

A right to rent?

The Right to Rent scheme has been operating as a pilot in the West Midlands since 1 December 2014.

On 1 February 2016 it was extended to the whole of England.

In this article, Clare Wall examines the scheme and its implications for occupiers in England.

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Under the Right to Rent scheme, private landlords (or their agents) must check the immigration status of prospective tenants, lodgers and any adult members of their households who will occupy accommodation as their main home, to establish if they have a right to rent.¹

Landlords will need to carry out follow-up checks in some situations.

When checks are needed

The Right to Rent scheme applies to new private residential tenancy agreements granted on or after:

- 1 February 2016 in England²
- 1 December 2014 in the pilot area.³

Right to rent checks are not needed when a private renting agreement began before these dates, or when such an agreement is being renewed and the landlord and the occupiers remain the same.⁴

For the purposes of the scheme, residential tenancy agreements include licences and sub-tenancies.⁵ A residential tenancy agreement (whether written or oral) is an agreement that gives a right of occupation for residential use, provides for payment of rent and is not an excluded agreement (see below for details of excluded agreements).

Landlords must carry out right to rent checks on all people over the age of 18 who will live in the property as their only or main home whether or not they are named on the agreement, and regardless of whether it is a written or verbal arrangement. Where a landlord has any doubt, they should assume that a person occupies a property as their main home and carry out a check.

No checks are needed on children under the age of 18, or house guests (ie visitors whose home is elsewhere or who don't pay rent. Contributions towards food and fuel that are not linked to the agreement to live in the premises don't count as rent).

Codes of practice

There are three statutory codes of practice in relation to the scheme:

- 1) one that applies to residential agreements that started before 1 February 2016 in the pilot area⁶

- 2) one that applies to residential agreements that started on or after 1 February 2016 and to agreements that started before but require follow up checks after that date.⁷ This is referred to as the 'Code of Practice' in this article
- 3) one that advises landlords on how to avoid unlawful discrimination when carrying out right to rent checks.⁸

Subletting and lodgers

Anyone granting a sub-tenancy or taking in a lodger will be treated as a landlord for the purposes of the Right to Rent scheme. However, their own landlord will have to carry out the checks if:

- the tenant asks for permission to sub-let to a specific person and the landlord agrees. This is because the agreement to the sub-let is seen as a variation of the original agreement, and any variation of an agreement leads to a new residential tenancy.⁹ Someone in this position is strongly advised to get a written statement from the landlord that the landlord will carry out the checks.
- the landlord agrees in writing to do the right to rent check.¹⁰

Excluded agreements

Agreements that grant a right to occupy the following are excluded from the scheme:¹¹

- most refuges and hostels
- holiday lets
- housing provided by/through social services under sections 17 or 20 of the Children Act 1989, or under section 18 of the Care Act 2014
- housing provided through a local authority allocation scheme, or under homelessness duties (including private sector leased housing but not accommodation provided under a rent deposit scheme)
- student accommodation (see below) and accommodation provided in connection with vocational training
- accommodation provided to asylum seekers under sections 4, 95 or 98 of the Immigration and Asylum Act 1999.
- care homes, hospitals and hospices

- mobile homes and tied accommodation
- fixed terms of seven or more years with no break clause, and long leases.

Student accommodation

Excluded student accommodation includes:¹²

- a hall of residence (whether the landlord is an educational institution or private)
- accommodation provided for students directly by an educational institution (or certain other charitable bodies)
- any agreement where a student has been nominated to occupy the accommodation (including a privately rented property) by an educational institution or certain charitable bodies.

Where a nomination is made, the institution should provide evidence of this to the landlord. It is not clear whether a nomination could cover the entire duration of a course of education, and therefore exempt the student from the need for follow-up checks.

Who has a right to rent?

The table shows who has a right to rent:¹³

Unlimited right to rent	British citizen/ Commonwealth citizen with right of abode; EEA/ Swiss national; person with indefinite leave/ permanent right to reside
Time-limited right to rent	Person with limited leave to remain in UK, eg students, people on work permit, refugees; non-EEA national exercising derivative right to reside (eg 'Zambrano' carer or carer of child in full-time education); person with Home Office grant of discretionary time-limited permission to rent

Evidence of a right to rent

Prospective occupiers must provide evidence of their right to rent in accordance with a list of acceptable documents. A comprehensive list, with detailed explanations of each form of evidence, can be found in the *'Right to Rent Document Checks: a User Guide'* (the 'User Guide') available on Gov.UK.¹⁴ The User Guide also explains what to do if proof of status has been lost or stolen, or does not exist. The Appendix to this article lists all the documents that can prove a right to rent.

Advisers should be aware that there are companies offering a 'Right to Rent' certificate for a fee.¹⁵ Such a certificate is not an acceptable document and caution should be taken with these companies.

There are a number of adults living lawfully in the UK who may never have needed to prove their right of residence. They include non-European Economic Area (EEA) nationals with a derivative right of residence, non-EEA national family members of an EEA national or a person with 'Zambrano' rights. Such people can obtain a residence card from the Home Office. Advisers should consider routinely asking people with these rights of residence if they have a residence card and should advise them to obtain one (even if their query does not relate to renting).

Carrying out the checks

A landlord must obtain original versions of the acceptable documents, check them in the presence of the renter (or via a live video link), and keep copies safely on file for one year after the person moves out.

The Home Office provides an online Landlord Checking Service that can be used to check if a person with an outstanding application or appeal with the Home Office, or whose documents are with the Home Office, has a right to rent.

A landlord can call the Landlord Helpline at the Home Office on 0300 069 9797 for help carrying out a right to rent check.

Follow-up checks

If a person has a time-limited right to rent and the rental agreement continues without any changes, the landlord must carry out a follow-up right to rent check no earlier than the latest of the following:¹⁶

- a year after the last checks were made
- when the person's leave to remain in the UK expires
- when the validity of the person's leave to remain or right of reside in the UK expires.

So, this means that a person who has a time limited right to rent for six months will not be subject to a follow-up check for a minimum of 12 months.

A landlord must report the expiry of an occupier's right to rent to the Home Office.

If a person knows that their immigration status is due to change within the period of

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11.8.7.10 Immigration checks by landlords

Footnotes

¹s.22 Immigration Act 2014.

² Immigration Act 2014 (Commencement No. 6) Order 2016 SI 2016/11.

³ Art.6 Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 SI 2014/2771. The pilot area was Dudley, Birmingham, Sandwell, Walsall and Wolverhampton.

⁴s.35 Immigration Act 2014.

⁵s.20 Immigration Act 2014.

⁶ Code of practice on illegal immigrants for tenancies which started before 1 February 2016. See tinyurl.com/preFeb16Code

⁷ Code of practice on illegal immigrants and private rented accommodation, Home Office 12 February 2016 ('Code of Practice' in these footnotes). See tinyurl.com/R2RCode

⁸ Code of practice for Landlords - avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector, Home Office, October 2014. See tinyurl.com/R2RCode

⁹ art.3 The Immigration (Residential Accommodation) (Prescribed Cases) Order 2014 SI 2014/2873; see also para 4.1 Code of Practice.

¹⁰s.23 (5) Immigration Act 2014.

¹¹sch.3 Immigration Act 2014; see also para 3 Code of Practice

¹²sch.3, paras 11 and 12 Immigration Act 2014.

¹³s.21 Immigration Act 2014, para 2 Code of Practice.

¹⁴sch.1, Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014/2874 as amended by the Immigration (Residential Accommodation)(Prescribed Requirements and Codes of Practice) Order 2016/9. See also tinyurl.com/R2Rdocs

¹⁵for an example see tinyurl.com/R2R-cert

¹⁶s.27(4) Immigration Act 2014.

a year, or that the last right to rent check was more than a year ago, they should obtain evidence of their status swiftly. This could include applying for further leave or for evidence of any new status.

No follow-up checks need to be carried out once a person has proven an unlimited right to rent, as long as the agreement is not changed by the landlord to allow new occupiers to be added to it.¹⁷

Where a landlord knows that an occupier will turn 18 years old during the term of the agreement, the landlord does not need to carry out a check on them at the start of the agreement. Their right to rent will be investigated at a follow-up check, should one become necessary.

Expired documentation

An expired British, European Economic Area (EEA) or Swiss passport with a recognisable photograph is enough to show that a person has an unlimited right to rent. A current or expired passport from another country is also acceptable if it proves the person's right to be in the UK indefinitely (eg due to visa stamps on it).¹⁸

Expired documents are not acceptable evidence of a time-limited right to rent.

Family members

A person will be seen as a landlord if a family member is making a regular financial contribution towards the rent. Paying bills or buying food for the household could count as rent if linked to the renting arrangement. Therefore, the family member would technically need a right to rent check. However, the Code of Practice advises that where 'due to a pre-existing relationship with the occupier' the landlord knows enough about a person's immigration status, s/he can avoid to carry out right to rent checks.¹⁹

For example, a parent could argue that they know the immigration status of their child and so no check is needed. Where a person has any doubt about a family member's immigration status they should carry out a check as failure to do so could lead to a fine.²⁰

Penalties

Failure to conduct the checks or report to the Home Office the expiry of an occupier's limited right to rent at the time of conducting a follow-up check, and the provision of accommodation to a person with no right

to rent, may lead to a fine of £1000 per tenant and £80 per lodger, rising respectively to £3000 and £500 for repeated non-compliance.²¹ Enforcement will be carried out by the Home Office.²²

Discrimination

It is unlawful to discriminate against a person on the basis of colour, nationality, ethnic or national origins when renting out a home. The government has stated that landlords will not be acting in a discriminatory way as long as they carry out checks on all prospective adult occupiers.²³ Advisers should be aware that a person who feels they have faced discrimination can claim compensation.²⁴ Legal aid may be available for this if the person is on a low income.

Anyone with experience of the Right to Rent scheme, including housing advisers and local authorities, can contact the Joint Council for the Welfare of Immigrants (JCWI), who is monitoring the scheme.²⁵

No right to rent - eviction

A landlord cannot evict a tenant simply because their limited leave or visa expires during the life of the tenancy. When a landlord's follow-up check shows that an occupier no longer has a right to rent, the landlord must report this to the Home Office to avoid a penalty, but is not required to evict that occupier.²⁶

Advisers should look out for clauses in tenancy agreements stating that the tenant must have a right to rent - such a clause may be unenforceable if it purports to remove the right of an occupier to remain in occupation having initially passed a right to rent check.

Options where no right to rent

For people already renting a property prior to the commencement of the scheme, the advice may be to try to ensure that the agreement continues (or is renewed) and no changes (such as adding a new person to the agreement) are made to it unnecessarily as this could give rise to a right to rent check.

Where a person with no right to rent is homeless, they may be able to find accommodation that is excluded from the scheme such as a hostel or refuge, or accommodation that is free of charge such as staying with friends. In some circumstances social services might provide help with accommodation under the Care Act 2014, or under section 17 of the Children Act 1989.

Footnotes

¹⁷ para 5 Code of Practice.

¹⁸ arts. 6 and 7 Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2016/9; para 5.2 Code of Practice, List A Group 1.

¹⁹ para 3.6 Code of Practice.

²⁰ para 7 Code of Practice.

²¹ s.23(2) Immigration Act 2014.

²² tinyurl.com/R2R-enforce

²³ p.4 Code of practice for landlords - avoiding unlawful discrimination when conducting 'right to rent' checks in the private residential sector, Home Office, October 2014.

²⁴ See Citizens Advice website tinyurl.com/R2R-CAB and Equality Advisory Support Services (EASS) website tinyurl.com/EASS-advice or contact the EASS Advice line on 0808 800 0082.

²⁵ tinyurl.com/R2R-JCWI

²⁶ Currently, if a landlord wants to evict an occupier whose limited right to rent has expired, they will need to follow the appropriate process for lawful eviction. The Immigration Bill 2015/16 proposes changes that would allow a landlord to end a tenancy due to an occupier not having a right to rent but this is not law yet. For a commentary on the Immigration Bill and the changes it could bring see tinyurl.com/HOCR2R

An illustrated list of documents proving a right to rent, plus the list of 'acceptable professionals' can be found on Gov.uk at tinyurl.com/R2Rdocs

Unlimited right to rent

Any **one** of the following will prove an unlimited right to rent:

- (current or expired) UK/EEA/Swiss passport or national identity card
- (current or expired) registration certificate/document certifying the permanent right to reside of EEA/Swiss nationals
- (current or expired) 'permanent' residence, 'indefinite leave to remain', 'indefinite leave to enter' or 'no time limit' card certifying the permanent right to reside of a non-EEA national who is a family member of an EEA national
- (current or expired) biometric 'residence permit' card certifying that the holder has 'indefinite' leave in the UK, or has 'no time limit' on their stay in the UK
- (current or expired) passport or other 'travel document' endorsed by the Home Office to show that the holder is either 'exempt from immigration control', has 'indefinite' leave in the UK, has the 'right of abode' in the UK, or has 'no time limit' on their stay in the UK
- current immigration status document with a valid endorsement by the Home Office to show that the holder is either 'exempt from immigration control', has 'indefinite' leave in the UK, has the 'right of abode' in the UK, or has 'no time limit' on their stay in the UK
- certificate of registration or naturalisation as a British citizen.

Any **two** of the following will also prove an unlimited right to rent:

- UK full birth or adoption certificate
- current full or provisional photo card UK driving licence
- evidence of current/past service in the UK armed forces
- paperwork relating to the prospective occupier's welfare benefits
- criminal record check

- letter from UK further/higher education institution, prison service, government department or local authority and/or national offender management service
- letter of testimony from an employer containing the employee's reference/national insurance number
- letter from a private rented housing access scheme (voluntary sector or public authority)
- letter from the police confirming (with a crime reference number) the theft of a passport or biometric immigration document
- letter from a UK passport holder who is an 'acceptable professional' (eg doctor, teacher or solicitor) confirming that the writer has known the holder for more than three months.

Letters, criminal records checks and benefits paperwork must all have been written or issued within three months of the check and must contain relevant details of the prospective occupier.

Time-limited right to rent

Any **one** of the following will prove a time-limited right to rent if the document shows the holder has permission to live in the UK for a time-limited period:

- current passport / other travel document
- current biometric residence permit card
- current 'residence card' (including an accession residence card or a derivative residence card) issued by the Home Office to a non-EEA national who is either a 'family member' of an EEA or Swiss national or has a 'derivative' right of residence
- current non-EEA national residence card.

Home Office checking service

Where a prospective occupier cannot provide acceptable evidence but says their documents are with the Home Office, a landlord can use the landlord's online checking service to receive verification that the person can rent. The Home Office aims to respond to such queries within two days.¹

Under the Right to rent scheme, landlords must obtain, check and retain copies of documents that prove an occupier's right to rent.

This appendix lists the documents that a landlord can accept as evidence of a right to rent

Footnotes

¹ See tinyurl.com/askHOcheck