HOUSING LAW PRACTITIONERS ASSOCIATION

Immigration Bill 2015 – clauses 13 and 14

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About HLPA

The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, environmental health officers, academics and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. It has members throughout England and Wales.

HLPA has existed for over 25 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. Presently, meetings the take place every two months and are regularly attended by c.100 practitioners.

The Association is regularly consulted on proposed changes in housing law (whether by primary or subordinate legislation or statutory guidance). During 2015 it has given oral evidence to committees of both the Welsh Assembly (on the Renting Homes (Wales) Bill) and the House of Commons (on legal aid reforms).

Membership of HLPA is on the basis of a commitment to HLPA's objectives:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

Justin Bates and Giles Peaker are the authors of this paper. Justin is a barrister at Arden Chambers (London & Birmingham) and the vice-chair of the HLPA. He is the Deputy General Editor of the Encyclopedia of Housing Law and the author or co-author of various other books on housing law and local government law. Giles is a partner in the Housing and Public Law department at Anthony Gold Solicitors. He is the chair of the HLPA. He writes widely on housing law and edits the Nearly Legal: Housing Law news and comment website.

Clause 13

1. Cause 13 creates two new routes by which a landlord can recover possession.

2. The first is new s.33D, being inserted into the Immigration Act 2014. The Secretary of State will serve notice on the landlord, informing him that a person without a "right to rent" lives in the property (new s.33D(2)). The landlord is then given power to terminate the tenancy by giving at least 28 days written notice to the tenants (ss.33D(3)-(4)). The notice will be enforceable "as if it were an order of the High Court" (s.33D(6)). There will be no need to obtain an order for possession (indeed, the Protection from Eviction Act 1977 is expressly amended to make this point – new s.33E(4)).

3. We have the following concerns:

(a) There is no appeal mechanism for either the landlord or the tenant against the service of either notice. What happens if the Secretary of State has made an error? The only remedy that we can see would be for (i) the landlord to seek judicial review of the Secretary of State; or (ii) the tenant to seek an injunction (probably in the High Court) to prevent the landlord acting on his own notice. Both of these are likely to be expensive and, frankly, largely inaccessible to the majority of landlords and tenants.

(b) It is not at all clear what it means for a notice to be enforceable "as if it were an order of the High Court." In particular, the landlord's notice to his tenant seems intended to have the effect of terminating the underlying tenancy and removing all security of tenure. That would appear to suggest that the landlord can simply use "self-help" to recover possession, *i.e.* personally turn up and throw occupiers onto the street. There are clear risks in this, of potential violence and damage to property, for both landlord and tenant. If what the government intends is that a High Court Enforcement Officer must carry out the eviction, then that needs to be made clear.

(i) This second point is particularly important. If a possession order had been obtained and executed, even on an erroneous basis, there could be no question of the landlord having carried out an unlawful eviction or committing a trespass.[1] But this is *not* a possession order, merely a power to enforce a notice. There is an obvious risk to landlords that, if it turns out *either* notice was erroneous, they could have committed a crime;[2] a tort;[3] and a breach of contract.[4]

[1] *E.g.* see the discussion in *Southwark LBC v Sarfo* (1999) 32 HLR 602 CA and *Brent LBC v Botu* [2001] 33 HLR 14.
[2] Unlawful eviction is a crime – Protection from Eviction Act 1977.
[3] Such as trespass to land or trespass to goods.

(c) There is no provision for rent repayment, whether as a condition of execution or at all. So, a tenant who has no right to rent could have paid rent in advance (whether monthly, yearly, etc) and, after only a matter of days/weeks, evicted pursuant to these notice provisions. The landlord is under no obligation to refund the rent for the "lost" period. There clearly should be such an obligation, akin to that which the Government has recently imposed on private sector landlords under assured shorthold tenancies in the Deregulation Act 2015.[5]

4. The second is a new mandatory Ground for possession in both the Housing Act 1988 and the Rent Act 1977, again, triggered by a notice to the landlord from the Secretary of State.

5. Whilst we have various objections to mandatory grounds[6] we recognise that *if* there has to be a new route to recovering possession, it is far preferable that it be through a court than simply as a result of the service of a notice by the landlord. This route would (probably)[7] at least allow for the court to consider whether *in fact* someone did not have a right to rent and whether the notice from the Secretary of State was valid. However, it still suffers from the absence of any rent repayment mechanism.

6. The creation of a mandatory ground against a Rent Act tenant is remarkable. Save for a tiny number of residual categories, it has not been possible to create new Rent Act tenancies since January 1989. Yet this Bill envisages bringing possession proceedings against such tenants. Given that, in order to be a Rent Act tenant today, one would have to have been occupying the property as your only or principal home since *pre*-January 1989, there would be an obvious unfairness[8] in recovering possession against someone who had only known that property as home for over 25 years.[9]

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[4] Evicting by erroneous notice is likely to be a breach of the covenant for quiet enjoyment which is implied into all residential tenancy agreements.

[5] The 2015 Act provisions will not apply here because the Bill makes clear that, once the notice is served, the tenancy cannot be an Assured or Assured Shorthold tenancy.

[6] The absence of any judicial discretion means that individual hardship cannot be prevented. To take an extreme example, if the law requires that possession must be ordered in 14 days, even if there is clear medical evidence that an occupier will die in, say, 15 days, then the order must be made and executed.

[7] On the basis that the validity of the notice is a precedent or jurisdictional fact which must be established, although we would much prefer it if the Bill could be amended to make this clear.

[8] And possibly even a breach of Art.8, ECHR.

[9] Indeed, one would have thought that such a person would have a very strong case for being allowed to remain in the UK in any event. Certainly, this was the view of the Residential Landlords Association when giving oral evidence to the Bill Committee: "First, it is generous of you to put in a provision to allow eviction of Rent Act tenants, but it is possibly not entirely necessary, as Rent Act tenants will have lived in the UK for so long that they are almost certainly entitled to stay here anyway, irrespective

Clause 14

7. This contains the text of the two new mandatory grounds for possession, as to which, see above.

8, It also contains a new power (new s.10A, Housing Act 1988) to allow a court to transfer the tenancy from a person who has no right to rent into the name of someone who does. There are various problems with this proposal:

(a) it only arises if no other ground for possession is made out, so, in practice, it will be relatively easy to circumvent and we would prefer this restriction be removed;

(b) it makes no provision for a range of other landlord and tenant provisions to be similarly changed, *e.g.* suppose the disqualified tenant has paid a deposit, is that now transferred to the "new" tenant and, if so, how should the landlord and tenancy deposit scheme administrator respond (see Housing Act 2004 for the provisions on tenancy deposits);

(c) why has this provision not been extended to Rent Act tenants, so as to allow qualified occupiers to retain the tenancy in the same way?

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of how they entered the country." http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151020/pm/151020s01.htm