible exemptions to the scheme and how the scheme will be implemented nationally, will have to be dealt with by secondary legislation. The secondary legislation will, in effect, address the results and evaluate the pilot scheme and include the codes of practice for landlords.

IA 2014, s 33 provides that the Secretary of State must issue a code of practice specifying what a landlord or agent should or should not do to ensure that, while avoiding liability to a penalty under IA 2014, ss 23 or 25, they do not contravene the Equality Act 2010 so far as relating to race, or the Race Relations (Northern Ireland) Order 1997, SR 1997/869. The purpose of the code is to provide practical guidance to landlords and agents on how to comply with the obligation not to allow the occupation of premises contrary to the provisions in IA 2014 without discriminating on grounds of race. The code itself will not impose new or different legal requirements on landlords or agents, it will simply reflect the requirements introduced by other statutory provisions. IA 2104, s 33(3) acknowledges the importance of engaging with statutory bodies responsible for discrimination issues and provides that before issuing the code, the Secretary of State shall consult the Commission for Equality and Human Rights and the Equality Commission for Northern Ireland, as well as relevant bodies representing the interests of landlords and tenants. Under IA 2014, ss 33(4)–(6) the Secretary of State must publish a draft code after that consultation and consider any representations about the published draft and lay a draft code before Parliament, with or without modifications to reflect the representations.

IA 2014, s 32 provides that the Secretary of State must also issue a code of practice which will set out the framework for the civil penalty scheme and cover matters such as the level of penalty which would be appropriate for a first time breach as opposed to landlords and agents found to be letting to individuals without leave on multiple occasions without carrying out proper checks, and any differential treatment to be afforded to landlords depending on whether they are operating in order to generate a profit or have taken in a lodger on an informal arrangement in order to contribute to the costs of running their own home. The Secretary of State must lay the code, and any revision of the code, before Parliament. The code of practice format is considered appropriate for the level of technical and operational detail necessary and to allow the flexibility to amend the guidance and the operating framework for the penalty scheme where necessary. The code will come into force on a date specified by order of the Secretary of State.
The following powers will be addressed in secondary legislation by means of an order to ensure that detailed requirements can be defined and updated in line with operational realities and without the need for further primary legislation:

- **IA 2014, s 20(7)**—power to amend IA 2014, Sch 3 to vary the list of agreements of a description excluded from the definition of ‘residential tenancy agreement’
- **IA 2014, s 23(6)**—power to amend the maximum sum payable as a penalty by a landlord
- **IA 2014, s 25(5)**—power to amend the maximum sum payable as a penalty by an agent
- **IA 2014, s 34(1)**—power to prescribe the requirements, which, if complied with, excuse a landlord or agent from a penalty
- **IA 2014, ss 29, 37**—power to prescribe the manner and time limit for a landlord or agent to object to a penalty
- **IA 2014, ss 37(6)–37(8)**—powers to prescribe when a residential tenancy will or will not be considered within the scope of the penalty scheme and when a person will or will not be considered to be living in a place as their only or main residence for the purposes of the scheme

**What is the position for students?**

IA 2014, Sch 3 provides details of which types of residential tenancy agreement are excluded from the effect of IA 2014, and includes provisions for student accommodation, social housing, care homes, hospitals and hospices, hostels and refuges, mobile homes, accommodation provided by virtue of immigration provisions, tied employment accommodation, certain local authority homelessness accommodation and long leases.

The position of students was the subject of much lobbying during the progress of the Immigration Bill through Parliament. In their explanatory notes to the amendments to the Bill brought from the House of Lords on 6 May 2014, the government noted that educational institutions that are sponsoring non-EEA students to study in the UK already have a duty to ensure that their students are lawfully in the UK. It stated that halls of residence are exempt from the landlords scheme, to ensure that educational institutions are not subject to double regulation.

The government subsequently accepted the Lords’ amendments to extend the scope of the exemption for student accommodation to cover all halls, regardless of whether the provider has entered into an agreement with an educational institution regarding the nomination of the students who will live there, and to other forms of accommodation in the private rented sector, provided that the student has been nominated for the tenancy by the educational institution. What the amendment does not do is to provide any relief for students wishing to occupy accommodation not arranged through the institution.

**Are any of these changes cause for concern?**

There are major concerns with regard to landlords verifying documents to confirm whether an individual is in the UK lawfully. There is a whole range of documents that can be presented to a landlord to confirm identity and status. For example, a landlord may be presented with a UK passport and believe that this confirms that the holder is a British citizen. However, holders of certain UK passports are subject to immigration control. Furthermore, family members of EEA nationals are not required to obtain documents to evidence their right to reside in the UK lawfully. They may feel forced to apply for an EEA residence card or document confirming their right of permanent residence to ensure they are allowed to continue as a tenant or take up a tenancy.

The current system whereby employers can access the Home Office’s employee checking service is likely to be placed under a greater strain if landlords are encouraged to utilise a parallel landlords checking service. At present the information received by employers from the Home Office may be incorrect, for example where the current stage of an individual’s application may not be reflected accurately on the Home Office databases as a result of lengthy appeals. There would need to be an increase in resources and adequate training of Home Office staff to ensure that the increased demand for this service is met. It is of some concern that a third party provider may be tasked with administering this scheme and may provide inaccurate data through lack of training or experience.

An additional concern is also the risk of racial profiling and discriminatory behaviour by landlords. They generally take a risk-averse approach and may avoid engaging in a tenancy agreement with an individual on the basis of their appearance, place of birth or perceived ethnicity. How will the Home Office audit landlords if there is not a register of licensed landlords? Will enforcement officers act upon information received or will certain geographical areas be targeted? Finally, there is the question of the retention of documents by landlords. Will they store the documents appropriately with the correct level of confidentiality and will they then destroy documents in an appropriate manner as required?
How will these changes be rolled out?
As previously explained, the changes will not come into effect until the pilot project has been completed and subsequent reports have been considered by Parliament. This is not anticipated until mid-2015 and if the evaluation of the projects suggests that the scheme is unworkable, it may be abandoned.

What should immigration advisers be doing to prepare for the changes and what are the implications for advisers and their clients?
It may be that immigration advisers and lawyers will receive queries from letting agents or private landlords with regard to verifying a document and the status of an individual. Individuals who are unable to secure housing or who are made homeless as a result of a landlord’s decision may also seek to consult immigration advisers and lawyers for written confirmation of their lawful status and they may also wish to seek legal redress against a landlord on the grounds of discrimination.

Any predictions for future developments?
Once the pilot project has been initiated, the impact on the issues of homelessness and discrimination should become clearer. It should be noted that the pilot will never fully reflect a national scheme because during the pilot project people can move to areas where these requirements have yet to be implemented. It will fall upon social services to deal with any increase in homelessness brought about by this scheme. If an impact assessment of the pilot projects reveals too many negative implications or too great a resource cost to administer the scheme, the Home Office may decide to abandon it.

Selected further reading
Factsheet 7: Residential tenancies (GOV.UK)
Draft code of practice on civil penalties for landlords and their agents (GOV.UK)
Prototype code of practice on discrimination (GOV.UK)
Consultation: tackling illegal immigration in privately rented accommodation (GOV.UK)

Access to services
Alex Russell, associate at Mills & Reeve LLP

What are the main provisions about access to services?
IA 2014, Pt 3, Ch 2 introduces new powers to regulate migrants’ access to certain services, including their ability to use the National Health Service (NHS), open a bank account and obtain or retain a driving licence.

NHS health charge
IA 2014, ss 38 and 39 contain provisions relating to access to the NHS. Although health is a devolved matter in Scotland, Wales and Northern Ireland, these provisions will apply across the UK. This is because the UK government has responsibility for immigration matters.

An immigration health charge will be payable by those migrants who apply for entry clearance or limited leave to remain in the UK. Those who have paid the charge are expected to be able to access free NHS care to the same extent as permanent residents during the period of their leave, subject to exceptions for particularly expensive discretionary treatments. The government confirmed to the Lords on 12 March 2014 that no exceptions are currently planned for when the charge is introduced or in the future.

Details of the amount of the surcharge, how it will be applied, any exemptions, and consequences of non-payment will be set out in secondary legislation.

Bank accounts
IA 2014, ss 40–42 introduce provisions with the purpose of preventing individuals who do not have permission to live in the UK from opening bank accounts. The government anticipates that this will in turn make it more difficult for such individuals to access other products such as credit cards, mortgages or mobile phone contracts.
Banks and building societies will be required to undertake an immigration status check on all individuals who apply for a current account, unless at the time of opening they are unable to carry out the check for reasons outside of their control. A bank or building society will not be considered ‘unable’ to carry out a check if a fee is payable for it and this is not paid. The status check must be made with an anti-fraud organisation or data-matching authority that has been specified by the Secretary of State for this purpose. The Home Office has confirmed in its Statement of Intent on Bank Accounts that the anti-fraud organisation, CIFAS, will be specified in secondary legislation as the organisation through which the checks must be made.

If the check indicates that the person is a ‘disqualified person’, the bank or building society will be prohibited from opening the requested current account. The Treasury will have the power to enable the Financial Conduct Authority to make arrangements for monitoring and enforcing compliance with the prohibition placed on banks and building societies.

IA 2014 itself only covers banks and building societies opening current accounts. However, IA 2014, s 34 includes a power to amend the provisions by order to expand the types of financial institutions and accounts covered, and to set out exemptions from the checking regime.

Access to UK driving licences
IA 2014, ss 46 and 47 contain provisions restricting access to UK driving licences. The government has made clear that this measure is intended to make it more difficult for individuals who are not entitled to live in the UK to access other services and benefits by virtue of this form of identification.

IA 2014 puts into primary legislation arrangements that have been in place since 2010 restricting the issuing of driving licences for non-EEA and other designated country nationals. Any individual who does not have a driving licence from an EEA or other designated country will be required to demonstrate that they have at least six months leave to enter or remain in the UK when applying for a driving licence.

IA 2014 also grants new powers to the DVLA to revoke a licence issued to someone who is not lawfully resident in the UK. Where a person’s licence is revoked on this basis, it will not be open to them to argue in an appeal against the revocation that leave should be or should have been granted to them, or that they have been granted leave after the date their licence was revoked.

Are any of these changes welcome, or a cause for concern?

NHS health charge
It is widely accepted there is a need to protect limited public resources by discouraging health tourism and ensuring that those who use the NHS make an appropriate contribution to the associated costs. The evidence in support of a health charge for migrants acting as a deterrent or generating significant additional revenue is, however, limited.

The government faces a difficult decision about the amount to set for the surcharge. If the charge is too high, it may discourage some skilled migrants who would make a valuable contribution to national life from coming to the UK. If it is set too low, the deterrent and financial impact may be minimal. The government has indicated that the charge will be set at a competitive rate which compares favourably with other comparable countries, many of which require migrants to take out their own private medical insurance. It has been suggested that the yearly surcharge may be set at £150 for international students and £200 for other migrants.

There is a risk the health charge may discourage some international students, many of whom have limited resources, from studying at UK higher education institutions.

The government has indicated that migrants who obtain leave to remain in the Tier 2 (Intra Company Transfer) category—which enables international organisations to transfer staff to the UK—may not be required to pay a charge. This will be welcomed by the business community and should help minimise the risk of a negative impact on inward investment to the UK.

It is debatable whether it is reasonable to require migrants who are working, paying tax and national insurance and contributing to civic life, to pay a further separate charge in respect of healthcare. There is a risk the measure may discourage some individuals from coming to the UK—a concern the British Medical Association has expressed in relation to doctors and other healthcare workers—while generating minimal additional revenue.

We anticipate that further details in relation to the relevant secondary legislation are likely to be published this coming autumn.
Bank accounts
Banks and building societies already carry out due diligence on new customers when opening accounts so the added immigration status check is unlikely to be particularly onerous. The public response to the measures from the main banking groups has been limited. The risk of extending credit to individuals who are likely to be removed from the country at short notice is likely to be reduced.

How will these changes be rolled out?
IA 2014 received Royal Assent on 14 May 2014. We are awaiting commencement dates in respect of the access to service provisions. It is anticipated that the changes will be implemented from this summer onwards.

It is possible that there will be pilot schemes before some of the provisions are brought into full effect.

What should immigration advisers be doing to prepare for the changes?
Advisers should be familiarising themselves with the new statutory provisions and alerting clients to the key changes and potential sanctions for non-compliance.

There is a window of opportunity to work with clients in implementing new processes and procedures in preparation for the relevant commencement date, thereby avoiding a last minute rush.

Advisers should also be alerting clients to the opportunity to take advantage of the time period before the new measures (such as the NHS surcharge) come into force. For example, migrants who are planning to come to the UK in the near future may wish to take steps to expedite their application process for leave to enter. Employers may wish to accelerate the recruitment process for a role they wish to fill in the short to medium term.

Advisers may wish to offer training for clients on the new requirements.

Any predictions for future developments?
It is clear that there will be a significant additional burden both on the finances and administrative resources of the Home Office to oversee the implementation of these provisions and their enforcement. It remains to be seen whether the necessary resources are allocated to successfully implement the provisions.

With so much of the detail to be set out in secondary legislation, the implementation of the provisions remains a fluid process and much uncertainty remains.

Selected further reading
Consultation: sustaining service and ensuring fairness in the NHS (GOV.UK)
Consultation: Controlling immigration: regulating migrant access to health services in the UK (GOV.UK)
Factsheet 8: National Health Service (GOV.UK)
Factsheet 9: Bank accounts (GOV.UK)
Statement of intent on bank accounts (GOV.UK)
Factsheet 11: Driving licences (GOV.UK)
Lexis®PSL Immigration News Analysis: Changes to the provision of health services to migrants

Prevention of illegal working
Annabel Mace, partner in the labour and employment practice group and head of the UK business immigration team at Squire Patton Boggs

What is the impact of IA 2014 on the law relating to the prevention of illegal working?
In May 2013 the government announced in the Queen’s Speech that it would introduce an Immigration Bill that would ‘enable tough action against businesses that use illegal labour, including more substantial fines’. IA 2014 came into force on 14 May 2014 but actually contains only very minor provisions relating to the prevention of illegal working by employers.
These address appeals against and the recovery of civil penalties, in particular providing that:

- an appeal against a penalty notice can only be brought once an employer has first given a notice of objection and the objection procedure been determined in listed ways or the relevant time limit has passed, and
- a penalty notice will be recoverable as if it were payable under an order of the county court (or the equivalent sheriff’s court procedure in Scotland)

Instead, following the government’s public consultation on ‘Strengthening and Simplifying the Civil Penalty Scheme to Prevent Illegal Working’, the results of which were published in October 2013, two new Orders (in force from 16 May 2014) have been issued under the Immigration, Asylum and Nationality Act 2006:

- the Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014, SI 2014/1183 amends the list of documents which can be used to check the right to work in the UK and to excuse the employer from paying a civil penalty—the Order also brings into effect two revised codes of practice, on ‘preventing illegal working-civil penalty scheme for employers’ (which introduces changes to the way in which document checks should be carried out) and ‘avoiding unlawful discrimination while preventing illegal working’
- the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014, SI 2014/1262 increases the maximum civil penalty which may be payable for employing an adult without the right to work in the UK and the job in question after 16 May 2014 from £10,000 to £20,000

What are the specific changes included in these two Orders?
The principal changes are as follows:

- employers are no longer required to conduct checks every 12 months following the initial right to work check for employees with temporary permission to be in the UK as a pre-condition to retaining a statutory excuse against payment of a civil penalty—follow-up checks are instead required when the employee’s permission to be in the UK and do the work in question expires, as evidenced by the documentation produced for the initial right to work check
- a reduction in the range of documents that are acceptable for checking the right to work
- employers are now required to keep a record of the date on which a right to work check is made (this was previously only a recommendation)
- employers are now required to obtain and retain a copy of evidence from a student’s education sponsor if the student has a restricted right to work in the UK, setting out their term and vacation times covering the part of their period of study in the UK for which they will be employed
- an extension of the grace period from 28 to 60 days for conducting right to work checks for employees acquired as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (TUPE)
- a revised method for calculating civil penalty levels
- inclusion of the payment-by-instalment option, and
- the reduction of the civil penalty amount for early payment

Are any of these changes welcome?
Many employers will be pleased about the removal of annual follow-up checks (but note that checks on the expiry of the permission to work are still a requirement). Some, however, have expressed a desire to continue carrying out annual checks as a means of monitoring the current immigration status of their migrant workforce.

An extension of the grace period from 28 to 60 days for conducting right to work checks for employees acquired following a TUPE transfer is certainly welcome as businesses acquiring large numbers of staff were often hard-pressed to conduct the necessary checks within the previous deadline.

Are any of these changes cause for concern?
Although some of the administrative burden for employers has been eased, those that get it wrong could now be charged up to £20,000 (twice the amount for a breach that occurred before 16 May 2014). Note, however, that for a first offence in three years, mitigating factors including reporting a suspected illegal worker and co-operating with the Home Office can lead to a fine of only £5,000—where there is also evidence of otherwise effective document checking practices, the employer may be issued only with a warning notice rather than a civil penalty.

The additional requirements to record the dates on which checks are carried out and obtain additional evidence for students should not be a cause for concern—many employers were doing this as a precaution in any event.

Although a reduction in the range of documents that are acceptable for checking the right to work appears to be a positive change, in fact, only three documents no longer provide proof of the right to work:
• a UK issued travel document which is not itself a passport
• work permits, and
• general Home Office letters

In practice, until all non-EEA nationals are issued with a BRP there remains a wide range of documents that can prove the right to work. Many of these documents contain very limited and/or confusing information about an employee’s right to work and employers will continue to have difficulty in interpreting them.

One change that may cause employers and prospective employees some difficulty is that from 16 May 2014, passports other than those held by a British citizen (or a citizen of the UK and Colonies having a right of abode in the UK) or a national of an EEA country or Switzerland must still be current in order to provide the employer with a statutory excuse against a civil penalty for illegal working. Prior to 16 May 2014, employers were able to accept indefinite leave to remain stamps and valid unexpired visas even in expired non-EEA passports as evidence of the right to work. In practice, this means that if a prospective non-EEA national employee now produces an expired passport and does not already have a BRP, the employer should insist on them getting one prior to the employment starting. This involves making an appointment to submit an application and attend the Home Office in person with a fee of £507 (if they have limited leave to remain) or £504 (if they have indefinite leave to remain)—there is a cheaper postal service available but this can take weeks. Where possible, employers should therefore ensure that they check right to work documentation well in advance to avoid the inconvenience of having to delay an employee’s start date while they obtain a BRP.

What are the implications for lawyers and their clients?

Although many of the changes are positive ones, it’s vital for lawyers and their clients to get to grips with the nuances of the new Home Office guidance on the prevention of illegal working. This is now more than somewhat inconveniently spread across several documents, accessible here.

Compliance with the employer obligation to prevent illegal working is also particularly important for any business with a Tier 2 sponsor licence as the issue of a civil penalty may in some circumstances result in its licence being revoked. Revocation of a Tier 2 sponsor licence would lead to the Home Office curtailing the permission to remain in the UK of any non-EEA employees sponsored by that employer, even if those employees had no involvement in the circumstances leading to the issue of the civil penalty. In turn, the employer would be required to terminate the employment of all of its Tier 2 sponsored employees unless they were quickly able to obtain some other means of being able to reside and work lawfully in the UK.

As ever, up-to-date right to work training is essential not just for HR professionals but for anyone (including line managers) with responsibility for the recruitment and induction of new staff. In our experience, mistakes in this area are often the result of otherwise robust right to work procedures not having been properly communicated to all those in the business who need to know about them.

Selected further reading

Consultation: Prevention of illegal working: simplifying the civil penalty scheme (GOV.UK)
Employers: illegal working penalties (GOV.UK Collection)
Factsheet 10: Work (GOV.UK)

Marriage and civil partnership

Katie Newbury, solicitor at Kingsley Napley LLP

What are the main provisions about marriage and civil partnership?

IA 2014 received royal assent on 14 May 2014 and touches on many areas of life which interact with immigration law. This includes changes to the procedures for marriage and civil partnership in the UK. The changes are within IA 2014, Pt 4 and some of the new laws will impact all proposed marriages and civil partnerships in England and Wales, regardless of the nationality or immigration status of the parties to the marriage.

From the date of commencement, the standard notice period for marriages and civil partnerships will increase from 15 days to 28 days and this will apply to everyone irrespective of nationality.

The provisions targeted at non-EEA nationals are more far-reaching
Currently parties to a marriage are exempt from civil preliminaries if they instead comply with ecclesiastical preliminaries in advance of their marriage at either the Church of England or the Church of Wales. However, this exemption will no longer apply to non-EEA nationals.

Where notice of a marriage or civil partnership is given and one party to the marriage/civil partnership is a non-EEA national who is not exempt from immigration control, there will be an automatic referral by the registrar to the Home Office if the marriage/civil partnership could result in an immigration advantage being derived. The details of changes to the duty to make a referral are set out in IA 2014, Sch 4.

The definition of exempt person includes British nationals, EEA nationals, foreign nationals not subject to immigration control, persons with settled status or permanent residence and persons with entry clearance as a fiancé or proposed civil partner.

Following the automatic referral to the Home Office, the Secretary of State must decide whether to investigate the proposed marriage or civil partnership. In order to conduct an investigation, the Secretary of State must be satisfied that:

- either only one of the parties to the marriage or civil partnership is exempt or neither of the parties is exempt, and
- the Secretary of State has reasonable grounds for suspecting that the proposed marriage or civil partnership is a sham

The government’s Factsheet on sham marriages and civil partnerships stated that referrals will be ‘assessed against intelligence-based risk profiles and factors, together with reports from registration officials of suspected sham cases and other information’. A decision as to whether to investigate must be made within the 28-day notice period.

If an investigation is embarked upon, the notice period is extended to 70 days to allow the Secretary of State to look into the proposed civil partnership/marriage. During that period of time, the Secretary of State will need to decide if the parties to the proposed marriage/civil partnership have ‘complied’ with the investigation. Compliance with an investigation will mean the couple can marry irrespective of the outcome of the investigation. However, if the couple comply but are still deemed to be entering a ‘sham’ marriage, they will not be able to derive an immigration advantage from the relationship. The Home Office will also look to take enforcement action and where appropriate to prosecute.

IA 2014 has also changed the definitions of ‘sham marriage’ and ‘sham civil partnership’. In order to be deemed a ‘sham’, pursuant to the new definition there must also be no genuine relationship between the parties.

There are expanded powers of disclosure of information between registration authorities and the Secretary of State. Information will be disclosable for immigration purposes, verification purposes and the prevention of crime.

There are some other changes to the process for giving notice and the way the scheme operates.

IA 2014 also contains provision for the extension of the scheme to Scotland and Northern Ireland.

**What matters will be left to secondary legislation?**

The Secretary of State has powers to make regulations regarding the evidence to be provided in determining nationality and immigration status. These regulations can also specify the consequences for failure to provide suitable evidence and when evidence can be retained. These regulations are to be published in consultation with the Registrar General.

Powers have also been given to the Secretary of State to make provision by regulations regarding the giving of notices in accordance with IA 2014, Pt 4 and relating to the referral of proposed marriages and civil partnerships.

The Secretary of State is empowered to publish guidance on the circumstances when investigation of a proposed marriage/civil partnership is appropriate.

The conduct of any investigations into proposed marriages and civil partnerships is to be governed by regulations and guidance published by the Secretary of State for this purpose. This includes specifying what requirements must be met as part of the investigation by the parties to the marriage/civil partnership.

As part of the investigation process, it is crucial that the parties to the proposed marriage/civil partnership comply with any relevant requirements specified by the Secretary of State. What is classified as a failure to meet a particular requirement, together with the consequences for failure to comply, will be set out in regulations published by the Secretary of State.

**How will these changes be rolled out?**

Sections 56, 59 and 62 and Sch 6 will come into force 14 July 2014. Section 56 deals with amendments to the duties on registrars to report sham marriages where they have advance knowledge of them. Section 59 introduced Sch 6 which permits greater disclosure of information between registrars and the Secretary of State and between registrars/registration authorities. Section 62 contains definitions for this Part of IA 2014.
The other changes, including those concerning investigation have not yet come into force and there is no date yet for commencement. Changes should only impact people giving notice on or after commencement and should not apply retrospectively.

**Are any of these changes welcome?**

The amendment to the definition of a ‘sham’ marriage/civil partnership is a welcome change. Prior to this change, a marriage/civil partnership was defined as a ‘sham’ if one or more parties was a non-EEA national who had entered into the marriage/civil partnership ‘for the purpose of avoiding the effect of one or more provisions of UK immigration law or the Immigration Rules’. Therefore, a marriage/civil partnership could theoretically be considered a ‘sham’ even if there was a genuine relationship between the couple. While this may have rarely caused a problem in practice, the clarification introduced by IA 2014, Pt 4, Ch 2 is still welcome.

**Are any of these changes cause for concern?**

There are numerous concerning features of these changes.

The automatic referral process means it is likely the Secretary of State will become more involved at an earlier stage in proposed nuptials where one party is not exempt and it may become increasingly common for couples to face increasing scrutiny of their relationship prior to their marriage/civil partnership. The detail of these investigations and how onerous the investigations will be remains to be seen as this will be set out in regulations to be determined by the Secretary of State but it may prove to be a significant interference into a private relationship.

Depending on the nature and conduct of these investigations, genuine couples could be deemed to be entering a ‘sham’ relationship and then have very little recourse to challenge these outcomes in order to remain together in the UK. It seems likely that couples will look to challenge decisions through greater use of JR.

The new rules permit the Secretary of State to, in consultation with the Registrar, make further provision with regard to the documentation which must be provided to give notice. By imposing increasingly specific requirements for identity documentation that will be accepted, it can become more and more difficult for couples to get past the first hurdle in order to marry/enter a civil partnership.

**What should immigration advisers be doing to prepare for the changes?**

If they are advising clients who are planning to marry or enter into a civil partnership, they may want to advise them to give notice sooner rather than later. The changes should not apply to those who gave notice prior to commencement.

In addition, where one party to a proposed marriage/civil partnership is not an exempt person, it may be advisable for them to have to hand evidence of the genuineness of their relationship when giving notice. While the regulations will specify evidence to be supplied to give notice and in any investigation, such evidence of a relationship may help fend off suspicion from the Registrar that the proposed union is a sham.

**Do you have any predictions for future developments?**

It seems likely that it will become more difficult for couples to marry when one party is subject to immigration control. To this end, more couples may travel abroad for their big day where they are not subject to such a high level of scrutiny and suspicion.

For those who do marry in the UK and are subject to an investigation, it is likely we will see an increased number of JR as couples seek to challenge decisions of the Secretary of State. However, until more details are published about the nature, conduct and frequency of such investigations, it is hard to predict with accuracy how many couples will be impacted.

Factsheet 12: Sham marriages and civil partnership (GOV.UK)
Sham marriage and civil partnership impact assessment (GOV.UK)
Sham marriage and civil partnership: Background information and proposed referral and investigation scheme (GOV.UK)
Lexis®PSL topic: Partners
Lexis®PSL Practice Note: Family members of EEA nationals: definitions and rights of entry and residence
OISC-regulated advisers
Ian Westwood, director at the Westwood Organisation

What are the main provisions affecting OISC-regulated advisers?
Under IA 2014, Pt 5 and IA 2014, Sch 7 the Immigration Services Commissioner will:

• be under a duty to immediately cancel the registration of unfit, incompetent or defunct advisory organisations
• be able to apply to the First-tier Tribunal (Immigration Services) to suspend an adviser who has been charged with a serious criminal offence (defined as one involving dishonesty or deception, an indictable offence or an offence under the Immigration Act 1971, ss 25, 26(d) or 26(g)) until the matter is resolved
• be able to require entry to business premises to conduct an inspection by warrant—this is a variation on the current regulation which only allows the Commissioner entry in relation to a specific complaint (refusal of entry may lead to cancellation of registration)
• be able to require entry to a private residence to conduct an inspection by warrant—this will be applied to advisers operating from a residential address (again, refusal of entry may lead to cancellation of registration)—according to the factsheet issued by the Home Office on 10 October 2013, 20% of advisers are home based

In addition, there will be a single category of regulation, rather than the current ‘for profit’ and ‘not for profit’ categories. The latter category is currently exempt from registration by the Commissioner. Organisations that are currently exempt will be registered by the Commissioner on commencement of the relevant provisions of IA 2014 and will be required to reapply for registration periodically as determined by the Commissioner. The decision on whether a fee for registration with the OISC should be charged will be removed from the Commissioner and be made by the Secretary of State for the Home Department. The government does not plan to change the current scheme where not-for-profits do not pay a fee.

What matters will be left to secondary legislation?
The circumstances under which the Commissioner will be required or authorised to waive the registration fee will be specified by order. The government has indicated an intention to use this mechanism to waive the registration fee for not-for-profits.

Are the changes welcome?
Broadly speaking, any measures to strengthen the regulatory scheme are welcomed as long as they do not add undue burden to those who are regulated.

As with any changes, the detail of the implementation and the exact nature will be cause for concern and the advisory sector looks forward to further detail. All genuine advisers are concerned about the sector’s reputation which is frequently tarnished by unscrupulous immigration advisers, or by those operating outside their level of competency. Swift action by the OISC in respect of advisers who have been charged with a serious criminal offence and those unfit to give advice is welcome. I am pleased to see that the right of appeal to the Immigration Services tribunal has been retained to allow for an independent review.

The new powers of entry constitute a big change. Giving the Commissioner the right to enter residential premises when they are in use as part of an advisory business, is, in my opinion, reasonable in order to close a current loophole, however this needs to be managed in an appropriate way. I would like to see the proposal as to how the OISC plan to put this in to practice, with some reassurance that there will be checks and safeguards in place. Of most concern is that the officers conducting these inspections will be appropriately trained, and where necessary, accompanied by the police, or other appropriate enforcement body. Full risk assessments will need to be conducted prior to visits and consideration given to a whole variety of factors.

Given the above, these inspections will be resource intensive, and I would like clarification as to how these will be resourced, particularly in terms of cost. Will this cost be passed on to advisers through increased registration fees?

Regulating all advisers in a similar manner will mean less confusion, and that has to be a welcome development. The counter side to this is that it may mean some of the current not-for-profit advisers choose to leave the profession. If this then reduces the access of people to advice then that is a concern—however most not-for-profit advisers are really only signposting to appropriate professionals, and anyone giving detailed advice should be required to demonstrate their competency.

There is some discussion in the not-for-profit sector as to how much extra administration will be required for the anticipated annual renewals, but broadly speaking, the proposals appear to be fairly benign and are therefore cautiously welcomed.

How will these changes be rolled out?
The changes will be implemented by order.
PSL practical point: The OISC has also confirmed via a press release that information about the implications of IA 2014 will be made available to advisers through the OISC newsletter, which is available on the news page of the OISC website. The OISC’s content is due to move to GOV.UK during 2014.

What should immigration advisers be doing to prepare for the changes?

There will be little extra required on a day-to-day basis for most advisers—at times of change it can be good practice to review internal systems and records to ensure they continue to meet the needs of regulatory oversight. Advisers should be aware of the new powers held by the OISC and be prepared for their impact. All registered advisers are already subject to inspection on a regular basis and should therefore be prepared anyway. The extra here is that information from third parties, clients or the Home Office might now prompt an investigation.

Any predictions for future developments?

Who knows what it might bring. Regulation of advisers is not going to disappear, and nor should it. The challenge for advisers will be in continuing the debate to ensure any changes are in the best interests of the industry and as light touch as possible. With an election looming, immigration will be the subject of debate and it is feasible that further regulation will be introduced.

Selected further reading

Factsheet 13: Immigration advisers and immigration service providers (GOV.UK)
Office of the Immigration Services Commissioner regulatory triage assessment (GOV.UK)
OISC press release: Immigration Bill

Deprivation of citizenship

Eric Fripp, barrister at Lamb Building

What are the main provisions about deprivation of citizenship?

By the British Nationality Act 1981, s 40(2) (BNA 1981) the Secretary of State may issue an order depriving a person of citizenship status where satisfied that deprivation is conducive to the public good. That extremely wide power is primarily constrained by BNA 1981, s 40(4) which provides that such an order may not be made if the Secretary of State ‘is satisfied that the order would make a person stateless’. In SSHD v Al-Jedda [2013] UKSC 62, [2013] All ER (D) 85 (Oct), the Supreme Court confirmed that ‘the question to be answered is whether, at the point of making [a] determination, an individual is a national of the country or countries in question’.

IA 2014, s 66 introduces a new subsection 40(4A) by which the Secretary of State will not be prevented from making an order under BNA 1981, s 40(2) to deprive a person of a citizenship status if:

- that person has become a citizen by naturalisation
- the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the UK, any of the Islands, or any British overseas territory, and
- the Secretary of State has reasonable grounds for believing that the person is able under the law of a country or territory outside the UK, to become a national of such a country or territory

What matters will be left to secondary legislation?

British nationality law is an area of the law in which secondary legislation is relatively uncommon. There is substantial reliance upon non-statutory guidance, and it is likely that there will be amendment of the guidance provided in the Nationality Instructions, Volume 1, Chapter 55 ("Deprivation and Nullity of British citizenship"). Such guidance may be altered by the Secretary of State without prior notice, and essentially at will.

Are any of these changes welcome?

The Secretary of State will welcome a further removal of restrictions upon the power to remove British citizenship status, which she believes will enable her to escape the constraint hitherto imposed by the bar upon rendering individuals stateless confirmed by the Supreme Court in the case of Al-Jedda. In practice, however, the enactment of the provision, and still more any future exercise of the power, may have negative consequences for the public policy and international relations of the UK.
Does any cause for concern arise?

The UK has ratified the Convention on the Reduction of Statelessness 1961. Article 8(1) of that Convention prohibits a state from depriving a person of their nationality if the effect is to render them stateless. Para (3)(a) of art 8 provided the opportunity for a state to escape more widely from the prohibition if:

- at the time of its ratification of the Convention, its law were to provide for deprivation on, in effect, the ground of conduct seriously prejudicial to the vital interests of the state, and
- at the time of ratification the state declared its retention of the right to deprive a person of citizenship on that ground

The UK initially retained that right, but by IANA 2006, s 55 amended domestic law so that there remained no power in that law to render an individual stateless.

The new provision on its face breaches the obligations of the UK under art 8 of the Convention, because while this allowed states to ‘retain’ the power to deprive an individual of nationality where statelessness resulted, the conception of ‘retention’ of a particular power, interpreted according to established principles, seems not to coincide with ‘regaining’ or ‘recreating’ that power once it has been lost by the amendment of domestic law. This is a point of considerable wider importance because instruments within many regimes of international law (not only statelessness, but, for example, economic and environmental law) may allow ‘retention’ of some aspects of the status quo as a necessary point of compromise in order to reach agreement on measures serving a progressive goal, whether the reduction of statelessness or some other objective. However, these may not be widely interpreted as permitting the regaining or recreation of a power which has in the interim been surrendered.

Further, the Secretary of State has in the past shown a considerable penchant for exercising denationalisation powers while individuals are outside the UK. But as a matter of customary international law, where an individual presenting a British passport enters the territory of country X, of which they are not a national, a relationship is created between the UK and country X, which in general is entitled to expect the UK to readmit that individual if that is the only means by which expulsion or departure from the country of presence can be actioned. Denationalisation of an individual by the UK creating statelessness in that context, if the UK is itself unprepared to readmit the individual (which appears to be the position contemplated by the government), will breach the sovereignty of the country of sojourn by frustrating its right of expulsion. Given that the UK each year expels tens of thousands of individuals to other countries, basing this upon acceptance by those countries of the duty to accept return which the UK may now be seeking to limit unilaterally, the effect of any future exercise of the new power might be wider than anticipated.

There are also questions concerning the future operation in practice of the scheme. The requirement of having ‘reasonable grounds for believing’ that a person is able to become a national of another country or territory suggests an intention that statelessness is created only for relatively short transitional periods. But, in fact, the construction and operation of many domestic systems of nationality law is complex, opaque, and politicised, and the question of possible access to nationality is in general even less susceptible to ready determination than is the question of actual current nationality arising under the current scheme. The past cases concerning deprivation of nationality in which the latter question arises, including Al-Jedda itself, offer little ground for optimism.

How will these changes be rolled out?

This is not yet clear. Given the extent to which the change represents a reaction to defeat in the Supreme Court on the previous statutory provision, it would seem likely however that the Secretary of State will seek to reverse the position obtained in relation to the respondent in Al-Jedda.

Any predictions for future developments?

The position is uncertain. It seems likely that the courts will have to be asked to consider the new provision at an early stage, assuming as seems likely that the Secretary of State intends to exercise the new power. IA 2014, s 66(3) adds a new BNA 1981, s 40B which requires regular reviews of the exercise of the power. The effectiveness or otherwise of the review process will have to be ascertained over time.

Selected further reading

Factsheet 15: Deprivation of citizenship (GOV.UK)
ECHR memorandum on deprivation of citizenship (GOV.UK)
Lexis®PSL Immigration News Analysis: Al-Jedda Statelessness and the restoration of nationality
Lexis®PSL Immigration

Always know where to start

Lexis®PSL Immigration gives you an authoritative and practical view in minutes, with direct links to the relevant Immigration Rules, Home Office guidance, legislation and case law to back it up.

Our clear, concise practice notes summarise the key points, flag up any conflicts and highlight practical tips and common pitfalls. And they’re written in business-like language, which you can easily share with your clients. Our news and cases teams keep you on top of the latest developments. Plus our immigration category-specific suites of questionnaires, document checklists and template letters make it easy for you to draft the client materials you need, in less time.

Benefits

• Stay on top of the latest developments and find the answers you need fast.
• Short, concise practice notes help you find what you need more quickly, but also provide the ability to link directly to the relevant section of underlying authority.
• Lexis®PSL Immigration contains over 200 immigration category-specific precedents with detailed drafting notes.
• Receive legal and sector news in your inbox, with ‘so what’ analysis.
• Save hours of drafting time with our ‘smart’ PDF Home Office, appeal and JR forms which can easily be completed, updated, saved and emailed.
• Navigate your way quickly and easily around the Immigration Rules using our bespoke source.
• Access previous versions of Home Office sponsor and migrant policy guidance documents in PBS categories using our Archive of PBS guidance.

For a free trial of Lexis®PSL Immigration, visit www.lexisnexis.co.uk/immigrationtrial.