



Home Office

# **UK Borders Act 2007:** Code of Practice about the sanctions for non-compliance with the biometric registration regulations

(February 2015)

This document is a draft only and is subject to public consultation

This Code of Practice is for use by those persons issued with a civil penalty notice or immigration sanction under the biometric registration regulations made under the UK Borders Act 2007, and their representatives and legal advisers. It is also to be used by case-working staff in the Home Office and the civil courts.



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# About this code of practice

## Background

1. The Government is committed to securing the United Kingdom's borders and improving immigration control. An important aspect of this is reducing identity abuse through the use of more secure and easily verified proof of permission to be in the UK (referred to as leave to enter or leave to remain in the UK, or "leave") and to access the labour market or public services.
2. A central part of delivering these objectives has been the progressive transition, since 2008, to the use of Biometric Immigration Documents (BIDs)<sup>1</sup>. BIDs are replacing less secure evidence of leave, such as immigration status letters, or ink stamps and stickers or vignettes in travel documents.
3. The rollout of BIDs to those making successful in-country applications to extend their leave in the UK was completed in 2012. The final phase of the transition will be completed during 2015, when those who apply for leave for more than six months from outside the UK will start to be issued with BIDs.
4. Under the UK Borders Act 2007<sup>2</sup> (the 2007 Act) the Secretary of State may make regulations<sup>3</sup> to require foreign nationals subject to immigration control to apply for a BID and, as part of that application, to provide their biometric information<sup>4</sup>, such as a photograph of their face and their fingerprints.
5. If a person does not comply with a requirement of the regulations, the Secretary of State may impose a sanction<sup>5</sup>. This forms part of the overall strategy of ensuring foreign nationals living in the United Kingdom have secure, reliable evidence of their immigration status and comply with any conditions imposed on them.

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<sup>1</sup>References in this Code to a Biometric Immigration Document (BID) include both Biometric Residence Permits and Short Stay Permits.

<sup>2</sup>Section 7.

<sup>3</sup>Currently the Immigration (Biometric Registration) Regulations 2008 SI 2008/3048 (as amended).

<sup>4</sup>Section 5(1)(a).

<sup>5</sup>Regulation 23.

## Legal requirements

6. The 2007 Act requires the Secretary of State to issue a Code of Practice<sup>6</sup> about the matters which the Secretary of State must consider when determining whether to issue a civil penalty notice. The Act also requires the Secretary of State to publish proposals, consult members of the public, and lay a draft of the Code before Parliament before issuing or re-issuing it.
7. The Act provides that the relevant civil courts (the County Court in England, Wales and Northern Ireland, and the Sheriff Court in Scotland) must take the Code into account when considering any appeal against the issue of a civil penalty under section 11 of the 2007 Act.
8. This Code of Practice is an important document which will be relevant to a person who is issued with a sanction under the 2007 Act, and their representatives and legal advisers. It will also be used by case working staff in the Home Office, and by the civil courts.
9. This Code updates the one issued in 2008. It includes detail of the following changes to the operation of the sanctions scheme:
  - drafting changes consequent to the repeal of the Identity Cards Act 2006, most notably replacement of reference to the *Identity Card for Foreign Nationals* with reference to BIDs;
  - the provision of BIDs for relevant applications made from outside the UK, and ensuring the document is safely issued to the applicant.
10. For BID applications made within the UK the Home Office has, since 2008, generally used a secure courier service to deliver the BID to its rightful holder. For those who apply from outside the UK the Home Office has introduced a secure collection arrangement using almost 200 branches of the Post Office network to overcome two potential problems not normally encountered by those who make their application from within the UK:
  - the absence, at the time of application, of an appropriately secure address in the UK to which the BID could be delivered; and
  - the substantially greater likelihood that the applicant will not be in the UK at the time the BID would normally become available for delivery by a secure courier.

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<sup>6</sup>Section 13(1).

## Summary of the requirements

11. All foreign nationals who are subject to immigration control must comply with the relevant requirements of the regulations.
12. The requirements are divided into three categories relating to: **application, maintenance and collection**. A breach of any relevant requirement may result in the imposition of a sanction.
13. **Application requirements** are those which form an essential part of the application process for a BID. They require a person to:
  - apply or reapply for a BID when required to do so by the regulations;
  - surrender any requested documents connected with immigration or nationality when required as part of the issue of a BID; and
  - follow any process specified by an authorised person in respect of the particular application that has been made, including providing by a specified date a record of their fingerprints and a photograph of their face.
14. **Maintenance requirements are those which apply** after a BID has been issued. They require a person to:
  - notify the Secretary of State when they suspect that the information provided in connection with their application for a BID was or has become false, misleading or incomplete;
  - use their BID in specified circumstances;
  - comply with other requirements specified in the biometric registration regulations; and
  - surrender to the Secretary of State when required to do so any BID in the person's possession.
15. The **collection requirements** are introduced by the 2015 Amendment Regulations for those people applying from outside the United Kingdom. They require a person to collect their BID:
  - from the UK Post Office specified in the person's notification letter (or an agreed alternative collection point); and
  - within the specified number of days of the person's first arrival in the UK as set out in their notification letter.

## Summary of the types of sanctions

16. If a person does not comply with a requirement of the regulations, the Secretary of State will consider whether to impose one or more of the following sanctions<sup>7</sup>:
- a **refusal to issue** a BID;
  - an **immigration sanction**, that is:
    - the refusal or rejection as invalid of a person's application for leave to enter or remain in the UK;
    - the cancellation or variation by curtailment of a person's existing leave to enter or remain in the UK;
  - a financial sanction in the form of a civil penalty notice.
17. To assess which sanction to impose, and if relevant at what level any penalty should be set, the Secretary of State will first consider which requirement has been breached and the seriousness of the particular breach. Consideration will also be given to whether the person has limited or indefinite leave to enter or remain in the UK.
18. The Secretary of State will not issue a civil penalty notice after imposing an immigration sanction in respect of a particular breach. However, this does not exclude the imposition of an immigration sanction on a person who has already been subject to a civil penalty notice, or notices, for a failure to comply if, after a period of 90 days, they continue in their failure to comply with that requirement.
19. If a person fails to comply with a **maintenance requirement** or a **collection requirement** the Secretary of State may consider cancelling their BID. If the Secretary of State cancels a BID, the person will be required to apply for a new one and to pay the associated fee.

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<sup>7</sup>Regulation 23 of the Immigration (Biometric Registration) Regulations 2008 (as amended).

# Process before issuing a sanction

- 20 If the Secretary of State is satisfied that a person has failed without a reasonable excuse to comply with a requirement of the regulations the Secretary of State may issue that person with a warning letter<sup>8</sup>.

## Content of warning letter

21. The warning letter will set out the reasons why the Secretary of State considers the person has not complied with the requirements of the regulations and what action may be taken, and will outline how the person may avoid a sanction being imposed provided they:
- respond within the “warning period”, which is 10 working days beginning on the day the letter is served, which is either the date it is administered by an officer acting on behalf of the Secretary of State, or two days following the post date of the letter or the email date if the warning letter is issued by email;
  - provide an acceptable explanation as to why they were unable to comply and demonstrate that compliance will take place as soon as is practically possible;
  - provide an acceptable explanation that allows the Secretary of State to put into place special arrangements to enable the person to comply; or
  - provide an acceptable explanation or satisfactory evidence that they cannot comply.

## Following the issuing of a warning letter

22. The Secretary of State will not proceed to impose a sanction until the warning period has ended.
23. If the Secretary of State decides to issue the person with a civil penalty notice, the person will have the right to make a written objection, which must be received by the Secretary of State within the “objection period”. This is **20 working days** beginning with the date of the civil penalty notice. The person will also have a right of appeal to the relevant civil court against the Secretary of State’s decision to issue a civil penalty notice.
24. If the Secretary of State decides to impose an immigration sanction, the person may have a right of appeal against that decision under the Nationality, Immigration and Asylum Act 2002.
25. If, 20 working days following the beginning of the warning period, the Secretary of State has neither issued the person with a civil penalty notice nor provided written notification that the person is to be subject to an immigration sanction, no further action will be taken in respect of that particular incident of non-compliance.

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<sup>8</sup>In the presence of an official acting on behalf of the Secretary of State the warning can be given orally rather than in writing.



# Immigration sanctions

26. The Secretary of State may consider imposing an immigration sanction on a person:
- who breaches an application requirement; or
  - who persistently breaches requirements of any type, particularly where there is a continuing failure to comply despite the earlier imposition of civil penalties.

## Rejection or refusal of an immigration application

- 27 The Secretary of State will refuse to issue a BID when a person fails to comply with an application requirement without a reasonable explanation, and may reject an application for leave to enter or remain<sup>9</sup>.

## Curtailment or cancellation of leave

28. The Secretary of State may consider curtailing or cancelling any existing limited leave to enter or remain in the UK, if a person with limited leave persistently fails to comply with an application requirement. This will be the usual response when a person has failed to comply with an application requirement three times within a five-year period.
29. If, during any five-year period, a person fails to comply with a total of **any five** requirements (whether application, maintenance or collection requirements) the Secretary of State may consider curtailing any existing limited leave held by that person.
30. The Secretary of State will only consider cancelling indefinite leave in compelling circumstances, and if doing so would not contravene domestic law or the UK's international obligations.

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<sup>9</sup>Regulation 23 of the Immigration (Biometric Registration) Regulations 2008 (as amended).

## Circumstances when immigration sanctions will not be imposed

31. The Secretary of State will not impose an immigration sanction for failure to comply with a requirement of the regulations where:
  - the person is to be granted leave following a protection claim (a claim that removal would breach the United Kingdom's obligations under the Refugee Convention or in relation to persons eligible for a grant of humanitarian protection);
  - or
  - the person is to be granted leave following a human rights claim.
32. The Secretary of State cannot issue the person with a BID (which acts as evidence of their leave) until they apply for the BID and then comply with the specified biometric information recording processes.
33. An immigration sanction will not be used where the person has existing indefinite leave to enter or remain in the UK, unless there are compelling reasons for cancelling this leave.

## Right of appeal

34. Under the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014 there will not be a statutory appeal against an immigration sanction. This is because there are only appeal rights against the refusal of protection or human rights claims and these are circumstances excluded from an immigration sanction (see above).
35. There may, however, be transitional cases that exist where the application for leave to remain pre-dates the Immigration Act 2014 being fully in force. If the Secretary of State decides to refuse an application for leave, or to curtail or cancel leave in a transitional case, the person may have a right of appeal to the First-tier Tribunal.

# Civil penalties

36. The Secretary of State will consider imposing a financial sanction in the form of a civil penalty notice following a failure to comply with a requirement where:
- a person has existing leave and the Secretary of State has decided not to impose an immigration sanction for that failure to comply;
  - a person has applied for a travel document but has failed to apply for a BID, or has applied but has failed to comply with the specified biometric information recording processes;
  - a person is to be, or has been, granted leave as a refugee or on human rights grounds and has failed to apply for a BID;
  - imposition of an immigration sanction would be contrary to the person's rights under the European Convention on Human Rights; or
  - a person has existing indefinite leave to enter or remain in the UK and there are no compelling circumstances why that leave should be cancelled.

## Determining the amount of the civil penalty notice

37. Where the Secretary of State is satisfied that a civil penalty should be issued, consideration will be given to which requirement of the regulations has been breached.
38. To reflect the importance of breaching an application requirement, the level of the civil penalty notice will be higher than the amount issued for the breach of a maintenance requirement or a collection requirement.
39. The basic penalty for an initial failure to comply with either a maintenance requirement or a collection requirement will be £125.
40. The basic penalty for an initial failure to comply with an application requirement will be £250.

## Evidence of mitigating circumstances

41. When determining the amount of the financial sanction the Secretary of State will consider whether the person has produced evidence of mitigating circumstances that would warrant a reduction in the amount of a civil penalty.
42. The Secretary of State may reduce the penalty by the amount stated in the **Sanctions Table** where there is satisfactory evidence that the penalty would cause undue financial hardship to a person in receipt of means tested benefits.
43. Where a child under the age of 18 fails to comply with one of the requirements, the Secretary of State will usually consider issuing a civil penalty notice to the child's "designated adult", who will be liable for the civil penalty on the child's behalf. A designated adult who receives a penalty on behalf of a child will be able to object and appeal against that penalty.

44. Where the designated adult is also in receipt of a civil penalty in respect of their own non-compliance, the Secretary of State may reduce the penalty in respect of the child by the amount stated in the **Sanctions Table**.
45. Where a person provides evidence of more than one extenuating circumstance the Secretary of State will allow only a single discount regardless of the number of mitigating circumstances.

## Further incidents of non-compliance

46. Where there are further incidents of non-compliance or continued failures in respect of the original requirement in a five-year period, the Secretary of State may increase the level of penalty by the amounts shown in the **Sanctions Table** up to the statutory maximum. The total amount of the penalty on each occasion will be based on the number of times the person has failed to comply, or continued in their refusal to comply, and not the nature of the previous non-compliance.

## Payment of penalties

47. Once the amount of the civil penalty has been fixed, the Secretary of State or the relevant court may allow the penalty to be paid in instalments. The Secretary of State or the court will decide the amounts and periods of payments.

### Sanctions Table

	Where there has been a contravention of an application requirement	Where there has been a contravention of a maintenance requirement or a collection requirement
Basic penalty level	£250	£125
Incident of non-compliance after first incident within the period or continued non-compliance	+ £250	+ £125
Evidence of mitigating circumstances	- £100	- £50

## Issuing a civil penalty notice

48. If the Secretary of State receives a response within the warning period and is satisfied that a person is taking the steps required to comply with the relevant requirement of the regulations, then a civil penalty will not be imposed. The Secretary of State, however, reserves the right to consider issuing a civil penalty notice if there is further non-compliance.
49. If no response is received to the warning letter within the warning period the Secretary of State may decide to issue a civil penalty notice. The notice will specify the:
  - amount of the penalty;
  - date before which the penalty must be paid;
  - methods of payment by which the civil penalty may be paid;
  - grounds on which the Secretary of State considers the person to have failed to comply with a requirement of the regulations;
  - ways to object to and appeal against a civil penalty; and
  - ways in which the civil penalty may be enforced.

## Right of objection

50. If the Secretary of State has issued a civil penalty notice to a person they will have a right to object and/or appeal in writing on the grounds that:
  - they have not failed to comply with a requirement of the regulations;
  - it is unreasonable to require them to pay a penalty; or
  - the amount of the penalty is excessive.
51. The person must submit a notice of objection using the specified form<sup>11</sup>, completed in English or Welsh. The notice of objection must be received by the Secretary of State by post within the objection period.
52. The person must fully complete the form, and must include the address where they are residing and their signature. The form must clearly set out the grounds and reasons for objecting to the civil penalty notice.
53. The Secretary of State will consider a notice of objection and may:
  - cancel the civil penalty notice;
  - reduce the amount of the civil penalty by varying it;
  - increase the amount of the penalty by issuing a new civil penalty notice; or
  - confirm the amount of the civil penalty.
54. The Secretary of State will inform the person of the outcome of the objection in writing.
55. If, following an objection, a civil penalty notice is cancelled or the amount of the civil penalty is reduced the Secretary of State will not usually pay any of the costs which the person incurred when objecting. The objection process does not attract a fee and is designed to avoid significant costs.

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<sup>11</sup><http://www.legislation.gov.uk/uksi/2008/2830/schedule/made>.

56. If the Secretary of State has not issued a response within 20 working days following the end of the objection period, the civil penalty notice will be cancelled. However, it remains open to the Secretary of State to issue further penalty notices if the person persists in their failure to comply with the regulations.
57. If a person has objected to a civil penalty notice, but new evidence is submitted which shows the original amount was too low, the Secretary of State may decide to increase the amount of the civil penalty. This is in addition to the Secretary of State's powers to cancel, reduce or confirm the penalty notices issued.

## Right of appeal

58. There is no right of appeal to the Tribunal against a civil penalty. However, a person may appeal to the civil courts against a civil penalty notice imposed on them by the Secretary of State. An appeal may be brought for the same reasons as making an objection.
59. A person may appeal whether or not they have submitted a written objection to the Secretary of State.
60. Following an appeal, the Secretary of State will take account of any decision by the court to allow an appeal and will arrange for the person to comply with the requirement of the regulations where appropriate.

## The role of the court

61. The relevant civil courts (the County Court in England, Wales and Northern Ireland and the Sheriff Court in Scotland) are required to have regard to this Code of Practice when considering a person's appeal<sup>12</sup>. The court may review the Secretary of State's decision to impose a civil penalty, including any decision made after the Secretary of State's consideration of a written objection. The court may consider matters of which the Secretary of State was not aware when issuing a civil penalty notice<sup>13</sup>.
62. On consideration of an appeal the court may:
  - cancel the civil penalty;
  - reduce the amount of the civil penalty by varying the notice;
  - increase the amount of the civil penalty by varying the penalty notice (whether because the court considers the original amount to have been insufficient or that the appeal should not have been brought); or
  - confirm the civil penalty notice.
63. Where a court increases the penalty by varying the notice there may be a right of appeal to a higher court.

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<sup>12</sup>Section 13(3) of the UK Borders Act 2007.

<sup>13</sup>Section 11(3) of the UK Borders Act 2007.

## Costs<sup>14</sup>

64. If it considers it appropriate the court may require the Secretary of State to pay the reasonable costs of a successful appellant.
65. The Secretary of State may apply to the court to recover the Secretary of State's reasonable costs from an unsuccessful appellant.

## Enforcement of a civil penalty

66. If a person has exhausted their rights of objection and appeal but has still failed to pay the civil penalty, the Secretary of State may enforce the civil penalty through the courts as a debt due, or instruct the sheriff officers to take enforcement action.
67. The debt may be enforced by various means, including attachment of earnings orders (in England, Wales and Northern Ireland), or earnings arrestment or attachment in Scotland.
68. If the Secretary of State has issued a civil penalty notice against a designated adult the debt will be enforced against that adult, rather than against the child.
69. There is no power to imprison a person for failure to pay a civil penalty. However, the offence of contempt of court may be applicable.

## Continued non-compliance with a requirement of the regulations

70. If a person's failure to comply with a requirement is continuing 90 days after the issue of the civil penalty notice, the Secretary of State may issue a new civil penalty notice for that continuing failure (taking account of paragraph 83 of this Code). A further civil penalty notice may only be issued after any objection and/or appeal against the original notice is withdrawn or determined, or the deadline for objecting and appealing has elapsed, and where the person continues their non-compliance<sup>15</sup>.
71. The Secretary of State may continue to issue civil penalties until the person has complied with the requirement. Any new notice issued will reflect the person's particular circumstances, which may include the person's continued non-compliance with the requirement for which the penalty was originally imposed and any non-compliance with other requirements.
72. The Secretary of State will not impose a civil penalty notice on a person who has already been subject to an immigration sanction if they continue to fail to comply with the requirement in respect of which the immigration sanction was imposed.

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<sup>14</sup>In Scotland the normal rule is that expenses usually follow success in any litigation.

<sup>15</sup>Section 9(5) of the UK Borders Act 2007.

# Provisions for vulnerable people

73. All foreign nationals who are subject to immigration control are required to comply with the regulations. This includes a person who may be vulnerable, such as a person;
- with a serious medical condition;
  - who lacks capacity as defined under
    - the Mental Capacity Act 2005 (for England and Wales);
    - the Adults with Incapacity (Scotland) Act 2000; or
    - common law in Northern Ireland;
  - who is a victim of trafficking or domestic violence.
74. In such cases, and where there is **satisfactory evidence** that a person has difficulty or has failed to comply with a requirement because of a vulnerability, the Secretary of State will consider alternative arrangements to enable the person to comply. Each case will be considered on its individual merits and handled with care and sensitivity.

## Serious medical conditions

75. Where the person's vulnerability is based upon a serious medical condition, for example, the person has substantial mobility difficulties or is infirm they or their carer or designated adult, must provide satisfactory medical evidence from the treating clinician. In the majority of cases, the Secretary of State will consider delaying the requirement for a short period to enable the person to either recover sufficiently to enable them to comply, or to make alternative arrangements to enable them to comply.

## Where a person lacks capacity to make a decision

76. Where there is satisfactory evidence that a person lacks the capacity to make decisions within the terms of the Mental Capacity Act 2005 (in England and Wales) or common law (in Northern Ireland), the Secretary of State will allow the person to identify a carer, close friend or family member who is able to assist them to comply. Where the person concerned is unable to identify someone who is able to assist, efforts will be made to identify such a person. Where the person has appointed an attorney, under a lasting power of attorney (in England and Wales), or under an enduring power of attorney (in Northern Ireland), whilst they had capacity, or a deputy has been appointed by the Court of Protection, it is likely that individual will be the most suitable person to assist.



77. Where there is satisfactory evidence that the person is an adult with incapacity within the terms of the Adults with Incapacity (Scotland) Act 2000, any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under that Act or under a court order is likely to be the most suitable person to assist.
78. Where no suitable person can be identified, the Secretary of State will act in accordance with the principles of the relevant mental capacity law in supporting the person to comply with any of the regulations. In particular, the Secretary of State will ensure, as far as is possible, that the person is given:
  - the opportunity to make decisions for themselves and the fullest possible input into any decisions made on their behalf; and
  - help to express their wishes, ensuring that they are able to make those decisions for which they have capacity; and where decisions are made on their behalf, that they have their wishes taken into consideration (where possible).
79. The Secretary of State may decide, in some cases, to delay the application of the regulations, or make alternative arrangements, until the person is more capable of understanding what is required.

## **Victims of trafficking and domestic violence**

80. Where there is satisfactory evidence that the person is a victim of trafficking or domestic violence, the Secretary of State will ensure that the person is treated compassionately and appropriately.

## **Where a sanction will be imposed upon a vulnerable person**

81. The Secretary of State will only impose a sanction on a vulnerable person where there is satisfactory evidence that despite arrangements appropriate to their particular vulnerability having been available they:
  - intentionally failed to cooperate;
  - understood what was required of them; and
  - understood the consequences of not complying.

## Where a sanction will not be imposed

82. Where the Secretary of State has issued a warning letter advising a person that they are liable to be subject to an immigration sanction or a civil penalty notice, that letter will be withdrawn if the person responds providing:
  - satisfactory evidence that they were unaware that they were required to comply with a requirement and have now made acceptable arrangements to comply;
  - satisfactory evidence that they have complied with the requirement;
  - a credible explanation that they did not receive notice of the requirement;
  - satisfactory evidence that they did not understand the requirement due to language difficulties or illiteracy;
  - satisfactory evidence of other circumstances outside their control where it would be unreasonable to impose the sanction.
83. The Secretary of State will not impose a sanction where the person has an appeal against a previous civil penalty outstanding which has not been considered by the court.
84. In such cases, the Secretary of State will make arrangements so that the person is able to comply with the requirements as far as is possible.





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