HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

14th Report of Session 2016–17

Immigration (European Economic Area) Regulations 2016

Correspondence:

Insolvency (England and Wales) Rules 2016

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.

Members

Baroness Andrews	Lord Hodgson of Astley Abbots	Lord Rowlands
Lord Bowness	Baroness Humphreys	Baroness Stern
Lord Goddard of Stockport	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne *(Chairman)*
Lord Haskel	Baroness O'Loan	

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

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

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.

Fourteenth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Immigration (European Economic Area) Regulations 2016 (SI 2016/1052)

Date laid: 3 November 2016

Parliamentary procedure: negative

The Home Office states that these Regulations largely revoke, modernise and replace the 2006 version[1] *and consolidate the transposition into domestic law of Council Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. However Schedule 1 to these Regulations sets out, for the first time, a non-exhaustive list of the "fundamental interests of society" which courts or tribunals must have regard to when considering restricting that right to freedom of movement. We are surprised that so significant a change should be implemented by a negative instrument, and also that it was undertaken without any prior consultation.*

We wrote to the Minister seeking explanation of how this policy is expected to operate in practice and how such broad terms as "protecting public services" or "preventing social harm" can be interpreted consistently and objectively. His letter (published in Appendix 1) simply refers us to the guidance that is not yet published. We reiterate our strongly held view that if guidance is intended to direct users on how specific terms should be interpreted or how decisions should be made, it should be laid with the Regulations and be available to Parliament throughout the scrutiny process. It would be even better if such definitions were clearly set out on the face of the instrument.

These Regulations are drawn 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. These Regulations have been laid by the Home Office under section 2(2) of the European Communities Act 1972 and under section 109 of the Nationality Immigration and Asylum Act 2002. They are accompanied by an Explanatory Memorandum (EM).

2. The Home Office states that these Regulations largely revoke, modernise and replace the 2006 version[2] and consolidate the transposition into domestic law of Council Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States.

3. They also make changes to give effect to certain judgments of the Court of Justice of the European Union. This includes setting out in detail the factors that must be taken into account when considering an application from a family member of a British citizen for a right to reside in the UK under

1 SI 2006/1003
2 SI 2006/1003

the Directive. This is to tackle circumvention of the domestic immigration system as a consequence of the *Surinder Singh*[3] judgment under which the non-EEA partner of a British citizen who has moved temporarily to another EU country, for example to work, can acquire a right of residence in the UK under EU freedom of movement laws, even if the couple subsequently divorce.

A statement of the "fundamental interests of society"

4. Schedule 1 to these Regulations also sets out, for the first time, a non-exhaustive list of the "fundamental interests of society" which courts or tribunals must have regard to when considering restricting the right to freedom of movement, for example, an EU national's appeal against a deportation decision. **We are surprised that so significant a change should be implemented by a negative instrument, and also that it was undertaken without any prior consultation.**

Broad definitions

5. A fundamental tenet for new legislation is that it should not make work for the courts by using loosely worded provisions. The Committee has significant concerns therefore about the open-ended character of some provisions in the Regulations and whether they could be interpreted consistently and objectively. For example:

- the basis for deciding whether the residence of a British citizen and another family member in an EEA state was "genuine" (regulation 9);
- when considering whether to restrict an EU citizen's free movement what is meant by "preventing social harm" or "protecting public services" under Schedule 1; and
- subparagraph 7(h) of Schedule 1 to the Regulations states that when considering whether to deport someone numerous lesser offences can be aggregated but it is not clear what sort of offences are intended and how many will qualify a person for removal.

6. Paragraph 9 of the EM states that the Home Office will be publishing guidance to accompany the Regulations. It was not available to us for our initial scrutiny and nor was a draft. We wrote to the Minister seeking further explanation about how these Regulations are expected to operate in practice. His letter (published in Appendix 1) simply refers us to the guidance which, we note with disappointment, will not be published until the very day the legislation comes into effect.

7. **We reiterate our strongly held view that if guidance is intended to direct users on how specific terms should be interpreted or how decisions should be made, it should be laid with the instrument and be available to Parliament throughout the scrutiny process. It would be even better if such definitions were clearly set out on the face of the instrument.**

3 Case C-370/90, Surinder Singh (ECLI:EU:C:1992:296)

CORRESPONDENCE

Insolvency (England and Wales) Rules 2016 (SI 2016/1024)

8. The Department for Business, Energy and Industrial Strategy (BEIS) has laid these Rules ("the 2016 Rules"), with an Explanatory Memorandum (EM) and Impact Assessment. In the EM, BEIS says that the 2016 Rules provide the procedural framework for the Insolvency Act 1986 ("the 1986 Act"), and do three things. They consolidate the Insolvency Rules 1986 with the 28 amending instruments made since those earlier Rules came into force. They restructure the Rules and update the language. Finally they modernise the Rules to take account of the changes made to the 1986 Act by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015, in particular amendments enabling modern methods of communication and decision-making to be used in place of paper communications and physical meetings.

9. We raised a number of concerns with BEIS, notably about how the insolvency regime guards against possible conflict of interests; what protection creditors enjoy against excessive fees charged by insolvency practitioners; and the risk that the suppliers of a company that goes through a pre-packaged administration may suffer disadvantage. We are publishing at Appendix 2 our correspondence with the Parliamentary Under-Secretary of State, Minister for Small Business, Consumers and Corporate Responsibility, at BEIS. We note the Government's intention to keep changes made to the insolvency regulatory regime under review.

INSTRUMENTS OF INTEREST

Statement of Changes in Immigration Rules (HC667)

10. The Statement of Changes ("the Statement") clarifies a number of definitions so that the Immigration Rules ("the Rules") may be properly understood and enforced. They set out the grounds for which a person will be automatically refused limited or indefinite leave to remain in the UK under the Rules, for example, "serious criminality" (such people would then only be granted restricted leave to remain in the UK on a discretionary basis where their deportation would breach their human rights). The Statement also makes technical changes to clarify the concepts of "a first country of asylum" and "a safe third country" under the Dublin Regulations.[4] To encourage greater compliance with the Rules, the "28-day grace period" is abolished to emphasise that people must make any application for further leave before their current leave expires. To encourage integration, they also provide that non-European Economic Area national partners and parents applying to extend their stay in the UK after 1 May 2017 must demonstrate their ability to speak English by passing, as a minimum, an A2 level Common European Framework of Reference for Languages speaking and listening test. Finally, changes in the Statement implement the first phase of the reforms recommended by the independent Migration Advisory Committee on salary thresholds for Tier 2 (General) and short-term Intra-Company Transfers. There are exemptions from the new salary thresholds for certain occupations in health and education. **The Committee remains concerned about the complexity of these Rules in general and the presentation of changes to them as a piecemeal miscellany. The Home Office has also failed to publish the Impact Assessment mentioned in the EM. Both issues make it very difficult for the reader to understand the significance of the changes being made.**

Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc.) Regulations 2016 (SI 2016/1060)

11. The Immigration Act 2016 ("the 2016 Act") amended the Immigration Act 2014 ("the 2014 Act") to create new offences for landlords and agents who knowingly let property to persons disqualified by reason of their immigration status, to act as a stronger deterrent than the civil penalties included in the 2014 Act. (This Committee commented on the original implementing Regulations at some length in January 2016).[5] Under new section 33A(1) of the 2014 Act, in determining whether the defence of having taken reasonable steps to terminate the residential tenancy agreement within a reasonable time can be made, a court must have regard to guidance issued by the Secretary of State. These Regulations bring into force the statutory guidance laid before Parliament on 1 November 2016[6] which has been issued in the fulfilment of a commitment given to Parliament during the passage of the 2016 Act. The Regulations also prescribe the form of notice to be used by a landlord if the landlord wishes to terminate a residential tenancy agreement by making use of the new route to eviction available in circumstances where all occupiers of the property are disqualified as a result of their immigration status.

4 The Dublin Regulations are the rules governing which Member State of the EU is responsible for determining the asylum application of a third country national who has entered the EU.

5 22nd Report, Session 2015–16 (HL Paper 86) (which included written submissions from external organisations).

6 UK Visas and Immigration, *Ending a residential tenancy agreement: draft guidance* (1 November 2016): https://www.gov.uk/government/publications/ending-a-residential-tenancy-agreement-draft-guidance

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 instrument subject to affirmative approval

Bank Recovery and Resolution Order 2016

Draft instrument subject to annulment

HC 667	Statement of Changes in Immigration Rules

Instruments subject to annulment

SI 2016/1024	Insolvency (England and Wales) Rules 2016
SI 2016/1043	Modern Slavery Act 2015 (Duty to Co-operate with Commissioner) Regulations 2016
SI 2016/1044	Labour Market Enforcement (Code of Practice on Labour Market Enforcement Undertakings and Orders: Appointed Day) Regulations 2016
SI 2016/1058	Illegal Working Compliance Orders Regulations 2016
SI 2016/1060	Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc.) Regulations 2016

IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 (SI 2016/1052)

Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Robert Goodwill MP, Minister of State for Immigration at the Home Office

I am writing on behalf of the Secondary Legislation Scrutiny Committee which undertook initial scrutiny of these Regulations at its meeting yesterday.

A fundamental tenet for new legislation is that it should not make work for the courts by using loosely worded provisions. The Committee expressed significant concern about the open-ended character of some provisions in the Regulations and whether they could be interpreted consistently and objectively. For example:

- the decision as to whether the residence of a British citizen and another family member in an EEA state is "genuine" (regulation 9); and
- "preventing social harm" or "protecting public services" under Schedule 1.

We note from paragraph 9 of the Explanatory Memorandum that the Home Office will be publishing guidance. Please could you tell us how the guidance will support understanding of these and other similarly broad expressions contained in the Regulations. We would also be grateful if you could send us a copy of the guidance with your response and confirm that it will be available to Parliament without delay so that it can be taken into account should these Regulations be debated.

We also note that, under subparagraph 7(h) of Schedule 1 to the Regulations, numerous lesser offences can be aggregated and we would welcome clarification about what sort of offences are intended and how many will qualify a person for removal.

I would be grateful to hear from you by 11am on Monday 14 November so that the Committee may consider the Regulations at its next meeting in the light of your reply.

9 November 2016

Letter from Robert Goodwill MP to Lord Trefgarne

Thank you for your letter of 9 November regarding the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) ("the Regulations") which raised a number of questions about the wording of some of the provisions, notably: regulation 9 and subparagraphs 7 (c), (e) and (h) of Schedule 1.

Regulation 9(2)(c) specifies that where a British citizen who has exercised free movement rights in another EEA Member State wishes to sponsor an application made by a family member under the EEA Regulations, one of the conditions to be met is that the residence in the other Member State must be, or have been, genuine. This condition subsumes the current 'centre of life' test, aligning more closely with the language used in jurisprudence of the Court of Justice of the European Union (for example, *O and B* (C-456/12), paragraphs 51 to 57), and will allow a broader range of evidence to be taken into account.

When assessing whether such residence is or was genuine, regulation 9(3) signposts relevant factors to consider. Guidance will set out how caseworkers should

approach the 'genuine residence' question and the other conditions of regulation 9. The guidance will be published on Gov.uk on 25 November when the changes to regulation 9 come into force. We will notify the Committee when it is available.

With reference to Schedule 1, the government already makes a significant volume of decisions on grounds of public policy and public security. The courts therefore already deal with a high volume of litigation in this area. By setting out in legislation what is in the UK's interests, these Regulations make it clearer what factors decision makers and the courts must take into account when considering whether the deportation of an EEA national is in the fundamental interests of society. The Regulations need to be able to relate to a broad and varied array of circumstances in which an individual may pose a threat and so it is inevitable that some of the provisions are somewhat general in nature. A precise description of every possible circumstance would neither be practically possible nor helpful given the immense number of provisions this would need and the changing nature of the threats that UK society faces.

All decisions made on grounds of public policy or public security will be made in accordance with the principle of proportionality and will take into consideration the personal circumstances and conduct of the individual as set out in regulation 27(5). There is therefore no prescribed list of the offences that will fall under subparagraph 7(h) of Schedule 1, nor is there a threshold to the number of offences that must be committed in order to qualify a person for a decision to be made on the grounds of public policy or public security.

These Regulations will be accompanied by guidance to assist with the interpretation of the provisions. This will provide more detail on the sorts of circumstances which could be considered when making a decision on the grounds of public policy and public security. The guidance will be published on Gov.uk on 1 February when the provisions come into force. We will notify the Committee when it is available.

11 November 2016

APPENDIX 1: CORRESPONDENCE: INSOLVENCY (ENGLAND AND WALES) RULES 2016 (SI 2016/1024)

Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Margot James MP, Parliamentary Under Secretary of State, Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy

The Secondary Legislation Scrutiny Committee gave a first consideration to these Rules at its meeting yesterday. We agreed that I should write to you to raise a number of issues which in part go beyond the Rules to the wider regime governing insolvency.

As a general concern, we would like to know more about how the insolvency regime guards against possible conflict of interests which may arise, for example if an insolvency practitioner (IP) first advises a bank on the financial health of a company, and is later being appointed by that bank as the administrator if the company becomes insolvent. We understand that insolvency practitioners (IPs) must operate under an agreed Code of Ethics, but we questioned why the Rules themselves apparently do not address such conflicts of interest.

A further concern relates to the protection which creditors enjoy against excessive fees charged by IPs. We understand that Chapter 4 of Part 18 of the Rules deals with the way in which an IP may seek agreement to fees, but we would welcome clarification from you on whether these provisions strike a fair balance between IPs and creditors in settling fees.

In relation to pre-packaged administrations, we are also aware of concern that following this route may serve to disadvantage the suppliers of a company that goes through a pre-packaged administration. We understand that, among the Statements of Insolvency Practice (SIPs) which set out basic principles and essential procedures for IPs to follow, SIP 16 deals with pre-packaged administrations. Here again, we questioned why issues relating to pre-packaged administrations are not (also) dealt with in the Rules.

I would be grateful if you could reply by midday on Monday 14 November.

9 November 2016

Letter from Margot James MP to Lord Trefgarne

Thank you for your letter of 9 November and my thanks to the Committee whose work ensures that our legislation meets the highest standards.

The Insolvency (England and Wales) Rules 2016 (the Rules) provide the procedural framework for the Insolvency Act 1986 (the Act). They prescribe matters required by the Act and set out the procedural rules to be followed in the conduct of insolvency proceedings. The Act sets out the regulatory objectives for the regime, which, amongst other things, require regulators to encourage an independent and competitive profession, whose members provide services at a cost which is fair and reasonable. The Act also allows the Secretary of State to recognise certain professional bodies for the purpose of authorising their members to act as insolvency practitioners. Also under the Act, the Secretary of State (acting through the Insolvency Service) acts as oversight regulator of the recognised professional bodies. Although the insolvency profession is self-regulated, in order to satisfy

the Secretary of State, the regulators must (and do) have in place rules to ensure their members meet acceptable requirements with regard to education, practical experience and training, insurance and ethical and professional standards.

How does the insolvency regime guard against possible conflicts of interest?

In addition to the regulatory objective of independence set out in the Act, all insolvency practitioners are subject to an insolvency code of ethics. It sets out the fundamental principles of integrity, objectivity and confidentiality. It requires insolvency practitioners to act with professional competence and due care.

Prior to accepting an insolvency appointment, the insolvency practitioner must check whether the appointment might carry any risk to the fundamental principles, for example a conflict of interest. Where any risk exists, the insolvency practitioner must take steps to mitigate it. They must also disclose both the risk and any safeguards in place, and will have a continuing duty to assess the risk and whether any safeguards are sufficient. If the risk cannot be reduced to an acceptable level, they should not accept an appointment.

Do the provisions in the Rules around fees strike a balance between creditors and insolvency practitioners?

It is of course right that an insolvency practitioner should be properly remunerated for the work that he or she does, but the court can be asked to review the amount of remuneration on the application of either the office holder or creditors.

Insolvency legislation currently provides powers for creditors to approve the actions, remuneration and expenses of insolvency practitioners, subject to the overall control of the court. However, it is recognised that some creditors may not have the knowledge, understanding or financial incentive to make full use of their rights. As a result there was a change to the Insolvency Rules 1986 (the predecessor to the SI that the Committee are looking at) which requires insolvency practitioners to provide early information to creditors about their fees and expenses. In most instances, insolvency practitioners are now required to provide an estimate of their fees for creditor approval. This restricts insolvency practitioners from taking fees in excess of the approved estimate unless creditors give further approval and therefore acts as a cap on fees.

I believe that these provisions should ensure that the right balance is struck and, as you would expect, once they have had a chance to bed in properly, the changes to the regime will be evaluated to ensure that they do work.

Pre-packaged administrations

There are regulatory requirements for pre-packaged administrations, which require the administrator to prepare a detailed narrative explanation and justification of why the pre-packaged sale was undertaken. That report is sent to creditors. It is also sent to the administrator's regulatory body, all of whom monitor the statements to ensure administrators comply with the spirit, as well as the letter, of this requirement. If the pre-packaged administration has not been dealt with correctly and the breach is serious, the regulator can then investigate the matter and may take disciplinary action.

The Government recognised that improvements could be made to pre-packs to ensure greater transparency and fairness and commissioned an independent review to look into this. As a result, industry stakeholders, including creditor, business and insolvency representative organisations, have put together a package

of measures to improve the marketing and valuation of a business (or its assets) and to enhance independent scrutiny. These improvements came into effect late last year.

If these voluntary changes do not prove to be satisfactory, the Government will consider whether legislative measures are necessary to regulate pre-pack sales more closely. There is a power in paragraph 60A of Schedule B1 to the Act which will allow Government to make regulations which could prohibit sales to connected parties or permit them to proceed subject to meeting certain conditions.

I hope that these answers will help to satisfy the Committee.

14 November 2016

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 15 November 2016 Peers declared the following interest:

Draft Bank Recovery and Resolution Order 2016

Lord Janvrin

Deputy Chairman, HSBC Private Bank (UK) Ltd (interest ceased 3 March 2016)

Attendance:

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