HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

6th Report of Session 2012-13

Statement of Changes in Immigration Rules (HC 194)

Plus 6 Information Paragraphs on 7 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(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 (2).

(2) 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.

(3) 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.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord Bichard
Baroness Eaton
Lord Eames
Rt Hon. Lord Goodlad *(Chairman)*
Baroness Hamwee
Lord Hart of Chilton
Lord Methuen
Rt Hon. Baroness Morris of Yardley
Lord Norton of Louth
Lord Plant of Highfield
Rt Hon. Lord Scott of Foscote

Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Sixth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

Statement of Changes in Immigration Rules (HC 194)

Dates laid: 13 June
Parliamentary Procedure: negative

Summary: The changes to immigration rules contained in HC 194 are extensive although mainly intended to strengthen or clarify the current position and reduce the overall numbers claiming a right to settlement on the basis of family life. Key changes include a new requirement for the sponsor to demonstrate a minimum annual income of £18,600 before a non-EEA partner will be allowed to settle in the UK; the extension of a number of qualifying periods, a reduction in the range of relatives who may apply, and the curtailment of discretionary leave to remain for those who cannot meet the requirements. HC 194 also makes it more difficult for a convicted criminal to appeal against deportation on the grounds of ECHR Article 8. These provisions are well explained in the EM and Statement of Intent, however they are significant and likely to be of interest to the House.

The second policy aim of the Home Office is to use HC194 as a vehicle to gain Parliament's endorsement of its approach to Article 8 of ECHR to assist the courts when deciding appeals on immigration matters. ***While the Home Secretary's intention is clear, questions remain about whether the Government's approach can deliver it. The Home Office provides no evidence to support its view that the procedural approach it proposes will lead the courts to react in the way the Home Office anticipates. We also question why the Home Office is taking a different approach in the two Houses: seeking the Commons' explicit approval of a motion; but relying in the Lords on the negative procedure. Accordingly we draw this aspect of the policy to the special attention of the House on the grounds it may inappropriately implement its policy objective.***

This instrument is drawn to the special attention of the House on the grounds it may inappropriately achieve its policy objective.

Content

1. This Statement of Immigration Rules (HC194) has been laid before the House by the Home Office along with an Explanatory Memorandum (EM), a Statement of Intent, an Impact Assessment (IA), a Policy Equality Statement and a Statement of the grounds of its compatibility with Article 8 of the European Convention on Human Rights (ECHR).

2. The changes HC 194 makes are extensive although mainly intended to strengthen or clarify the current position and reduce the overall numbers claiming a right to settlement on the basis of family life. Key changes include:

- the requirement for the sponsor to demonstrate a minimum annual income of £18,600 before a non-EEA partner will be allowed to settle in the UK;
- A number of qualifying periods for settlement are extended, for example, for a migrant partner from 2 years to 5 years and for an individual from 14 years to 20;
- Reducing the scope of who can apply for settlement under this route – aunts and uncles will in future be excluded and adult dependent relatives will only be able to apply to settle here if the care they require can only be provided by a relative in the UK and without recourse to public funds;
- Discretionary leave to remain for those who cannot meet the requirements will be severely curtailed;
- Clearer statements about criminality which make it more difficult for a convicted criminal to appeal against deportation on the grounds of ECHR Article 8;
- From 1 October 2012 those who have overstayed more than 28 days will automatically be refused further leave to remain and be subject to a re-entry ban of up to 10 years.

3. These provisions are well explained in the EM and Statement of Intent, however they are numerous and significant and **we draw them to the attention of the House on the grounds of policy interest.**

A statement for the courts

4. The second policy aim of the Home Office is to use HC194 as a vehicle to gain Parliament's endorsement of its approach to Article 8 of ECHR to assist the courts when deciding appeals on immigration matters.

5. The Explanatory Memorandum says that "both Houses will be invited to debate and approve the Government's approach to setting conditions in the Immigration Rules for migrants to enter or remain in the UK on the basis of their family or private life which reflect the qualified nature of Article 8 of ECHR".

6. The Statement of Intent[1], to which the EM cross-refers, goes into more detail. At Paragraph 34 it says: *"Exceptionally for changes to Immigration Rules, Parliament will be invited to debate and approve the Government's Approach to Article 8 and the weight the new Immigration Rules attach to the public interest under Article 8(2), in order to provide the Courts with the clearest possible statement of public policy on these issues. This is consistent with some non-binding comments made by the Courts in recent Article 8 case law, and with the House of Lords' observation in Huang in 2007 that immigration lacks a clear framework representing "the competing interests" of individual rights and the wider public interest in Article 8 because the immigration rules are "not the product of active debate in Parliament"."*

7. Subsequent paragraphs in the Statement of Intent explain that after the Immigration Rules were first laid in 1994, a vacuum was created when the Human Rights Act 1998 came into force in 2000, because it left the

[1] Statement of Intent: Family Migration http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf

judgement of the interaction between the Rules and Article 8 to the courts. The courts have judged proportionality on a case by case basis but have not done so systematically because they lacked a clear statement of Parliament's view of how the balance between the two should be struck. Paragraph 38 states that *"the new Immigration Rules are intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality… [because] if the rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with Article 8."*

The proposed mechanism

8. While the Home Secretary's intention is clear there are some questions about whether the procedural approach proposed can deliver it. In the House of Commons, the Government tabled the following motion, which was agreed to without a vote on 19 June after 4 hours of debate[2]:

> "That this House supports the Government in recognising that the right to respect for family or private life in Article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules."

9. We understand that the Government does not immediately intend to table an equivalent motion in the House of Lords, but is planning to rely on the usual procedures the House applies to dealing with negative instruments.

10. HC194 is subject to the negative procedure under section 3(2) of the Immigration Act 1971 and there is no need for a debate for it to have force of law. While the Home Office is of course free to promote a general debate on Immigration Rules, that would be quite separate from this instrument's procedure.

11. When the Committee asked the Home Office about their plans for debate in the Lords they replied:

> "If a debate in the House of Lords on the Statement of Changes, and the approach to qualifying Article 8 rights in the way the Statement reflects, is not triggered by a resolution under the negative procedure *[for example a prayer motion],* the Government will consider the options available to it to enable such a debate."

The Government has given no explanation for the different approaches taken in the two Houses.

How will the courts react?

12. It is unclear what the courts would accept as a Parliamentary steer. Paragraph 39 of the Statement of Intention says: "…It is for the State to demonstrate that measures that interfere with private and family life are proportionate. But a system of rules setting out what is or is not proportionate outside of exceptional circumstances, is compatible with individual rights, as has been accepted by the Courts in other spheres, e g housing law." However the Government does not explain in what form the

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[2] Commons Hansard, 19 June 2012 Cols 760-823

steer on housing law was given, and whether the current proposal for debates follows the same procedure; or whether the courts might respond differently to different types of debate in each House. It should also be noted that most of the provisions of HC 194 will take effect on 9 July, so any debate in the Lords may well take place after that date.

13. If HC194 is debated, the House may invite the Minister to address the following points:

- HC194 is a partial change to the Immigration Rules yet the Commons' motion appeared to seek an endorsement of the whole, as did the wording of the EM (see paragraph 5 above). The wording in the Statement of Intent however refers to the "new Immigration Rules" (see paragraph 6 above). The Home Office's inconsistent use of the term "Immigration Rules" also caused considerable confusion throughout the Commons' debate. One MP, for example, asked which Rules they were being asked to endorse - the ones current on 19 June or the version amended by HC 194 which would come into effect on 9 July (HC Deb col 806)).

- The normal method for seeking a debate on a negative instrument would be to lay a prayer or a "take note" motion, and this would be limited to the content of the instrument under discussion. Such debates tend to focus on some specific aspect of the instrument that the Member proposing the motion has doubts about. Prayer motions are often withdrawn after debate, so it is uncertain whether procedurally the debate would deliver a sufficiently clear endorsement of the wider policy to assist the courts.

- The quoted case law source says that the courts lack a framework because *the immigration rules are "not the product of active debate in Parliament"*. The debate in the Commons sought explicit endorsement of what the current government has suggested, not a wide-ranging debate seeking the consensus of the House on what the Rules should be. Such a debate provides no means for the House to amend even a minor aspect of these proposals. It is therefore unclear whether the government's procedural approach would fully satisfy the court's definition of "active debate".

14. The Joint Committee on Human Rights has not yet given its view on the Government's approach to Article 8 as set out in HC 194. Liberty has sent the Committee a briefing note which expresses concern over whether the legislation strikes the appropriate balance in its approach to Article 8, which is published on our website.[3]

15. Although it is the Home Office's firm intention to provide the courts with a clear policy steer on the weight to be given to Article 8 of ECHR in relation to the Immigration Rules, they seem equivocal about the procedural approach for delivering it. We would have expected the Home Office to set out any precedents that have been effective in the past, and from that basis indicate clearly what procedure the courts would require both Houses to adopt in order to achieve their goal. The Committee has raised some unresolved questions about whether the various approaches suggested are

[3] See www.parliament.uk/seclegpublications. It is also published on Liberty's website at http://www.liberty-human-rights.org.uk/pdfs/policy12/changes-to-immigration-rules-liberty-s-briefing-on-statement-of-changes-june.pdf

capable of delivering something the courts will recognise as "the product of active debate in Parliament" and can use as intended. The Home Office has not provided us with sufficient information to take a view and accordingly **we draw this second policy objective to the special attention of the House on the grounds that it may imperfectly achieve its objective.**

OTHER INSTRUMENTS OF INTEREST

Draft Equality Act 2010 (Age Exceptions) Order 2012

16. Part 3 of the Equality Act 2010 ("the 2010 Act") provides for the prohibition of discrimination, victimisation and harassment in respect of the provision of goods and services and of discrimination in relation to the exercise of public functions. Certain statutory exceptions are already included in the Act; following extensive public consultation, this Order inserts a number of specific age-related exceptions into the 2010 Act in Schedule 3 (Services and public functions – exceptions), Schedule 16 (Associations: exceptions) and section 195 (general exceptions: sport). The objective is to put beyond doubt that such activities will always be excepted from the age discrimination prohibition in respect of services etc. They are activities which, in the Government's view in the light of consultation, are either justifiable for public policy reasons or are harmless or on balance beneficial. They include provisions which allow age to be taken into account in immigration matters, insurance, discounts, holiday lets and sports.

Cattle Compensation (England) Order 2012 (SI 2012/1379)

17. We cleared this Order from scrutiny on 26 June, but have subsequently received further information from the Department for Environment, Food and Rural Affairs (Defra). Article 3 of the Order provides for compensation to be paid for animals slaughtered for brucellosis, tuberculosis or enzootic bovine leukosis. Article 2 states that ""animal" means domestic cattle, buffalo or bison". Defra has confirmed that, in this provision, the word "domestic" refers to buffalo and bison as well as to cattle. The Department has commented that buffalo and bison are now commonly domesticated in England and reared for their meat and milk, and that bison and buffalo meat can be bought at certain farmers' markets and specialist outlets. It has stated that the term "domestic" in this context means that the animals are owned by someone, and that the Government would not pay compensation in relation to any such animals that were living in the wild.

Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 (SI 2012/1464)

18. The Localism Act 2011 ("the 2011 Act") provides that a member or co-opted member of a relevant authority must notify the authority's monitoring officer of any "disclosable pecuniary interest". Under section 30(3) of the 2011 Act, the Secretary of State may specify what constitutes such an interest; these Regulations serve that purpose. The Department for Communities and Local Government (DCLG) has decided to introduce the new local authority standards arrangements on 1 July, despite a request from the Local Government Association that implementation be put back to 1 October. We have been told by DCLG that, since it had been in contact with local authority standards practitioners throughout the period leading up to the publication of these Regulations, it took the view that it was not necessary to move the implementation date to 1 October; we felt that this information did not fully explain the Department's decision.

Immigration Appeals (Family Visitor) Regulations 2012 (SI 2012/1532)

19. Appeal rights for persons applying to visit family members in the UK are being restricted. These Regulations remove the appeal right from those visiting an aunt, uncle, niece, nephew or a first cousin in the UK, previously allowed under the Immigration Appeals (Family Visitor) Regulations 2003 (SI 2003/518). They also introduce a requirement that the family member whom the applicant seeks to visit has to have settled, refugee or humanitarian protection status in the UK. It is the Government's view that it is particularly excessive that a full right of appeal should exist where the applicant is seeking to visit a person who is only in the UK on a temporary basis. This change will reduce the volume of appeals against refusal of visa applications to visit a family member in the UK which currently account for around a third of all immigration appeals. It is estimated that the volume of family visit visa appeals will be reduced by 20-40%. This will result in savings of approximately £0.9m in 2012-13. The change is being made in advance of the removal of the full appeal right, which is included in clause 24 of the Crime and Courts Bill, introduced into Parliament on 10 May.

Smoke-free (Signs) Regulations 2012 (SI 2012/1536)

Health and Safety (Miscellaneous Revocations) Regulations 2012 (SI 2012/1537)

20. The Red Tape Challenge is a programme led jointly by the Cabinet Office and the Better Regulation Executive which invites the public to identify legislation that needs to be simplified, improved or abolished as an unnecessary burden on businesses. Two instruments in the current batch, laid by different Departments, remove or modify legislation as a result of that or similar reviews: Smoke-free (Signs) Regulations 2012 SI 2012/1536 and Health and Safety (Miscellaneous Revocations) Regulations 2012 (SI 2012/1537).

Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547)

21. These Regulations amend the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") which transposed into UK law Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside feely within the territory of the Member States. The current Regulations give effect to recent judgments delivered by the European Court of Justice and make a number of other amendments to provide clarity and consistency in the 2006 Regulations. However, the instrument and the Explanatory Memorandum that accompanies it use a number of terms which require further explanation so the House may understand what the legislation is doing (See Appendix 1). **We remind Departments in general, and the Home Office in particular, that their explanations of legislation should be clear and free-standing, so that someone not familiar with the subject area is able to understand its intent.**

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

Equality Act 2010 (Age Exceptions) Order 2012

National Minimum Wage (Amendment) Regulations 2012

Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2012

Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order 2012

Instruments subject to affirmative approval

SI 2012/1375 Fishing Boats (Satellite-Tracking Devices and Electronic Reporting) (England) Scheme 2012

Instruments subject to annulment

SI 2012/1426 Medical Devices (Amendment) Regulations 2012

SI 2012/1464 Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012

SI 2012/1479 Health and Social Care Act 2012 (Consequential Provision – Social Workers) Order 2012

SI 2012/1480 General Social Care Council (Transfer of Register and Abolition – Transitional and Saving Provision) Order of Council 2012

SI 2012/1523 Sustainable Communities Regulations 2012

SI 2012/1532 Immigration Appeals (Family Visitor) Regulations 2012

SI 2012/1536 Smoke-free (Signs) Regulations 2012

SI 2012/1537 Health and Safety (Miscellaneous Revocations) Regulations 2012

SI 2012/1547 Immigration (European Economic Area) (Amendment) Regulations 2012

SI 2012/1548 Driving Instruction (Compensation Scheme) Regulations 2012

SI 2012/1554 Information as to Provision of Education (England) (Amendment) Regulations 2012

SI 2012/1555 Local Justice Areas (No. 2) Order 2012

SI 2012/1567 Private Security Industry Act 2001 (Exemption) (Aviation Industry) (Amendment) Regulations 2012

SI 2012/1573 Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2012

APPENDIX 1: IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT) REGULATIONS 2012 (SI 2012/1547): ADDITIONAL INFORMATION

Further information from the Home Office on the distinct legislation that relates to visitors from inside and outside the EEA

> "By virtue of section 7 of the Immigration Act 1988 persons are exempted from the requirement to seek leave to enter or remain in the UK under the immigration Acts where they have an enforceable right to do so as a matter or EU law or pursuant to any provision made under section 2(2) of the European Communities Act 1972. On this basis those persons who are entitled to exercise the rights of entry and residence set out in the 2006 Regulations are not required to obtain leave to enter or remain under the immigration Acts and therefore need not apply to enter or remain under the Immigration Rules made there under (although they can apply on this basis if they wish to do so).
>
> Following the ECJ determination in *Chen (C200/02),* the UK initially made provision to allow the primary carers of EEA self-sufficient children to seek leave to enter or remain under paragraphs 257C-E of the Immigration Rules in order to facilitate the rights of such persons to enter and reside in the UK notwithstanding that they would not fall to be regarded as a 'family member' for the purposes of regulation 7 of the 2006 Regulations. The Upper Tribunal's determination in ***M (Chen** parents: source of rights) **Ivory Coast** [2010] UKUT 277 (IAC))* however established that as primary carers of self-sufficient EEA national children resident in the UK have a right to enter and reside in the UK under EU law they could not be required to apply for leave under the Immigration Rules. The effect of this determination is that we can no longer require such people to apply for leave to enter or remain in the UK under the Immigration Rules. The rights of residence for the primary carers of EEA self-sufficient children will, therefore, now be provided for by amendment to the Immigration (European Economic Area) Regulations 2006. As a consequence of this, it will become necessary to delete paragraphs 257 of the Immigration Rules."

Home Office officials have provided the following responses to the questions put by the Committee:

Q1. Please define "Durable partner"

A. The term durable partner is defined in guidance at paragraph 5.1.3 of chapter 5 of the European Casework Instructions. A person who is the partner of an EEA national (other than a civil partner) will normally be able to satisfy the following conditions:

- The parties have been living together in a relationship akin to marriage which has subsisted for two years or more.
- The parties intend to live together permanently.

- The parties are not involved in a consanguineous relationship with one another (i.e. they are not blood relatives who would not be allowed to marry as this would constitute incest).
- Any previous marriage (or similar relationship) by either party has permanently broken down.

These conditions are similar to those which apply in respect of unmarried and same-sex partners of people present and settled in the UK or who are being admitted on the same occasion for settlement (paragraph 295A of the Immigration Rules).

Each case must be considered on its merits, taking into account all the facts and circumstances, as there may be cases where- notwithstanding that one or more of these points is not met- the caseworker will still be satisfied that the parties are in a durable relationship.

The term durable partner will encompass both mixed and same-sex relationships.

Q2. Please explain what is meant by a "self-sufficient" EEA National child?

A. In accordance with Article 7 of Directive 2004/38/EC in order to benefit from the free movement rights which it contains an EEA national must exercise treaty rights as a worker, student, self-employed person or self-sufficient person. This requirement has been transposed into domestic legislation by regulations 4 and 6 of the Immigration (European Economic Area) Regulations 2006. A self-sufficient person is defined in regulation 4(c)(i) as a person who has sufficient resources not to become a burden on the social assistance system of the UK during his period of residence; and (ii) has comprehensive sickness insurance in the UK.

For the purposes of regulation 4, the resources of the person concerned (and, where applicable, any family members) are to be regarded as sufficient if they exceed the maximum level of resources which a UK national and his family members may possess if he or she is to become eligible for social assistance under the UK benefit system.

Further guidance on how UKBA assesses if an EEA national has sufficient resources in order to be regarded as a self sufficient person can be found via the following link:

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/working/

Q3. Please explain para 7.7 of the EM: in particular what are the benefits of the Free Movement Directive that do not apply to someone who has never left their native country? What is the pre-McCarthy position and how has it changed?

A. Prior to the Court of Justice of the European Union (''ECJ'') decision in the case of *McCarthy (C434/09)*, the position was that a person who held the nationality of their host member state (for the UK this means a British citizen) along with the nationality of another EEA state, could rely on their nationality of that other EEA state in order rely upon the provisions of the Free Movement Directive. The most obvious benefits would be for any third country national family members of such a person, who could rely on the rights conferred by the Directive which include an automatic right of entry to, and residence in, the UK and an exemption from any requirement to make a formal application or pay a fee. These provisions are more generous

than those to which the third country national family member would be subject if they were to apply under the Immigration Rules as the family member of a British citizen.

In the case of McCarthy the ECJ ruled that a person who holds the nationality of their host member state and has never exercised their right of free movement and residence does not benefit from the rights contained in the Free Movement Directive; and that this principle applies irrespective of whether or not they also hold the nationality of another EEA member state.

Home Office

27 June 2012

APPENDIX 2: 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 business taken at the meeting on 3 July 2012 Members declared no interests.

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Lord Norton of Louth, Lord Plant of Highfield and Lord Scott of Foscote.