HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

27th Report of Session 2016–17

Draft Immigration Skills Charge Regulations 2017

Social Security (Personal Independence Payment) (Amendment) Regulations 2017

Correspondence: Civil Procedure (Amendment) Rules 2017

Includes 2 Information Paragraphs on 2 Instruments

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to 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 these specified grounds:

> (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;
>
> (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
>
> (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Baroness Andrews	Lord Hodgson of Astley Abbots	Lord Rowlands
Lord Bowness	Baroness Humphreys	Baroness Stern
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Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

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

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Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.Secondary Legislation Scrutiny Committee

Twenty Seventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Immigration Skills Charge Regulations 2017

Date laid: 20 February 2017

Parliamentary procedure: affirmative

These draft Regulations impose an obligation on persons who sponsor skilled migrants from certain overseas territories to pay a charge in respect of each skilled migrant whom they sponsor - the immigration skills charge. In the light of data showing that, on average, employers in the UK under-invest in training compared with other countries, the Government have said that they want to incentivise employers to invest in training the resident workforce, through the introduction of the charge, thus reducing reliance on migrant workers.

The Migration Advisory Committee (MAC) consulted widely on recommendations which underlie the proposals in these Regulations, and they strongly supported the charge, concluding that it would serve as an incentive to employers to reduce reliance on migrant workers and to invest in training UK workers. However, the Explanatory Memorandum laid with the instrument says nothing about the opposition to the immigration skills charge voiced by most of those consulted by MAC; and it provides little or no detail about the impact of the charge on those employers likely to be affected.

Additional material which our questions have elicited from the Government goes only some way to making good this information deficit. We are led to conclude that the process of policy formulation for these proposals is not complete, and that therefore the Government have not been in a position to supply Parliament with sufficient information about the implementation and impact of the proposed charge.

We draw this instrument to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

1. The Department for Education (DfE) has laid these draft Regulations with an Explanatory Memorandum (EM). They impose an obligation on persons who sponsor skilled migrants from certain overseas territories[1] to pay a charge in respect of each skilled migrant whom they sponsor ("the immigration skills charge"). The amount of the charge depends on the duration of the skilled worker's prospective employment in the United Kingdom: for 12 months or a shorter period, the charge proposed is £1,000, rising by £500 for each additional six months to £5,000 for five years. (The charge is set at a lower level for certain sponsors who are charities or small businesses.)

2. In the EM, DfE says that, at an economy-wide level, employer investment in training has been declining for 20 years, and that the UK is now 22nd out of 28 in the EU for the proportion of employees taking part in continuing vocational training courses. The Government are seeking to increase

1 Outside the European Economic Area.

investment in skills to increase UK productivity: through the introduction of an immigration skills charge, the Government wants to incentivise employers to invest in training the resident workforce, thus reducing reliance on migrant workers. DfE says that the income raised by the immigration skills charge will be put towards addressing skills gaps in the UK workforce.

3. DfE explains that the Government's intention to legislate for the charge was announced in 2015. In a speech delivered on 21 May 2015, the then Prime Minister said that the Government intended "to ask the Migration Advisory Committee to advise on significantly reducing the level of economic migration from outside the EU."[2] The Department adds that the Migration Advisory Committee (MAC) endorsed the introduction of the charge in its review of the Tier 2 skilled migration route in January 2016; and that the rate and scope of the charge were announced in a written ministerial statement on 24 March 2016.[3]

Migration Advisory Committee Report

4. In the EM, DfE says that the recommendations in the MAC's January 2016 report,[4] following its review of the Tier 2 skilled migration route, informed the development of this policy; that the MAC consulted widely before making its recommendations; but that a full public consultation has not taken place.

5. The MAC's January 2016 report does not provide a quantitative analysis of consultation responses. It does, however, contain the following:

> "Overall, the evidence from partners[5] on the ISC [immigration skills charge] was broadly against the introduction of such a charge. Business groups including the Recruitment and Employment Confederation, the Institute of Directors, the Confederation of British Industry and London First said that they were not in favour of an ISC citing, amongst other reasons, the fact that skills shortages are short term whilst skills investment is long term. Partners were mostly concerned with the likely size of any charge. Some said that an increase in the cost of recruiting migrants would price them out of doing so, while others said that they would absorb any additional cost because it was essential that the identified workers were brought in to the company. Partners were keen to point out that they saw the ISC as a tax rather than a charge or a levy. There was not a lot of enthusiasm or support for an ISC, even amongst employers that ran strong apprenticeship or other training schemes and who could potentially benefit from the additional funding stream that an ISC would provide."[6]

6. Noting this widespread opposition to the proposed charge, the MAC nonetheless concluded that the imposition of an immigration skills charge would serve to incentivise employers to reduce their reliance on employing migrant workers and to invest in training and upskilling UK workers; and

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2 "PM speech on immigration": https://www.gov.uk/government/speeches/pm-speech-on-immigration
3 See: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016–03-24/HCWS660/
4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493039/Tier_2_Report_Review_Version_for_Publishing_FINAL.pdf
5 "Partners" is used by the MAC to refer to those consulted.
6 *Ibid*, paras. 5.44 and 5.45.

also that the charge would provide a source of funding to help with this training and upskilling.[7]

Information from Department for Education

7. The EM laid by DfE says nothing about the opposition to the charge voiced by those whom the MAC consulted. It also states that an Impact Assessment has not been prepared for the Regulations. Given these significant gaps in the material provided, we sought additional information from the Department on a number of issues, including:

- what evidence the Government have drawn on to justify the introduction of the immigration skills charge, in the light of the views reported from the MAC's consultation process;
- how much income the Government expect to be raised by the charge; whether all the income will be dedicated to addressing skills gaps in the UK workforce; and which body or agency will be responsible for disbursing the income raised;
- which sectors are likely to be affected by the charge, and what financial impact is expected for those sectors; and
- given comments to the MAC from the Department of Health about the effect of the charge as proposed on employers recruiting relatively lower paid skilled employees, what the implications of the charge are for healthcare employees.

8. We are publishing the Department's responses as Appendix 1. We note in particular that DfE has told us that there is a large degree of uncertainty around the potential income that the charge may raise. The rationale for the charge advanced by the Government has referred both to reducing the level of economic migration from outside the EU and to raising income to tackle skills gaps in the UK workforce. In our view, these two aims may work against each other: if the prospect of paying the charge induces employers to cut back significantly in their use of skilled migrants, relatively little income may be raised. Moreover, the response of employers may also be influenced by their exposure to other charges, such as the apprenticeship levy[8] and other sector-specific levies.[9] Against this background, it is unsurprising that the Department foresees uncertainty.

9. As already noted, the MAC's January 2016 report quotes from the Department of Health (DH) response to its call for evidence: "A fixed levy amount (rather than percentage of salary) would be regressive, disadvantaging employers recruiting relatively lower paid skilled employees compared with those on higher salaries." In line with the MAC's recommendation, the Government propose, however, that the charge should be levied as a flat fee and not as a percentage of salary. We asked about DH's view of the proposals as now set out in the Regulations. DfE has said that the rate and scope, including exemptions from the charge, as announced in March 2016, were agreed in

7 *Ibid*, para. 5.84.
8 See: https://www.gov.uk/government/publications/apprenticeship-funding-from-may-2017
9 For example, the levy raised by the Engineering Construction Industry Training Board (see the Industrial Training Levy (Engineering Construction Industry Training Board) Order 2017: http://www.legislation.gov.uk/ukdsi/2017/9780111154724/contents

discussion with other Government Departments, including DH. We are writing to the Minister to seek further clarification of the implications of the charge for the healthcare sector, and how the Government expect to handle them.

Conclusions

10. We regret the fact that the EM laid with these draft Regulations failed to provide a good deal of information about their background and impact which, in our view, is essential for proper Parliamentary scrutiny of the proposals. The additional material which our questions have elicited from the Government goes only some way to making good this information deficit; indeed, the Department for Education has now told us, for example, that the forecast of income from the immigration skills charge is currently being revised and will be included in a revised EM. We trust that it will present a more cogent case for the policy than emerges from the existing EM. **We are led to conclude that the process of policy formulation for these proposals is not complete, and that therefore the Government have not been in a position to supply Parliament with sufficient information about the implementation and impact of the proposed charge.**

Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI 2017/194)

Date laid: 23 February 2017

Parliamentary procedure: negative

Two Upper Tribunal cases at the end of 2016 have challenged the Department for Work and Pensions' (DWP) interpretation of the current descriptors for two of the activities - Daily Living 3 and Mobility 1 - which determine whether a claimant is eligible for Personal Independence Payment (PIP) and, if so, at what rate. These Regulations seek to reverse the effect of those decisions by amending the activity descriptors to clarify the DWP's policy intention and prevent additional expenditure as a result of widening the scope of the benefit. The DWP's Equality Assessment and submissions from Tom Brake MP, the Disability Agenda Scotland, the Disability Benefits Consortium, MIND and Muscular Dystrophy UK indicate the likely negative effects of these changes on claimants, particularly those with mental health issues. **We believe that the Government need to make the long-term impact of these changes clear to the House.**

DWP states that, due to urgency, no consultation was possible prior to making these Regulations. **In our view it would be prudent, now that the DWP has some experience in the operation of the PIP system and a body of case law, to review all the descriptors and the guidance to ensure that they are delivering the policy intention and being correctly interpreted.**

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

11. These Regulations have been laid by the Department for Work and Pensions (DWP) under the Welfare Reform Act 2012. They are accompanied by an Explanatory Memorandum (EM) and an Equality Analysis. Changes to Social Security benefits are normally subject to review by the Social Security Advisory Committee but on this occasion the Secretary of State has cited the urgency of restoring the previous position to defer that requirement until after the Regulations have been made.

12. We have received representations from Tom Brake MP, Disability Agenda Scotland (DAS), the Disability Benefits Consortium (made up of 80 different charities), MIND and Muscular Dystrophy UK. These letters are referred to in the Report and published in full on our website.

Background

13. Personal Independence Payment (PIP) was brought into effect in April 2013 with the intention of replacing Disability Living Allowance for claimants of working age. It was also intended to decrease the overall expenditure on benefits and target them more effectively: when announcing the introduction of PIP, the Minister, Lord Freud anticipated that "of those reassessed under PIP by October 2015, about 28% of people currently on Disability Living Allowance will get a reduced award and about 30% will get no award".[10]

14. DWP states that PIP is intended to be broadly proportionate to the overall need of a claimant. It applies to a wide range of mental and physical conditions

10 Statement, 13 Dec 2012: col 1193.

and, to standardise the assessment of need, the approach adopted has been to identify certain activities involved in day to day life and the levels of support which people need with those activities. Assessment of ten "daily living activities" determine a claimant's eligibility to the daily living component of PIP and two "mobility activities" determine the claimant's eligibility for a mobility component. Each activity in the assessment is related to descriptors which set out varying degrees of ability to carry out the activity and each descriptor has a points score allocated to it. Those accumulating 8 points receive PIP at the standard rate, and those accumulating 12 points receive PIP at the enhanced rate.

15. Two Upper Tribunal cases at the end of 2016 have challenged the DWP's interpretation of the current descriptors for two of the activities: Daily Living 3 and Mobility 1. These Regulations seek to reverse the effect of those decisions by amending the activity definitions to clarify the DWP's policy intention. In particular DWP argues that, if unchanged, the broadened scope of the definitions would cost the taxpayer a further £550 million in benefits in 2017–18 alone.

The Upper Tribunal decisions

16. These Regulations reverse the effect of the decision of the Upper Tribunal in the case of *Secretary of State for Work and Pensions v LB (PIP)*.[11] The Upper Tribunal decided that where a claimant needed supervision, prompting or assistance **both** to take medication **and** to monitor a health condition, this should not be considered under descriptor b(ii) (with a score of 1 point), but instead should be considered support to manage therapy (attracting a score of 2, 4, 6 or 8 points, depending on the number of hours of supervision involved per week). In certain circumstances either component could individually also qualify for 2 or more points.

17. Regulation 2(2) separates the definition of "manage medication or therapy" into two separate definitions ("manage medication" and "manage therapy"). It also amends the definition of "therapy" to make it clear that this does not include receiving or administering medication by any means, or any action which falls within the definition of "monitor a health condition". Regulation 2(3) amends the activity "managing therapy or monitoring a health condition" in Part 2 of the Schedule (daily living activities) to make it clear that descriptor b (need for an aid, appliance, prompting, supervision or assistance to be able to manage medication or monitor a health condition) remains the appropriate descriptor even if two or more elements in that descriptor are satisfied.

18. Regulation 2(4) reverses the effect of the decision of the Upper Tribunal in the case of *MH v Secretary of State for Work and Pensions (PIP)*[12] by making it clear that in the activity "planning and following journeys" the effects of psychological distress are not relevant to the higher scoring descriptors c, d or f.

19. DWP state that the judgments were "contrary to the intention of the Department when developing the PIP assessment as the descriptors are proxy

11 https://www.gov.uk/administrative-appeals-tribunal-decisions/secretary-of-state-for-work-and-pensions-v-lb-pip-2016-ukut-0530-aac

12 https://www.gov.uk/administrative-appeals-tribunal-decisions/mh-v-secretary-of-state-for-work-and-pensions-pip-2016-ukut-0531-aac

for overall need and the policy was based on the judgement that someone who is receiving support in order to manage medication, monitor a health condition or both combined, is likely to have a lower level of need across all daily living activities than someone who needs support with therapy. For that reason it should only ever score a maximum of 1 point." [13]

20. The sort of health issues where these factors could be relevant include dementia, learning difficulties, epilepsy and type 1 diabetes. Page 10 of the Equality Assessment provided by DWP sets out some sample scenarios to illustrate how DWP thinks the criteria should apply.[14]

Concerns from disability groups

21. In a Written Statement the DWP states that in its view, prior to the ruling, the PIP assessment "made a distinction between the two groups, on the basis that people who cannot navigate, due to a visual or cognitive impairment, are likely to have a higher level of need, and therefore face higher costs," than someone with isolated social phobia or anxiety.[15]

22. **Tom Brake MP** challenges that, stating that the Government have changed their position from the December 2012 consultation on the PIP mobility descriptors. He also quotes from an earlier court case where the Government argued that the changes in PIP were to "reallocate resources from those with physical impairment to those with non-physical impairments".

23. **Disability Agenda Scotland** (DAS) raise similar points emphasising that the initial intention for PIP, set out in the Explanatory Notes to the Bill that became the Welfare Reform Act 2012, was that people should be entitled to the higher rate of mobility component if their mobility is severely limited by the person's physical or mental condition.[16] In response to a subsequent written question the Government clarified this further: "For example, when considering entitlement to both rates of the mobility component we will take into account ability to plan and follow a journey, in addition to physical ability to get around. *Importantly, PIP is designed to assess barriers individuals face, not make judgment based on their impairment type*."[17] DAS feel that the Upper Tribunal decisions supported this intention and by going against it the Government are now making a distinction between people with different conditions, against the rulings of the court.

24. **The Disability Benefits Consortium** (DBC) support the Upper Tribunal's approach to the descriptor which looks at the claimant's functional ability to perform the task rather than the cause of their difficulties. In particular they are concerned that the changes proposed by these Regulations could move over 140,000 people from the higher rate of mobility to no entitlement at all. They also point out that many conditions are complex and fluctuate in severity: "at any given time up to 40% of people with Parkinson's disease will also have depression or anxiety. Similarly many people with MS experience significant cognitive difficulties and are more likely to have a co-morbid mental health condition". Such people often need to be accompanied throughout a journey, which could be as simple as a trip to the shops or a medical visit.

13 Equality Analysis paras 23–24.
14 Equality Analysis page 10.
15 HL WS497 23 February 2017.
16 Explanatory Notes on the Welfare Reform Bill 2011, para 355.
17 Commons Hansard, 7 Feb 2012, col 233W—Emphasis added.

25. DBC is concerned that by amending the assessment criteria in this way the legislation moves further away from the original policy intention of "a holistic view of the impact of disability, fairly taking into account the full range of impairments" towards a hierarchy of needs between different condition types.

26. **MIND** is concerned that these Regulations move away from the "parity of esteem" that PIP was supposed to establish between mental and physical impairments and create a legal distinction between mental health problems and other kinds of impairments when it comes to benefit assessments: "Whilst this will not be a 'cut' for people currently receiving PIP, it is a clear diversion from the stated aims of the legislation back in 2012 as it excludes people who experience 'overwhelming psychological distress' from being eligible for the higher mobility component."

27. **Muscular Dystrophy UK's** submission offers case studies that illustrate why people with physical difficulties may also develop anxiety that prevents them from venturing out alone. They are concerned that some disabled people could lose out as a result of this emergency legislation.

Impact

28. In both the Minister's Written Statement on 23 February and his oral statement on 28 February, he stated that the changes "will not result in any claimants seeing a reduction in the amount of PIP previously awarded by DWP".[18]

29. The Equality Analysis, in contrast, on pages 12-13, sets out a table of conditions most likely to be affected by reversing the effect of the judgment on daily living activity 3 (Table 1) and the numbers estimated to be affected by it (Table 3). It estimates about 0.12% of the PIP caseload would have their benefit reduced as a result of the criteria changes (approximately 1,000 cases). Similar tables on pages 20-21 of the Equality Assessment list the conditions most likely to be affected by reversing the effect of the judgment on mobility activity 1 and estimate that this would affect approximately 16% of the PIP caseload. Table 7 sets out the estimated proportion of these for whom the judgment is likely to mean a change in descriptor and Table 8 shows the impact of these changes on award rates. According to Table 8, 143,000 cases would be likely to lose the mobility component as a result and a further 21,000 have their component reduced from Enhanced to Standard rate.[19]

30. We put this to DWP who responded: "The legislation will not result in any claimants seeing a reduction in the amount of PIP previously awarded by DWP. The Equality Analysis illustrates our assessment of the number of people that we estimate would have been benefited from the UT decision(s), had the amending Regulations not been made. This is a notional not a cash loss. Complex change takes time to implement safely and reliably across a national service of over 3,000 Case Managers and 2,000 Health Professionals. DWP hasn't yet reached a point where it's possible to implement the MH/LB case law in its decision-making in a safe and consistent manner".

18 HL WS497 23 February 2017: oral statement 28 February 2017, col 717.
19 Equality Analysis

31. However, as the submissions received point out, while this change may not result in an immediate 'cut' for people currently receiving PIP, they may lose out in future (despite no change to their condition), if they are reassessed under the new criteria. The submissions see DWP's own Equality Analysis evaluation as demonstrating that the Government have no firm idea of the long-term impact of these changes but indicative that many will lose benefit. **We believe the Government need to make the long-term impact of these changes clear to the House.**

Conclusion

32. We note with particular concern that DWP states at section 9.2 of the EM that "since this instrument clarifies the PIP Regulations so as to reverse the effect of the two Upper Tribunal judgments and reinstate the originally intended meaning, no changes are required to [the PIP Assessment] guidance". This seems illogical. The existing guidance has led to two significant Upper Tribunal decisions because the interpretation of the current descriptors was inconsistent or misunderstood. The wording of the descriptors has been changed, which suggests that, as a minimum, those making the assessments should be provided with revised guidance to ensure that they take proper account of the distinctions made. The response from DWP at paragraph 28 above which indicates that the assessors do not have either the ability or the capacity to implement the Upper Tribunal decisions "in a safe and consistent manner" also indicates a need for review.

33. DBC make the point that in the process of conversion from Disability Living Allowance to PIP, 48% have received a lower level of award or no award at all and, of those who have appealed, 60% have been successful. The high level of successful appeals also appears to indicate that the guidance and the assessors' interpretation of it is not yet sufficiently robust.

34. **When we considered the initial PIP Regulations in 2013 we said that the House should examine the guidance carefully.**[20] **In our view it would be equally prudent, now that the DWP has some experience in the operation of the system and a body of case law, to review all the descriptors and the guidance to ensure that they are delivering the policy intention and being correctly interpreted**.

20 23rd Report, Session 2012–3 (HL Paper 101).

CORRESPONDENCE

Civil Procedure (Amendment) Rules 2017 (SI 2017/95)

35. In our 25th Report of this session[21] we drew attention to the section of the Civil Procedure (Amendment) Rules 2017 which amended the cost assessment regime for public interest cases taken to court on environmental grounds. We found that the Explanatory Memorandum provided by the Ministry of Justice lacked any evidence-based justification for the proposed changes or for the effect that they are assumed to produce. We therefore wrote to the Minister to express concern over the way that this policy change was presented, in particular how the outcome of the consultation was described. The Minister's response published in our last report agreed that the explanation could have been clearer and provided a revised Explanatory Memorandum. He also noted our concern that it was not appropriate for certain matters to be included in an instrument dealing with miscellaneous administrative amendments and undertook to consider the basis on which that might be done. The further correspondence published in Appendix 2 sets out the criteria for exclusion that the Ministry of Justice proposes to use in future.

21 25th Report, Session 2016–17 (HL Paper 114).

INSTRUMENTS OF INTEREST

Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017 (SI 2017/138)

36. In Universal Credit, claimants are currently exempted from the Benefit Cap when the individual, or a couple jointly, earns £430 or more per monthly assessment period, regardless of household type. This is to encourage claimants to move into work or increase their work hours. The £430 earnings exception threshold was originally set in 2012 as the gross monthly earnings from 16 hours of work per week paid at the highest national minimum wage rate, but has not subsequently been updated. This instrument moves the threshold from a fixed sum to a formula of 16 times the highest national minimum wage rate so that it will update automatically in April each year when the national living wage rate changes. The Social Security Advisory Committee (SSAC), a statutory consultee, has published a report accepting the rationale for the main change but expressing concern over the position of apprentices who are paid at a significantly lower rate.[22] The Government response disagrees with the SSAC but provides a clear explanation, with examples, of why they take that view. **We commend this transparent approach**.

Civil Legal Aid (Immigration Interviews) (Exceptions) (Amendment) Regulations 2017 (SI 2017/192)

37. Legal aid is not, as a general rule, available for a legal representative to attend an asylum interview with their client. An exception for clients detained at three specified locations was made in the First Tier Tribunal's Fast Track Rules which were quashed by the Court and are no longer in force. These amending Regulations reinstate the position by describing them directly as Colnbrook House, Harmondsworth and Yarl's Wood Immigration Removal Centres. These Regulations provide legal certainty so that the Legal Aid Agency may continue to make payments to lawyers attending asylum interviews at these Centres.

22 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594551/print-ready-universal-credit-benefit-cap-earnings-exception-amendment-regulations-2017-ssac-report.pdf

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Armed Forces Act (Continuation) Order 2017

Industrial Training Levy (Engineering Construction Industry Training Board) Order 2017

Non-Domestic Rating (Rates Retention) and (Levy and Safety Net) (Amendment) Regulations 2017

Prescribed Persons (Reports on Disclosures of Information) Regulations 2017

Draft instruments subject to annulment

London Borough of Redbridge (Electoral Changes) Order 2017

Instruments subject to annulment

SI 2017/138	Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017
SI 2017/150	National Health Service Litigation Authority (Amendment) Regulations 2017
SI 2017/162	Patents (Isle of Man) (Amendment) Order 2017
SI 2017/164	Personal Injuries (NHS Charges) (Amounts) Amendment Regulations 2017
SI 2017/173	Assisted Areas (Amendment) Order 2017
SI 2017/174	Social Security (Income-Related Benefits) Amendment Regulations 2017
SI 2017/175	Employment Rights (Increase of Limits) Order 2017
SI 2017/178	Plant Health (Sweet Chestnut Blight) (England) Order 2017
SI 2017/185	Child Trust Funds (Amendment) Regulations 2017
SI 2017/187	Court of Protection (Amendment) Rules 2017
SI 2017/192	Civil Legal Aid (Immigration Interviews) (Exceptions) (Amendment) Regulations 2017
SI 2017/193	Export Control (Amendment) (No. 2) Order 2017
SI 2017/198	Courts Act 2003 (Amendment) Order 2017

APPENDIX 1: DRAFT IMMIGRATION SKILLS CHARGE REGULATIONS 2017

Additional Information from the Department for Education (DfE)

Q1: In the Explanatory Memorandum (EM) to the Regulations, you say: "7.3 The income raised by the charge will be put towards addressing skills gaps in the UK workforce." How much income do you expect to be raised by the ISC? Will all the income be dedicated to addressing skills gaps in the UK workforce? Which body or agency will be responsible for disbursing the income raised by the ISC?

A1: There is a large degree of uncertainty around the potential income raised by the ISC. A number of assumptions must be made in order to calculate the potential income, including the response of employers to the introduction of the ISC, recently implemented changes to Tier 2 and other forthcoming changes to Tier 2, and other factors which might affect Tier 2 volumes and compositions in the future. Each of these assumptions is subject to uncertainty. The income forecast is currently being revised and will be included in a revised Explanatory Memorandum.

The charge will be collected by the Home Office as part of the visa sponsorship process. The Home Office will transfer the income to the Consolidated Fund, less an amount to cover collection and administrative costs. The Barnett formula will be used by HM Treasury to determine the split of funding between the Department for Education and each of the Devolved Administrations.

The income raised from the charge will be used to address skills gaps in the UK workforce (less an amount to cover Home Office collection and administration costs). Further information about how the income from the charge will be used will be set out in due course.

Q2: In the EM you also say that an Impact Assessment has not been prepared for the Regulations: Which sectors are likely to be affected by the ISC? What financial impact is expected for those sectors?

A2: The charge will impact employers who use the Tier 2 (General) and Tier 2 (Intra-company Transfer) routes to recruit skilled workers. We might expect employers who currently rely on Tier 2 to benefit the most from the upskilling of the resident workforce. The impact will vary depending on whether employers choose to use the Tier 2 route, the number of Certificates of Sponsorship employers choose to assign, whether they will be required to pay the standard rate or the reduced rate for smaller sponsors and charities, and also the length of time an employer chooses to employ a worker for.

A breakdown by Tier and sector can be found in the "sponsorship data tables" in the latest migration statistics published on 23 February 2017:

https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2016-data-tables

Q3: In the EM, you refer to consultation carried out by the Migration Advisory Committee, which is reported on in the MAC's December 2015 Review of Tier 2. In that Report, the MAC says that there are a number of skills levies in operation at the sectoral level in the UK, and identifies them as levies raised by the Construction Industry Training Board (CITB), the Engineering Construction Training Board (EICTB), and the Film Skills Investment Fund. Will employers in these sectors be exempt from the ISC? If not, why not?

A3: The ITB levies are to encourage training in sectors with very high degrees of self-employment, project working and long supply chains, while the Film Skills levy is voluntary. No sectors have been exempted from the ISC. We want to encourage all employers to consider the UK labour market first. Employers that are smaller sponsors or charities will be eligible for the reduced rate. We have exempted occupations skilled to PhD level in view of the Government's desire to protect the UK's position as a centre of excellence for research.

Q4: Also in that Report, the MAC says (at 5.38):

> *"Some partners were in favour of the ISC being proportionate to salary in order not to disadvantage lower paid occupations. However, we propose that those employers hiring more highly paid (and by inference more highly skilled) migrants should be penalised less in proportion to the salary paid, and would therefore recommend a flat fee. The implication of this is that those employers bringing in more highly skilled migrants are charged proportionally less on the grounds that the benefits to the UK of these migrants are greater, on average, than for less highly paid migrants."*

It also quotes the Department of Health response to the call for evidence: "A fixed levy amount (rather than percentage of salary) would be regressive, disadvantaging employers recruiting relatively lower paid skilled employees compared with those on higher salaries." What are the implications of the ISC for healthcare employees? Has the Department of Health expressed concerns about the impact of the ISC on the NHS?

A4: There have been discussions with the Department of Health about how health education and training can benefit from the Government's wider skills reforms such as apprenticeships. The rate and scope, including exemptions from the charge, as announced in March 2016, were agreed in discussion with other government departments, including the Department of Health.

Q5: Also in that Report, the MAC says:

> *"5.44 Overall, the evidence from partners on the ISC was broadly against the introduction of such a charge. Business groups including the Recruitment and Employment Confederation, the Institute of Directors, the Confederation of British Industry and London First said that they were not in favour of an ISC citing, amongst other reasons, the fact that skills shortages are short term whilst skills investment is long term.*
>
> *5.45 Partners were mostly concerned with the likely size of any charge. Some said that an increase in the cost of recruiting migrants would price them out of doing so, while others said that they would absorb any additional cost because it was essential that the identified workers were brought in to the company. Partners were keen to point out that they saw the ISC as a tax rather than a charge or a levy. There was not a lot of enthusiasm or support for an ISC, even amongst employers that ran strong apprenticeship or other training schemes and who could potentially benefit from the additional funding stream that an ISC would provide."*

Given that evidence from the MAC's consultation did not on balance support the introduction of the ISC, what other evidence have the Government drawn on to justify its introduction?

A5: The Government considered the evidence in the MAC's January 2016 report and the MAC's recommendation that it "strongly supports the introduction of an

Immigration Skills Charge". It is unsurprising that employers who would have to pay the charge were not in favour of it.

The Government also took account of the MAC's advice that "We consider that, for the sake of simplicity, clarity and in order to maximize its effect, the ISC be applicable to all employers recruiting migrant across all Tier 2 routes" and that "We recommend the ISC takes the form of an upfront payment added to the cost of a Certificate of Sponsorship, payable at the time of application for the initial CoS and extension visas. The charge should be calculated based on the length of the CoS".

In addition, the Government took account of data showing that on average employers in the UK under-invest in training compared to other countries. There are many examples of good practice but at an economy-wide level it is clear that training has been decreasing over the last 20 years:

- The Labour Force Survey shows that by 2014, the number of workers participating in training courses away from their own workplace had collapsed since 1992.
- Eurostat's Continuing Vocational Training Survey shows that UK workers undertake 20% less continuing vocational training on average than the EU average.
- The UK Commission for Employment and Skills (UKCES) Employer Skills Survey 2015 shows that, while overall employer investment in training (in-kind and cash) increased between 2011 and 2015, per employee expenditure flat-lined at £1,600, despite a period of economic recovery and business growth.
- In addition, the Employer Skills Survey 2015 highlights that there has been an increase in the proportion of businesses who only provide Health and Safety or induction training (11%, up from 9% in 2013), which is arguably not the training that will best equip individuals with the technical, analytical or people skills that staff need.

2 March 2017

APPENDIX 2: CORRESPONDENCE: CIVIL PROCEDURE (AMENDMENT) RULES 2017 (SI 2017/95)

Letter from the Rt Hon. Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee to, the Rt Hon. Sir Oliver Heald QC MP, Minister of State for Justice

Thank you for your letter of 23 February replying to my letter of 22 February on the Civil Procedure (Amendment) Rules (SI 2017/95). The Committee welcomed your positive response.

In its penultimate paragraph you state that you will reconsider your current approach to amending instruments and whether any controversial changes should be put into separate instruments. The Committee were interested to know whether the Ministry of Justice would be drawing up criteria that its officials and lawyers might use to identify the issues that should be given separate and more thorough explanation.

A response by 11am on Monday 6 March would be appreciated so that it can be considered at the Committee's next meeting.

1 March 2017

Letter from Sir Oliver Heald to Lord Trefgarne

Thank you for your letter of 1 March 2017 regarding the quality of Explanatory Memorandum for the Civil Procedure (Amendment) Rules (SI 2017/95).

As suggested, I have asked my officials to draft guidance on the criteria that should be considered when drafting explanatory memorandums. This work has already started, and will particularly focus on identifying when the policy is:

- Controversial or unpopular;
- Relating to a consultation which has had a negative reaction;
- Novel;
- Affecting a large number of people.

I hope that you find this reassuring.

5 March 2017

APPENDIX 3: 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 7 March 2017, Members declared no interests.

Attendance:

The meeting was attended by Lord Goddard of Stockport, Lord Haskel, Lord Hodgson of Astley Abbotts, Baroness Humphreys, Baroness O'Loan, Lord Rowlands, Baroness Stern and Lord Trefgarne.