



Home Office

Summary of responses to the consultation on proposed amendments to the Code of Practice about the sanctions for non-compliance with the biometric registration regulations

March 2015

Introduction

All foreign nationals from outside the European Economic Area (EEA) or Switzerland applying for or granted permission to stay in the UK for more than six months have to register their fingerprints and digital facial image.

Successful in-country applicants given permission to stay are issued with a Biometric Residence Permit as evidence of immigration status and any entitlements in the UK, such as the right to work or access to public benefits and services.

The phased roll-out of in-country applications began on 25 November 2008, and was completed in February 2012. Since this began the Home Office has issued over 1.8 million Biometric Residence Permits. The power to set up the Biometric Immigration Document scheme, under which BRPs are issued, is from the UK Borders Act 2007 and the regulations made under it (the Immigration (Biometric Registration) Regulations 2008, as amended). These regulations include provision of sanctions for non-compliance, including the issue of a civil penalty notice. The UK Borders Act requires the Secretary of State to issue a Code of Practice about matters which the Secretary of State needs to consider when determining whether to issue a civil penalty notice, and how much the civil penalty should be.

The introduction of overseas applications, where any non-EEA or Swiss national applying to stay in the UK for more than six months, will be required to apply for a Biometric Immigration Document, is scheduled to be phased in between March and July 2015. While the term Biometric Immigration Document (BID) is used throughout the Code of Practice it covers more than one type of similar document, and the migrant successful in applying to stay in the UK for more than six months will receive a Biometric Residence Permit.

As a result of this change new collection requirements have been introduced, that the successful applicant must collect their Biometric Residence Permit from a specified location within a prescribed time following their arrival in the UK. This has necessitated an update to the Code of Practice.

The UK Borders Act 2007 requires the Secretary of State to publish proposals; consult members of the public; and lay a draft before Parliament before re-issuing the Code.

The public consultation

The consultation sought responses in general to the revised draft and did not pose specific questions.

The physical presentation of the Code of Practice was changed to bring it more into line with current design standards and to make it easier to read. At the same time there was a general review of the existing text which was changed where this could improve understanding of the Code, make clearer the current operation of the Code, or remove duplication.

The substantive changes proposed to the Code of Practice were:

- To introduce a new type of requirement – “collection requirements”, which require the migrant to collect their BID at a specified location within a prescribed time of their arrival in the UK.
- To reduce the warning period from 17 days to 10 days. This is the period of time within which a migrant served with a warning letter about their alleged non-compliance with the biometric regulations, must respond to the Secretary of State.
- To reduce the objection period from 32 days to 20 days. This is the period of time within which a migrant who has been issued with a civil penalty notice must respond to the Secretary of State with a written objection.

Overview of responses

The public consultation closed on 23 December 2014 and seventeen responses were received, of which 14 were from educational institutions and representative bodies, two were from legal firms, and one was from a police force in England.

The vast majority of responses sought clarification about the proposed introduction of overseas applications for Biometric Residence Permits and the impact on students and educational institutions of their introduction, and as such had little or no specific bearing on the Code of Practice.

Each of those responding to the consultation received a substantive response from the Home Office.

Government response to the consultation

We would like to take this opportunity to thank all those who responded to this consultation. The responses we received not only helped us to improve the drafting of the Code of Practice but provided the catalyst to engage with partners and stakeholders, to both help us to improve their understanding of the wider proposal to introduce overseas applications for Biometric Residence Permits, and to work with them to ensure effective implementation of the proposal.

Analysis and summary of responses

We have focussed this section on responses that related specifically to the draft Code of Practice, and excluded the more general questions raised about the operation of the scheme, which have already been responded to directly, and are further addressed in communications releases now being sent out by the Home Office.

Paragraph 10

There is reference to “almost 200 branches of the Post Office network”. We very much hope that this number will increase. If this is likely/possible then a form of words less likely to go out of date should be chosen.

Government response: It is possible that the Post Office BID collection network will increase and we will amend the final draft of the Code to reflect this.

Paragraph 15

The full reference to the 2015 Amendment Regulations, which amend the Immigration (Biometric Registration) Regulations 2008, with statutory instrument number, should be given.

Government response: We will not be able to provide the full reference until the regulations are made but will include the reference to the 2008 biometric regulations that are being amended.

Paragraph 15

The reference in the second bullet point to ‘an alternative collection point’ is unclear. Does it mean somewhere other than a Post Office branch?

Government response: We will amend the final draft of the Code to make it clear that the alternative collection point is either another branch of the Post Office BID collection network, or a sponsor (or other) organisation where special arrangements agreed by the Home Office for that organisation to hold and distribute BIDs have been put in place.

Paragraph 15

The reference in the last line to a “notification letter” is confusing.

Government response: We will amend the final draft of the Code to refer to the “decision letter” which the migrant receives advising them of their successful application. This reflects the wording in the amended regulations.

Paragraph 18

This paragraph, when compared to the existing code at 3.3, appears to us either to be inaccurate or to indicate that the Secretary of State has been acting unlawfully. The existing code states at 3.3:

“The Secretary of State will not issue an immigration sanction AND a civil penalty notice for the same incident of non-compliance with one of the requirements of the biometric registration regulations.”

The Secretary of State should not be issuing sanctions contrary to her own published guidance.

Government response: We can confirm the Secretary of State has not been acting contrary to her own guidance, indeed we are advised that no immigration sanctions have been issued. The aim of the revision is to make clear two distinct situations. On the one hand the Secretary of State will not seek to issue a civil penalty notice following an immigration sanction, but on the other, continued non compliance following a civil penalty notice could possibly lead to an immigration sanction. We will amend the final draft to make this clear.

Paragraph 19

There should be an opportunity to explain failure to comply, for example with a collection requirement, and if this were for reasons beyond the person's control, the Biometric Information Document should not be cancelled and/or no fee should be levied for the issue of a new document.

Government response: No action would be considered without the individual being given every opportunity to explain any non-compliance. We will amend the final draft to make this clear.

Paragraph 21

The meaning of the word "administered" is unclear and we suggest it be replaced, perhaps with "given to the person"?

Government response: We note the point being made and will amend the final draft.

Paragraph 21

We object to the reduction of the warning period from 17 to 10 days. We do not understand the explanation given "to align it with the immigration rules" and should be grateful for an explanation of this statement. It is more likely that a holiday or absence for work will give rise to a 10- day absence than a 17-day absence, so that the notice is not received until time has run out. The shortened time limit appears designed to catch people out rather than to support compliance.

Government response: We note the objection but believe the reduction to 10 days is justified. This is particularly relevant to application requirements, where customers required to enrol their biometric information are granted an initial period of 15 days in which to do so. The vast majority of our customers comply with this requirement within the 15 day period, allowing us to consider their application promptly. Where enrolment has not been completed we contact the customer and give them a further opportunity to comply. It is this second period which we are proposing to reduce from 17 days to 10 days. This change would reduce the overall maximum enrolment period from 32 days to 25 days.

In cases where a second request to enrol has been given the majority of our customers comply within the first 10 days of the request. However some customers seek to exploit this process to extend their time in the UK and this change will assist

the Home Office in identifying such customers earlier without inconveniencing those who are compliant.

The reference to “align with the immigration rules” is in respect of paragraph 34 of the immigration rules. This allows customers who make an error or omission on their application, which would result in the application being invalid, an opportunity to remedy this. Customers are given 10 days to respond to such a ‘validation request’.

Paragraph 23

We object to the truncating of the objection period from 32 days to 20 working days. We do not understand the explanation given “to take account of it and keep it relative to the length of the warning period”. That a shorter warning period should mean a shorter objection period is in no way self-evident. Indeed insofar as there is any relationship between the two periods, it is arguable that shortening the warning period is a reason to lengthen the objection period.

Government response: We have taken account of the points made and propose to leave the objection period at 32 days.

Paragraphs 31, 33 and 34

The language of paragraphs 31, 33 and 34 is based upon the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. Those amendments have taken effect only for certain students and foreign criminals as defined and are subject to complex transitional provisions as set out in The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014(SI 2014/ 2771 (C. 122)) and the Immigration Act 2014 (Transitional and Saving Provisions) Order 2014 (SI 2014/ 2928). The amended provisions are thus not applicable to the vast majority of applicants. Unless the new code is not brought into effect until the new provisions apply to all categories of applicant it is necessary to amend the paragraph to include reference, both in paragraph 31 and paragraph 33, to the person being granted leave as a refugee or on human rights grounds and to curtailing or cancelling the person’s leave contrary to their rights under the Refugee Convention or the European Convention on Human Rights.

Paragraphs 34 and 35 are inaccurate. Cases to which the amendments effected by the 2014 Act apply are currently the exception rather than the rule. It is inaccurate to say “There may...be transitional cases” as there will be transitional cases.

Government response: Paragraphs 31 to 33 detail the groups who will not be subject to an immigration sanction under the code. The wording has been updated to reflect current drafting practice, for example use of the term protection claim, which it is explicitly stated covers persons granted leave as a refugee. These paragraphs are not, however, linked in their operation to the new appeals process in the Immigration Act 2014 and as such do not need to retain the language of the old process until the new one is fully in force

Paragraphs 34 and 35 on the other hand are related to cases to which the amendments in the 2014 Act apply and we will revise the draft Code as proposed, with regards to transitional cases.

Paragraph 36

We do not understand why there is no reference to the Refugee Convention in the penultimate bullet point.

Government response: We will add the reference to the Refugee Convention as suggested.

Paragraph 42

The wording has been changed. The paragraph now relates solely to those in receipt of means tested benefits and not income related benefits. No explanation has been proffered for the change and we recommend that it not be made. Limiting the financial hardship exception to those in receipt of benefits, when many persons under immigration control are not entitled to such benefits, is unreasonable and that the paragraph(s) should refer simply to financial hardship/extenuating circumstances more generally, as in the previous code.

Government response: The revised wording takes account of our view that the term “means tested benefits” also covers income related benefits.

Paragraph 43

Although this is unchanged from the current version of the code, we take this opportunity to ask when service on a child would be thought appropriate.

Government response: Those under 18 must have a “Responsible Adult” to conduct their dealings with the Home Office with regards to the Code and we will amend the final draft to make this clear.

Paragraph 48

It is unclear whether this proposes a new approach in cases where the Secretary of State is satisfied that a person is taking steps to comply. The current code speaks of a penalty being deferred; the new draft of its not being imposed, but then of consideration being given to issuing a new notice.

Government response: This is not a new approach in practice, and removal of the reference to the penalty being “deferred” was simply to reflect that there was no defined date that the penalty was being deferred to. Either the individual complied or a civil penalty notice would be considered. We will amend the final draft to make this clear.

Paragraph 55

We do not consider that paragraph 55, stating that the Secretary of State will not meet the costs of the objection where the penalty is cancelled or reduced, is appropriate. It could have the consequence of deterring persons wrongly treated from objecting. The Secretary of State should meet costs a person has been forced

to incur because of her error or negligence, or the failure of her systems and procedures. Such payments can only encourage a higher standard of work in future.

Government response: This represents the current position and the Government has no plans to change it at this time.

Paragraph 58

Reference to the county court in the current version of the code has been substituted by reference to “the civil courts”. More detail is given in paragraph 61 but it would be much clearer if detail were also given here.

Government response: We have noted this point and will include the extra detail as set out in paragraph 61 in the final draft.

Conclusion

The responses received have been most helpful, and where indicated above the Government will make the necessary amendments to the draft Code before it is published.