

HOUSE OF LORDS

Merits of Statutory Instruments Committee

40th Report of Session 2010-12

**Statement of Changes to
Immigration Rules**

**Social Security
(Miscellaneous Amendments)
(No. 3) Regulations 2011**

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Rt Hon Baroness Butler-Sloss GBE	Lord Methuen
Lord Eames OM	Rt Hon Baroness Morris of Yardley
Rt Hon Lord Goodlad (<i>Chairman</i>)	Lord Norton of Louth
Baroness Hamwee	Lord Plant of Highfield
Lord Hart of Chilton	Rt Hon Lord Scott of Foscote
Lord Lucas	

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Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hlmeritspublications

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The National Archives publishes statutory instruments on the internet on behalf of the Government at www.legislation.gov.uk/ukxi, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Fortieth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Statement of Changes to Immigration Rules (HC 1511)

Date laid: 10 October

Parliamentary Procedure: negative

This Statement of Changes in Immigration Rules (“the Statement”) makes a number of varied changes to the immigration rules. The Statement was accompanied by a Written Statement from Lord Henley, Minister of State at the Home Office¹. The most notable change brought into effect by the Statement would seem to be the new provision to provide that a person subject to immigration control who has failed to pay NHS charges of £1,000 or more in respect of NHS treatment charges should normally be refused permission to enter or remain in this country or have their leave cancelled. UK Border Agency (“UKBA”) has published an Impact Assessment (“IA”) in respect of this change, although this only provides analysis of the Government’s proposals and the “do nothing” option.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. The Explanatory Memorandum (“the EM”) gives the policy objectives of this change as being to:
 - Deter overseas visitors from misusing the NHS by making it clear that the UK health services are not an international free for all;
 - Encourage overseas visitors to meet their obligations to pay for the NHS services they use;
 - Enable UKBA to identify more effectively and take action against migrants with significant unpaid NHS charges; and
 - Reassure the public that UKBA is determined to operate fair and robust controls on migrants’ access to public benefits and services (EM paragraph 7.17).
2. The IA says that amending the rules would allow the fact of a debt to be immediately identified by electronic means in order to allow an immigration decision maker to take account of any outstanding charges in assessing the person’s application for a visa, entry to the UK or application to remain (IA page 7). The IA also says that an analysis of sample data from the Department of Health (“DH”) in England suggested that around 3,600

¹ HL Deb 10 October 2011 Col WS 88-90

people in one year had incurred unpaid NHS charges of over £1,000 (IA page 7). The EM says that the change will be phased in to be fully effective across the UK during 2012 (EM paragraph 7.17).

Consultation

3. The EM says that the Government ran a public consultation from 26 February to 30 June 2010 on proposals to introduce a change to the Immigration Rules to allow UKBA to refuse entry or stay in the UK to those with outstanding unpaid NHS charges (EM paragraph 8.4). DH undertook a separate consultation on the NHS charging regulations currently in force. The results of UKBA consultation² were published in March 2011. The EM goes on to say that the majority of responses were supportive of the proposed change for a number of reasons, with the British Medical Association (“the BMA”) supporting the proposals in principle and stating that “the introduction of changes to the Immigration Rules to promote repayment of NHS debt seems reasonable” (EM paragraph 8.4).
4. In order to get a better understanding of how the consultation fed into the policy development process the Committee sought further information from UKBA about any concerns raised during the consultation, as well as any risks and remaining dissatisfaction with the proposed change. The detailed response from UKBA³ reiterates that the majority of the consultation responses were supportive of the proposed changes to NHS debtor rules, but includes a list of concerns raised. These include:
 - The primary concern for most of the organisations, including the BMA, was the unintended consequence that the rule change may act as a deterrent for migrants to seek necessary medical care;
 - Many respondents who responded negatively suggested or implied that decisions should be made on a case by case basis. Some respondents made a clear distinction between those who evaded payment and those who were unable to pay; and
 - Three organisations raised issues of confidentiality and/or data protection. The issue of confidentiality was most actively highlighted by HIV/AIDS representative groups because HIV/AIDS is perceived to be a stigmatised condition.
5. The response from UKBA sets out how the proposal has been developed as a consequence of the consultation. This includes:
 - The rule change has been drafted so that an NHS debt will not result in a mandatory immigration refusal so the new rule will be applied on a case by case basis; and
 - Specific considerations to address concerns about data protection, confidentiality and fairness.

² ‘UKBA Consultation: Refusing entry or stay to NHS debtors – results of the public consultation on proposed changes to the immigration rules’: Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/nhs-debtors/>

³ Available on the Merits Committee website at: www.parliament.uk/hlmeritspublications

The way the new rule will be applied on a case by case basis would seem to be central to the implementation of the policy and the Committee has therefore written to the Minister seeking a full explanation of this.

6. In terms of any remaining dissatisfaction with the proposals, UKBA say that the National AIDS Trust (“NAT”) has indicated an appetite to mount a legal challenge on the grounds that people living with HIV who are refused entry or further leave on grounds of unpaid NHS charges would be victims of unlawful discrimination. The Committee has also received a submission from NAT⁴ saying:
 - They believe that the new rules will have a serious impact on public health by dissuading migrants with HIV from accessing testing and treatment;
 - The rules may lead to unlawful discrimination against disabled migrants within the framework of the Equality Act 2010; and
 - They question whether the new rules could be applied consistently and fairly, given the variation in implementation of charging rules across the UK.

Submission from the BMA

7. The Committee has received a letter from the BMA⁵ about the change. They say that they submitted a detailed response to the DH consultation and raised some general points by letter to UKBA in response to their parallel consultation. They say they have concerns with respect to the way comments relating to the proposed legislation have been represented, particularly in the EM accompanying the Statement, which they think does not adequately represent the balance of comments submitted by the BMA. The letter says that whilst they acknowledged the need to protect the public purse and introduce appropriate measures to prevent deliberate misuse of NHS resources, they also raised significant concerns, in particular over the detrimental impact such changes could have on the engagement of vulnerable groups with health services, which are not reflected in the EM. They say they continue to have concerns in this respect. The Committee shares the BMA’s concerns about UKBA’s representation of the BMA’s position in the EM.

Conclusions

8. The proposal to introduce a change to the Immigration Rules to allow UKBA to refuse entry or stay in the UK to those with outstanding unpaid NHS charges is a significant policy development and one which the Government is aware⁶ could generate controversy. The consultation produced important comment from stakeholders, and whilst the Committee notes that the document on the UKBA website giving the results of the consultation provides a relatively full and balanced account of the consultation outcome, it is regrettable that this was not matched in the EM

⁴ Available on the Committee website at: www.parliament.uk/hlmeritspublications

⁵ Available on the Committee website at: www.parliament.uk/hlmeritspublications

⁶ ‘UKBA Consultation: Refusing entry or stay to NHS debtors – results of the public consultation on proposed changes to the immigration rules’ page 24 (paragraph 4)

laid before Parliament. Furthermore, given the importance of some of the issues raised in the consultation, Parliament could reasonably expect UKBA to have used the EM to provide greater reassurance that the policy will achieve its objectives. **Even though this policy change will be given effect as part of an omnibus instrument, the Committee stresses the importance of providing appropriate levels of explanation and visibility for Parliament.**

B. Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (SI 2011/2425)

Date laid: 10 October

Parliamentary Procedure: negative

*Summary: This instrument includes 34 items that make minor amendments to a wide range of Social Security regulations. The Committee recognises the need for economy in regulating and it is therefore content that minor and technical amendments to legislation should be presented in a miscellaneous instrument of this type. However Departments need to be vigilant that appropriate standards of explanation are maintained and that transparency is not lost. Whether considering an instrument with a single focus or the miscellany presented here, the House expects to find a proportionate level of information to underpin the policy proposal, in terms of what consultation took place, how many individuals might be affected and what the financial impact will be. We did not consider that the Explanatory Memorandum to this instrument gave sufficient information for us to be able to understand the intent and likely effect of the legislative change in five cases. The Committee's further enquiries indicated that: one was indeed minor and technical; three were relatively minor policy changes which should have had more information to explain the rationale and impact; however the fifth, relating to work-focused interviews for Lone Parents, has close links to more prominent legislation and **DWP should have done more to make the House aware of the connection. Once again the Committee stresses the importance of providing appropriate levels of explanation and visibility for Parliament.***

These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.

9. This instrument includes 34 items that make minor amendments to a wide range of Social Security regulations. The Committee recognises the need for economy in regulating and it is therefore content that minor and technical amendments to legislation should be presented in a miscellaneous instrument of this type. However Departments need to be vigilant that appropriate standards of explanation are maintained and that transparency is not lost. The majority of the items in this instrument are purely technical (for example revoking obsolete references or consequential changes to align existing legislation with the commencement of a primary legislation) but it appeared to also include a number of items that made policy changes, where there was insufficient information for us to determine the intent or impact. We pursued further enquiries on five items.

(a) **Reduction in time for completion and return of medical questionnaires** (EM paragraphs 7.18-20 – also paragraph 8.2 on the

consultation response). This item is the only one on which the outcome of consultation is given and it was contentious. DWP's further explanation states they feel the current timescales are unnecessary but does not explain the benefit of change for either the claimant or the Department.

- (b) **Housing costs – excess income/capital linking rule** (EM paragraphs 7.27) – this clarifies the position so that those on contribution-based Jobseekers Allowance (JSA) or Employment and Support Allowance (ESA) and those on income-based JSA or ESA, are treated in the same way respect of the qualifying period for housing costs and can receive this help after 13 weeks from the date of claim. DWP's further explanation states that this is for clarification with no net costs rather than a significant policy change. The original EM contained insufficient information on the numbers affected and likely costs to enable the Committee to discern the nature and impact of this provision.
- (c) **Quarterly work-focused interviews for lone parent where youngest child is aged 4/5** (EM paragraphs 7.29-31) Lowering the age of the child to 7 was the most contentious aspect of the original Regulations⁷, and it is understood that this change of policy to lower the age threshold to a child age 5 is included in the current Welfare Reform Bill. However this instrument appears to bring aspects of the proposed policy change into effect from 31 October.

DWP explained that

“the Bill amends a provision in the Welfare Reform Act 2009 (not yet in force) which requires that regulations making provision for Income Support (IS) enable access to IS for lone parents with a child under the age of 7. The Bill will reduce this to age 5. This means that it will be possible to amend the current IS Regulations which provide for lone parents to be able to access IS on grounds of lone parenthood until their youngest child becomes 7. The Regulations will be made after Royal Assent, providing the clause that will make the change to age 5 is not changed or removed by amendment.

Those Regulations will provide for lone parents who are aged 18 or over and whose youngest child is aged 5 or over to no longer be entitled to make a new claim for IS after the date specified in the regulations (the exact date will depend on when Royal Assent is received and the regulations can be made). After that date if a lone parent wishes to remain entitled to benefit they will need to claim Jobseeker's Allowance (JSA) if they are capable for work or Employment and Support Allowance (ESA) if they have limited capability of work.

The purpose of [the provisions in the Miscellaneous Regulations] bringing in Quarterly Work-focused Interviews in advance of the proposed change in IS entitlement (the reduction from age 7 to age 5) is to prepare lone parents for when they are likely to move off of IS. Whilst it would therefore be appropriate to revert to the current

⁷ Draft Social Security (Lone Parents and Miscellaneous Amendments) (No. 4) Regulations 2008, 30th report of the Merits Committee Session 2007-08, HL Paper 187

position if the age change does not go ahead, we do not intend to disapply sanctions already imposed as a result of failure to comply with the new requirements while they are still in force. Those affected will, of course, be able to bring their sanction to an end by re-engaging with requirements. It follows from this that no question of repayment would arise.”

We were surprised to find this item in a miscellaneous instrument, particularly when a specific instrument on the same subject SI 2011/2428 The Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011 is also for consideration on the same agenda. The EM does not refer to the specific instrument, nor explicitly to the Welfare Reform Bill currently in progress, although the outcome of this change is dependent upon it: this is not in line with best practice. Given the current profile of other aspects of this policy, DWP should have done more to alert the House to this change.

- (d) **Treatment of payments made to Service Users** (paragraph 7.36) – although the change appears to be amending an oversight this may not be purely technical as a number of claimants may not have had expenses disregarded in line with policy. The House would normally expect to see an explanation of how many claimants are affected and how the matter is to be redressed. The further explanation indicates the likely impact is theoretical only and therefore the change can be regarded as technical.
- (e) **Amending the rules for the relaxation of the first contribution condition for Employment and Support Allowance** (EM paragraphs 7.45-48). This is the result of the original regulations being defective and acknowledges that some claimants may have been incorrectly paid but no indication is given of the number of claimants or the costs involved. The further explanation indicates that the administrative costs of correcting this error may be substantial but the number of claimants affected will be 50 to 100, that is relatively low.

Conclusion

10. Whether presented as an instrument with a single focus or as the miscellany presented here the House expects a proportionate level of information to underpin the policy proposal, in terms of what consultation took place, how many individuals might be affected and what the financial impact will be. We did not consider that the Explanatory Memorandum gave sufficient information for us to be able to understand the intent and likely effect of the legislative change in five cases. The Committee’s further enquiries indicated that: one was indeed minor and technical; three were relatively minor policy changes which should have had more information to explain the rationale and impact; and the fifth, relating to work-focused interviews for Lone Parents, has close links to more prominent legislation and **DWP should have done more to make the House aware of the connection. Once again the Committee stresses the importance of providing appropriate levels of explanation and visibility for Parliament.**

OTHER INSTRUMENTS OF INTEREST

Draft Al-Qaida (Asset-Freezing) Regulations 2011

11. These draft Regulations put in place criminal penalties for breach of EU financial sanctions in relation to Al-Qaida. The financial sanctions are contained in Council Regulation (EC) No.881/2002 of 27 May 2002 imposing certain restrictive measures directed against certain persons and entities associated with Al-Qaida (“the Council Regulation”). The Council Regulation has been amended by Council Regulation (EU) No.754/2011 so that it now imposes restrictive measures only in relation to Al-Qaida – it previously also contained EU sanctions measures in respect of Usama Bin Laden and the Taliban. The restrictive measures in relation to the Taliban are now contained in Council Regulation (EU) No.753/2011. This reflects the approach taken by the UN, in Security Council Resolutions 1988 (2011) and 1989 (2011). The Explanatory Memorandum (EM) says that guidance on the asset-freezing measures in relation to Al-Qaida is available on the Treasury’s website.

Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2011

12. The Health and Social Care Act 2008 requires all providers of regulated activities to be registered with the Care Quality Commission so that compliance with essential levels of safety and quality, including the care and welfare of service users, cleanliness and infection control and management of medicines, can be monitored. The Act allowed for a staggered timetable, under which the different types of health agencies would be registered incrementally. Twenty-two thousand health and adult social care providers have been registered since April 2010, however the task has proved more challenging than originally foreseen and there is something of a backlog. So, to enable the administration to catch up, these Regulations propose to delay the registration of most of the final tranche of registrations comprising 9,000 NHS primary care providers such as GP practices by 12 months to commence from April 2013. The Care Quality Commission also plan to use this deferment to review their own processes and streamline the registration process in the light of experience. However the 150 or so providers of out of hours primary care services are seen as a priority, because they deal with vulnerable people often in their own homes, their registration will go forward to the original timetable (that is from April 2012).

Plant Protection Products Regulations 2011 (SI 2011/2131)

13. These Regulations lay down enforcement powers and penalties for infringements of Regulation (EC) No 1107/2009 which concerns the placing of plant protection products (essentially pesticides used in the agriculture, horticulture and amenity sectors and in home gardens) on the market. The Committee is interested in the powers of entry provisions in the Regulations and wrote to the Minister to ask (i) what structures would be included in the definition of “land” to which an authorised person is allowed to enter in some circumstances, and (ii) the rationale for there being no power to enter a private dwelling which is not on land eg a houseboat. The Committee has

received a response from the Minister. The response explains in detail the other things that might be caught by “other structures” such as cranes, and caravans (in some circumstances). The response also says that there is no power to issue a warrant if something is not on “land”, so a houseboat used as a private dwelling or a vehicle (not caught by the definition of ‘other structures’) could not therefore be searched. The Minister says that although this is an unintended consequence it is one which is unlikely to have practical consequences for enforcement activities as it would be extremely unlikely that there would ever be the need to search a private dwelling that is not “land” for the purposes of enforcing the EU Regulation. The Committee finds this part of the response unsatisfactory and is remains unconvinced by the efficacy of this provision. Both letters are published on the Merits Committee’s website.

Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations (2011 SI 2011/2452)

14. These Regulations amend the Energy Performance of Buildings (Certificate and Inspections) (England and Wales) Regulations 2007 (SI 2007/991), which require the energy efficiency of buildings including their heating, lighting and ventilation systems to be assessed on a scale A+ to G (similar to the rating used for domestic appliances). The Energy Performance of Buildings certificate is required by an EU Directive and were originally included as part of a Home Information Pack. Since that link was removed in May 2010 compliance has fallen significantly. The Department for Communities and Local Government has conducted a review of how the system is operating. These Regulations make it mandatory for building owners to lodge inspection reports of air conditioning systems (above 12kW) on the England and Wales central Register every five years. Under the 2007 Regulations the certificates were only applied to domestic sales; the new Regulations extend the regime to all buildings marketed for sale or rent, including parts of a building designed or altered to be used separately (that is flats). In addition the Regulations make a number of changes to the timetable and enforcement provisions.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Al-Qaida (Asset-Freezing) Regulations 2011

Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2011

Local Authorities (Contracting Out of Community Infrastructure Levy Functions) Order 2011

Parliamentary Constituencies and Assembly Electoral Regions (Wales) (Amendment) Order 2011

West Northamptonshire Development Corporation (Area
and Constitution) (Amendment) Order 2011

Instruments subject to annulment

- SI 2011/2131 Plant Protection Products Regulations 2011
- SI 2011/2297 Nursing and Midwifery Council (Fees and Education, Registration and Registration Appeals) (Amendment) Rules Order of Council 2011
- SI 2011/2385 National Lottery etc. Act 1993 (Big Lottery Fund) (Amendment of Schedule 4A) Order 2011
- SI 2011/2419 Nuffield Orthopaedic Centre National Health Service Trust (Transfer of Trust Property) Order 2011
- SI 2011/2423 Social Fund Cold Weather Payments (General) Amendment Regulations 2011
- SI 2011/2426 Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Miscellaneous Amendments) Regulations 2011
- SI 2011/2428 Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011
- SI 2011/2430 Education (Student Support) (European University Institute) Regulations 2010 (Amendment) (No. 2) Regulations 2011
- SI 2011/2431 Civil Enforcement of Parking Contraventions Designation Order 2011
- SI 2011/2447 Child Trust Fund (Amendment No. 3) Regulations 2011
- SI 2011/2448 Bus Service Operators Grant (England) (Amendment) Regulations 2011
- SI 2011/2451 Agricultural Holdings (Units of Production) (England) Order 2011
- SI 2011/2452 Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2011
- SI 2011/2453 Storage of Carbon Dioxide (Amendment of the Energy Act 2008 etc.) Regulations 2011
- SI 2011/2455 Southgate College (Dissolution) Order 2011

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the meeting on 25 October 2011 Members declared no interests.

Attendance:

The meeting was attended by Baroness Butler-Sloss, Lord Eames, Lord Goodlad, Lord Hart of Chilton, Baroness Hamwee, Lord Lucas, Baroness Morris of Yardley, Lord Norton of Louth, Lord Plant of Highfield and Lord Scott of Foscote.