

**DRAFT**

***Code of Practice about the  
Sanctions for Non-compliance with  
the Biometric Registration  
Regulations***

**Laid in draft before Parliament under section 13(5)(c)  
of the UK Borders Act 2007**

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# 1. ABOUT THIS CODE OF PRACTICE

## Background

1.1 The Government is committed to securing the United Kingdom's borders and improving immigration control. It is determined to better manage and reduce identity abuses and to ensure and enforce compliance of our immigration laws. The UK also needs to comply with EU law on the format of residence permits issued to non-EEA nationals.

1.2 An important part of delivering these objectives is the introduction of compulsory identity cards for foreign nationals. Under the *UK Borders Act 2007*, the Secretary of State may make regulations to require foreign nationals subject to immigration control to apply for a biometric immigration document – that is, an identity card - and, as part of the application, to provide their biometric identifiers<sup>1</sup>, such as their facial image and fingerprints. Where a person does not comply with one of the requirements of the biometric registration regulations, the Secretary of State may impose a sanction.<sup>2</sup> This forms part of the overall strategy of ensuring foreign nationals staying in the United Kingdom have secure, reliable evidence of their immigration status and comply with any conditions imposed on them.

## Legal requirements

1.3 The 2007 Act requires the Secretary of State to issue a Code of Practice<sup>3</sup> about the matters which the Secretary of State must consider when determining whether to issue a **civil penalty notice**, and how much the civil penalty should be. The Act also requires the Secretary of State to publish proposals; consult members of the public; and lay a draft before Parliament before issuing or re-issuing the Code<sup>4</sup>. Although not a legal requirement, the Code includes information about how immigration sanctions will be applied instead of a civil penalty notice where a person fails to comply with the requirements of the regulations (section 2). The Act provides that the civil

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<sup>1</sup> Section 5(1)(a) of the Act.

<sup>2</sup> Under regulations made under section 7 of the Act

<sup>3</sup> Section 13(1) of the Act.

<sup>4</sup> Section 13(5) of the Act.

courts (i.e. county court in England, Wales and Northern Ireland, and sheriff court in Scotland) must take the code into account when considering an appeal against the issue of a civil penalty under section 11 of the 2007 Act.

1.4 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. This Code of Practice will also be used by case-working staff in the UK Border Agency, and by the county court or sheriff.

### **The Identity Cards Act 2006**

1.5 Under the *Identity Cards Act 2006*, the “identity cards for foreign nationals” issued under the 2007 Act may be designated for the purposes of the Identity Cards Act.<sup>5</sup> This means that, subject to further secondary legislation under the Identity Cards Act, a single combined “ID Card” can be issued under both the 2007 Act and the Identity Cards Act.

1.6 Where a person fails to comply with a similar requirement under both Acts, the Secretary of State will only impose a sanction under the 2007 Act.

## **2. SUMMARY OF THE COMPLIANCE REQUIREMENTS**

2.1 All foreign nationals who are subject to immigration control will need to comply with any requirement of the biometric registration regulations. The compliance requirements are classified into two groups: **application and maintenance** compliance requirements. A contravention of either requirement may result in the imposition of a sanction.

### **Application compliance requirements**

2.2 **Application requirements** are those which form an essential part of the application process for an identity card for foreign nationals. The Secretary of State may impose a sanction on a person who fails to comply (section 3.1).

2.3 **Application requirements** are those which require a person to:

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<sup>5</sup> Section 4 of the Identity Cards Act.

- apply or reapply for an identity card for foreign nationals when required to do so by regulations made under section 5 of the 2007 Act;
- surrender any requested documents connected with immigration or nationality when required as part of the issue of an identity card; and
- follow any specified process for the application stipulated by an authorised person, which may include making and attending an appointment at a specified time, date and place to enable a photograph to be taken and a record of their fingerprints to be registered.

## **Maintenance compliance requirements**

2.4 **Maintenance requirements** are other important requirements that apply after an identity card has been issued to a person and will normally result in the issuing of a civil penalty notice.

2.5 **Maintenance requirements** are:

- to notify the Secretary of State when required by regulations made under section 5 of the 2007 Act;
- to use an identity card for foreign nationals when required under regulations made under section 5 of the 2007 Act;
- when a holder is required under regulations to use an identity card, to provide information for comparison with biometric information provided in connection with the person's application for the document; and
- to surrender an identity card in the person's possession to the Secretary of State when required to do so in circumstances not connected to making an application for an identity card.

2.6 If a person does not comply with one or more of the requirements of the regulations, the Secretary of State will determine what type of sanction will be applicable – see summary at Section 3.

2.7 Where a person fails to comply with a **maintenance requirement** the Secretary of State may consider cancelling the identity card. Where the Secretary of State cancels an identity card, the person will be required to apply for a new one.

### 3. SUMMARY OF THE TYPES OF SANCTIONS

3.1 The three types of sanctions which the Secretary of State may impose under the biometric registration regulations are:

- a **refusal to issue** an identity card for foreign nationals;
- an **immigration sanction**, that is:
  - a refusal or rejection of a person's application for leave to enter or remain in the UK;
  - a variation (curtailment) or cancellation of a person's existing leave to enter or remain in the UK; and
- the issue of a **civil penalty** notice.

3.2 To assess which sanction to impose, and for civil penalty notices at what level the penalty should be, the Secretary of State will first consider which compliance requirement has been contravened and the seriousness of the particular contravention. Consideration will also be given to whether the person has limited or indefinite leave to remain in the UK.

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.

### 4. PROCESS BEFORE ISSUING A SANCTION

4.1 Where the Secretary of State is satisfied that the person has failed to comply with an **application or maintenance compliance requirement** (see Section 2), without a reasonable explanation, the person will be given a warning letter or notification which will advise him of the contravention and the likely sanction.<sup>6</sup>

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<sup>6</sup> In the presence of an official acting on behalf of the Secretary of State the warning will be given orally rather than in writing.

## Content of warning letter

4.2 The warning letter will set out the reasons why the Secretary of State considers the person had not complied with one or more of the biometric registration regulations, and what action may be taken.

4.3 The warning letter will also outline how the person may avoid a sanction being imposed providing the person:

- arranges to comply with the necessary requirement within the **seventeen working days** warning period beginning with the date of the letter, and gives notification to this effect;
- provides a credible explanation as to why he was unable to comply and gives notification, which demonstrates that compliance will take place as soon as is practically possible;
- provides a credible explanation that allows the Secretary of State to put into place special arrangements to enable the person to comply; or
- provides a credible explanation or satisfactory evidence that he cannot comply.

4.4 A multilingual leaflet printed in the ten most common languages spoken by non-EEA migrants coming to the UK, will accompany the warning letter advising the person of the letter's importance.

## Following the issuing of a warning letter

4.5 The person will have **seventeen working days**, beginning with the date of the warning letter to respond to the letter explaining why a sanction should not be imposed (see section 4.3).

4.6 Where the Secretary of State has not received<sup>7</sup> a response to the warning letter within the **seventeen working days** period, or if the person has still not complied with the biometric registration requirement by the time the **seventeen working days** period has passed, the Secretary of State will

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<sup>7</sup> Received means when a reply or notice of objection is stamped as received within the Home Office

consider all of the relevant facts, including any written response to the warning letter, before deciding to take action.

4.7 The Secretary of State will not proceed to impose an immigration sanction or issue a civil penalty notice until the **seventeen working days** warning period has passed.

4.8 Where the Secretary of State decides to issue the person with a civil penalty notice, the person will have the right to post a written objection, which must be received by the Secretary of State within **thirty-two working days** beginning with the date of the civil penalty notice (see paragraphs 7.16 - 7.24). The person will also have a right of appeal against the Secretary of State's decision to issue a civil penalty notice (see paragraphs 7.25 - 7.28).

4.9 Where the Secretary of State decides to impose an immigration sanction, the person may have a right of appeal against the Secretary of State's decision (see paragraphs 6.8 to 6.10) under the Nationality, Immigration and Asylum Act 2002.

4.10 Where the Secretary of State does not issue the person with a civil penalty notice, or provide written notification that the person is to be subject to an immigration sanction, within **thirty-two working days** beginning with the date of the warning letter, no further action will be taken in respect of the particular non-compliance. A penalty or notice is "issued" on the date of the penalty notice or the notification of the immigration sanction, not on the date of receipt by the person.

## **5. REFUSAL TO ISSUE AN IDENTITY CARD**

5.1 An identity card for a foreign national will be issued to a person who is granted leave to enter or remain in the UK, provided that regulations made under the 2007 Act required the person to apply for a card at the same time that they apply for leave. European law requires the UK to issue a biometric card when granting leave to remain to a person for more than six months, and this obligation will be rolled-out to all applications for leave incrementally.<sup>8</sup> The

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<sup>8</sup> EC Regulation 1030/2002 amended by EC Regulation 380/2008.

European Regulations require the person to provide a photograph and a record of his fingerprints unless he is physically unable to provide fingerprints, for example, if he is an amputee.

5.2 The Secretary of state will not issue an identity card under the 2007 Act to a person where:

- the Secretary of State decides not to grant the person leave to enter or remain in the United Kingdom; or
- the person who applies for leave to remain or enter fails to comply with an **application requirement**.

5.3 A decision to refuse to issue an identity card may be imposed alongside an imposition of an immigration sanction or a civil penalty notice.

5.4 There is no direct right of appeal against the Secretary of State's decision to refuse to issue an identity card.

## **6. IMMIGRATION SANCTIONS**

6.1 The Secretary of State may consider imposing an immigration sanction on a person who contravenes one or more of the **application requirements**, although there are some circumstances where immigration sanctions **cannot** be imposed (see paragraph 6.11). This is because the Secretary of State considers an **application requirement** to be particularly important, particularly when an application for an identity card is made alongside an immigration application.

6.2 There may be compelling circumstances where the Secretary of State may impose an immigration sanction on a person who persistently contravenes **maintenance requirements**, particularly where a person continues to fail to comply with requirements made under the regulations despite the imposition of civil penalty notices.

### **Rejection or refusal of an in-country immigration application**

6.3 The Secretary of State will refuse to issue an identity card for foreign nationals to a person, and/or reject or refuse an application for leave to enter

or remain if at the time of his application for leave he fails to comply with an **application requirement** without a reasonable explanation.

6.4 For example the Secretary of State will treat failure to comply with a requirement made under regulations as follows:

- The Secretary of State will **reject** the immigration application as incomplete where the person fails to book an appointment to enrol his biometrics within the specified time; and
- The Secretary of State will **refuse** an application for an identity card where the person books an appointment to provide his biometric identifiers, but fails to without reasonable excuse to complete the specified process of submitting to the biometric enrolment and verification process. The Secretary of State will also retain any fees paid.

### **Curtailment or cancellation of leave**

6.5 The Secretary of State may consider curtailing existing limited leave to remain in the UK, so that no outstanding leave remains, where a person with limited leave to enter or remain in the UK persistently fails to comply with an **application requirement** (but see paragraph 6.11). This will usually happen where the person has failed to comply with three **application requirements** within a five-year period.

6.6 Where a person fails to comply with a total of five **maintenance** and/or **application** requirements during a five-year period<sup>9</sup> the Secretary of State may consider curtailing existing leave to remain in the UK.

6.7 A person who has indefinite leave to enter or remain will only have his leave cancelled in compelling circumstances and where it would not contravene domestic law or the UK's international obligations. This may include a person who persistently fails to comply with any requirement made under regulations and the imposition of civil penalty notices have not effected his compliance with requirements imposed on him.

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<sup>9</sup> This means that a person who fails to comply with any five compliance requirements (**application or maintenance**) over a five-year period will have his remaining limited leave varied (curtailed) or cancelled.

## **Right of appeal**

6.8 Where the Secretary of State decides to **refuse an application for leave or curtail or cancel leave** to enter or remain in the UK for failing to comply with a requirement, the person may have a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 to the **Asylum and Immigration Tribunal**. However, there is no right of appeal against the Secretary of State's decision to refuse to issue an identity card for foreign nationals.

6.9 Where there is a right of appeal, the Asylum and Immigration Tribunal will have jurisdiction to decide whether the Secretary of State's decision to refuse, curtail or cancel leave is correct. Where the Tribunal find the Secretary of State's decision is correct they will dismiss the appeal.

6.10 If the person's appeal is successful, the Secretary of State will arrange to enable the person to comply with the requirements of the biometric registration regulations. This will ensure that the person is issued with an identity card for foreign nationals.

## **Circumstances when immigration sanctions will not be imposed**

6.11 The Secretary of State will **not** impose an **immigration sanction** for failing to comply with a compliance requirement (see paragraphs 2.2 to 2.5) where:

- The person is to be granted of leave as a refugee or on human rights grounds. However, under European law, the Secretary of State will not be able to issue the person with an identity card (which will also grant leave) until he applies for the card and complies with the specified biometric information recording processes;
- curtailing or cancelling the person's leave would be contrary to the person's Refugee Convention rights, or their rights under the European Convention on Human Rights; or
- Where the person has existing indefinite leave to enter or remain in the UK (unless there are compelling reasons for cancelling leave

and cancellation would not be contrary to the person's Refugee Convention rights or, their rights under the European Convention on Human Rights).

In each of these circumstances, the Secretary of State will consider issuing the person a civil penalty notice and to refuse to issue an identity card.

## **7. CIVIL PENALTIES**

7.1 The Secretary of State will consider issuing a civil penalty notice to a person who already has existing leave to enter or remain, is not applying for further leave and who contravenes one or more of the compliance requirements (see paragraphs 2.2 to 2.5).

7.2 The Secretary of State will consider issuing a civil penalty notice where the:

- person has existing leave and Secretary of State has decided not to curtail or cancel leave;
- person is to be, or has been, granted leave as a refugee or on human rights grounds;
- imposition of an immigration sanction would be contrary to the European Convention on Human Rights; or
- person has existing indefinite leave to enter or remain in the UK and there are no compelling circumstances why that leave should be cancelled.

To reflect proportionally that an **application requirement** has been contravened, the level of the civil penalty notice will be higher than the amount issued for the contravention of a **maintenance requirement** (see paragraph 7.6).

## **Failure to comply with requirements that may be imposed on other persons**

7.3 Where a person fails to comply with a requirement that may be imposed on persons other than the holder of the card, the Secretary of State will only impose a civil penalty notice on the person.

7.4 Examples of requirements that may be imposed on persons other than the holder include:

- a person who acquires an identity card without the consent of the Secretary of State or the person issued with the card, the person will be required to surrender it to the Secretary of State;
- upon the death of the person issued with an identity card, a person acquiring a card will be required to surrender it to the Secretary of State.

7.5 Where a person has been subject to a civil penalty for failing to comply with a requirement imposed on a person who is not the holder of the card (for example, failing to surrender another person's card), and then that person fails to comply with a requirement in respect of his own card (for example, a failure to provide biometrics as part of an application for a card), the sanction for the failure in respect of the other's card will not be taken into account when deciding whether it is appropriate to curtail or cancel the person's leave for his failure to comply with the application requirement in respect of his own card.

### **Determining the amount of the civil penalty notice**

7.6 Where the Secretary of State is satisfied that a civil penalty should be issued, consideration will be given to whether the applicant has contravened an **application** or **maintenance** compliance requirement. The basic penalty level for a person's initial failure to comply with a **maintenance requirement** will be  $\frac{1}{8}$  of the maximum statutory penalty. The basic penalty level for a person's initial failure to comply with an **application requirement** will be  $\frac{1}{4}$  of the maximum statutory penalty, (currently £1,000)<sup>10</sup>. The Secretary of State will increase the amount of the civil penalty for continued and subsequent

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<sup>10</sup> The maximum penalty may be increased by Order to reflect changes to the value of money.

failures to comply with a requirement, up to the maximum statutory penalty allowed – see the **Sanctions Table** at paragraph 7.13.

### **Evidence of extenuating circumstances**

7.7 The Secretary of State will also consider whether the person has evidence of extenuating circumstances would warrant a discount to the level of civil penalty notice issued. This will include factors such as where the person can demonstrate he has:

- limited financial means; or
- responsibility for children aged under 18 who have also failed to comply with one or more of the biometric registration regulations.

### **Where there are households with limited financial means**

7.8 The Secretary of State may discount the penalty issued to person by the amount stated in the **Sanctions Table** where there is satisfactory evidence that the issuing of a civil penalty would cause undue financial hardship. Financial hardship is where the person provides evidence that he is in receipt of:

- means tested benefits; or
- income related benefits.

### **Where there are households with children aged under 18 who have failed to comply with the biometric registration regulations**

7.9 Where a child under the age of 18 fails to comply with one of the biometric registration regulations, the Secretary of State will usually consider issuing a civil penalty notice to the child's designated adult, who would be liable for the civil penalty on the child's behalf.<sup>11</sup>

7.10 Where the designated adult is also in receipt of a civil penalty, in respect of his own non-compliance, the Secretary of State may discount the penalty by the amount stated in the **Sanctions Table** against the penalty issued for the child who has failed to comply. A designated adult who receives a penalty on behalf of a child will be able to object and appeal.

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<sup>11</sup> Under section 7(3) of the UK Borders Act 2007

### **Application of discounts for extenuating circumstances**

7.11 Where a person provides evidence of more than one extenuating circumstance the Secretary of State will only allow a single discount regardless of the number of extenuating circumstances.

### **Further incidences of non-compliance**

7.12 Where there are further incidences of non-compliance or continued failure in respect of the original requirement in a five-year period, the Secretary of State may increase the level of penalty by the amounts show in the **Sanctions Table** to the statutory maximum. The total amount of the penalty will be based on the number of times the person failed to comply and not the nature of the previous non-compliances.

### **Payment of penalties**

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

## Sanctions Table

|  | Where there has been a contravention of an <b>application</b> compliance requirement♣ | Where there has been a contravention of a <b>maintenance</b> compliance requirement♠ |
|--|---|--|
| Further incidences of non-compliance or continued non-compliance – for each additional failure♦♪ | + £250  | + £125   |
| Evidence of extenuating circumstances♥   | - £100  | - £50  |
| Basic penalty level  | <b>£250</b>   | <b>£125</b>  |

♣ - See paragraphs 2.2 – 2.3 of the Code of Practice

♠ - See paragraphs 2.4 -2.5 of the Code of Practice

♦ - For each addition occurrence of non-compliance in a five-year period to a maximum of £1,000, e.g. the 2nd failure of an application requirement in four years would attract a civil penalty of £500, (£250 + £250 = £500).

♥ - Where evidence of extenuating circumstances is provided the penalty is reduced, e.g. A person in receipt of income related benefits fails to comply with a maintenance requirement having previously failed to comply with an application requirement within three years would be issued with a civil penalty of £200, (£125 + £125 - £50 = £200).

♪ - Where a person with limited leave, fails to comply with a third application requirement in five-years his remaining leave will be curtailed.

### Issuing a civil penalty notice

7.14 Where the Secretary of State receives a response within the **seventeen working day** warning period, beginning with the date of the letter, and is satisfied that a person is taking the required steps to comply with a requirement under the biometric registration regulations, the imposition of a civil penalty will be deferred.

7.15 Where no response is received to the warning letter within the **seventeen working day** period and the Secretary of State has decided to impose a financial sanction, the Secretary of State will proceed to issue a civil penalty notice. The notice will specify the:

- amount of the civil penalty;
- date before which the civil 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 biometric registration regulations;
- ways to object to and appeal against a civil penalty; and
- ways in which the civil penalty will be enforced.

### **Right of objection**

7.16 Where the Secretary of State has issued a civil penalty notice to a person who has failed to comply with a requirement under the regulations, the person will have a right to object in writing.

7.17 A person issued with a penalty notice may object on the grounds that:

- i) he has not failed to comply with a requirement of the biometric registration regulations;
- ii) it is unreasonable to require him to pay a penalty; or
- iii) the amount of the penalty is excessive.

7.18 The person must submit a notice of an objection using the specified form and in English or Welsh. The notice of objection must be received by the Secretary of State by post within the specified period of **thirty-two working days** beginning with the date of the penalty notice.

7.19 The person must fully complete the form, and must include the address where he was residing and his signature. The form must clearly set out the grounds and reasons for objecting to the civil penalty notice.

7.20 The Secretary of State will consider a notice of objection and may either:

- cancel the civil penalty notice;
- reduce the amount of the civil penalty by varying the notice;
- increase the amount of the penalty by issuing a new penalty notice; or
- confirm the civil penalty.

7.21 The Secretary of State will inform the person of the outcome of the objection in writing.

7.22 Where a civil penalty notice is cancelled, or the amount of the civil penalty is reduced, following an objection, the Secretary of State will not usually pay costs which the person may have incurred when objecting. The objection process does not attract a fee and is designed to avoid significant costs.

7.23 Where the Secretary of State has not issued a response to the objection within the **thirty-two working days** beginning with the date that the Secretary of State received the objection, the civil penalty notice will be cancelled. The date of issue will be the date of the response letter. However, it remains open to the Secretary of State to issue further penalty notices if the person's failure to comply with the biometric registration regulations continues (see paragraphs 7.37 - 7.39).

7.24 Where a person has objected to a penalty notice, but new evidence is submitted which shows the original penalty award was too low, the Secretary of State may decide to increase the penalty. This is in addition to the Secretary of State's powers to cancel, reduce or confirm the penalty notices issued.

### **Right of appeal**

7.25 There is **no right** of appeal to the Asylum and Immigration Tribunal against a civil penalty. However, a person **may appeal** to the county court in England, Wales and Northern Ireland, and to the sheriff in Scotland against a civil penalty notice imposed on him by the Secretary of State. An appeal may be brought for the same reasons as making an objection.

7.26 A person may appeal whether or not he has submitted a written objection (see paragraphs 7.16 - 7.24) to the Secretary of State. Where the Secretary of State has not responded to an objection within **thirty-two working days** of receipt, the civil penalty will be treated as cancelled.

7.27 Rules of court will make provision about the timing of an appeal following the issuing of a civil penalty notice and notification of an outcome following an objection.

7.28 Following an appeal, the Secretary of State will take account of a decision by the courts to allow an appeal and will arrange for the person to comply with the requirement where appropriate.

### **The role of the county court and sheriff**

7.29 The county court in England, Wales and Northern Ireland, and the sheriff in Scotland) are required to have regard to this Code of Practice when considering a person's appeal.<sup>12</sup> The court or sheriff will be able to review the Secretary of State's decision to impose a civil penalty, including any subsequent decision made after the Secretary of State's consideration of a written objection. The court or sheriff is able to consider matters which the Secretary of State was not aware of when issuing a civil penalty notice.<sup>13</sup>

7.30 On consideration of an appeal the court or sheriff may either:

- 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 civil courts think the original amount insufficient or because the civil courts think that the appeal should not have been brought); or
- confirm the penalty notice.

7.31 Where a court or sheriff increases the penalty by varying the notice there may be a right of appeal to a higher court, and in Scotland to the sheriff principal or the Court of Session.

7.32 The court or sheriff may require the Secretary of State to pay the appellant's reasonable costs where it thinks appropriate.<sup>14</sup> However, the

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<sup>12</sup> Under section 13(3) of the UK Borders Act 2007

<sup>13</sup> Section 11(5) of the UK Borders Act 2007

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

Secretary of State may apply to the courts to recover any reasonable costs from the appellant if his appeal was unsuccessful.

### **Enforcement of a civil penalty**

7.33 Where a person has exhausted his objection and appeal rights, and 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.

7.34 Once a civil court has given its judgment, the debt may be enforced against the person by various means, including an attachment of earnings, orders and warrants of execution in England and Wales, or earnings arrestment or attachment in Scotland.

7.35 Where the Secretary of State has issued a civil penalty notice against a designated adult, i.e. someone who was responsible for ensuring the child's compliance, the debt will be enforced against the designated adult, rather than against the child.

7.36 There is no power to imprison a person for failure to pay a civil penalty. However, the offence of contempt may be applicable.

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

7.37 Where a person has failed to comply with and is continuing to fail to comply with a requirement, the Secretary of State may issue a new civil penalty notice for the continuing failure. A further civil penalty notice may 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 his non-compliance.<sup>15</sup>

7.38 The Secretary of State may continue to issue civil penalties until the person has complied with the biometric registration requirement. Any new notice issued will reflect the person's particular circumstances, which may include the person's continued non-compliance and non-compliance with other requirements. The amount of the new penalty will usually be a greater amount.

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<sup>15</sup> Under section 9(5) of the UK Borders Act 2007

7.39 The Secretary of State will not impose a civil penalty notice on a person who is subject to an immigration sanction and who continues to fail to comply with requirements.

## **8. PROVISIONS FOR VULNERABLE PEOPLE**

8.1 All foreign nationals who are subject to immigration control are required to comply with the requirements of the biometric registration regulations. This may include 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, Wales and Northern Ireland); or
  - the *Adults with Incapacity (Scotland) Act 2000*;
- who is a victim of trafficking or domestic violence.

8.2 In such cases, and where there is **satisfactory evidence** that a person has difficulty or has failed to comply with a compliance 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**

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

### **Where a person lacks capacity to make a decision**

8.4 Where there is satisfactory evidence that a person lacks the capacity to make decisions within the terms of the *Mental Capacity Act 2005*, the

Secretary of State will allow the person to identify a carer, close friend or family member who is able to assist him 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, whilst he had capacity, or a deputy has been appointed by the Court of Protection, it is likely that he will be the most suitable person to assist. Where there is satisfactory evidence that the person is an adult with incapacity within the context of the *Adults with Incapacity (Scotland) Act 2000*, any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to the adult is likely to be the most suitable person to assist the person.

8.5 Where no suitable person can be identified, the Secretary of State will act in accordance with the Acts and their principles in supporting the person to comply with any of the biometric registration regulations. In particular, the Secretary of State will ensure that the person:

- was given the opportunity to make decisions for himself and has the fullest input into any decisions made on his behalf;
- was given help to express his wishes, ensuring that he was able to make those decisions for which he does have capacity; and
- where decisions are made on the person's behalf, the person's wishes, where possible, will be taken into consideration.

8.6 The Secretary of State may decide, in some cases, to delay the implementation of the biometric registration regulations, or make alternative arrangements, until the person is more capable of understanding what is required of him.

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

8.7 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**

8.8 The Secretary of State will only proceed to impose a sanction where there is satisfactory evidence that the person intentionally failed to cooperate, and that the person also understood what was required of him and the consequences of not complying. This is despite the availability of alternative arrangements, where such arrangements are reasonably practicable.

## **9. WHERE A SANCTION WILL NOT BE IMPOSED**

9.1 Where the Secretary of State has issued a warning letter advising a person that he is liable to be subject to an immigration sanction or a civil penalty notice, but the person responds and is able to provide **satisfactory evidence** of the following circumstances, then the warning letter will be withdrawn. This will include where the person:

- provides satisfactory evidence he has complied with the requirement;
- the person is able to provide a credible explanation that he did not receive a notice of the requirement;
- the person is able to show that he was unable to understand the notice of the requirement due to language difficulties or illiteracy;
- there is evidence that the person was incapable of understanding the requirement;
- has an appeal against a previous civil penalty outstanding which has not been considered by the courts or sheriff and so a further penalty for continued failure cannot be imposed;
- was unaware that he was required to comply with a requirement and has now made acceptable arrangements to comply; or
- other circumstances outside his control where it would be unreasonable to impose the sanction.

9.2 In such cases, the Secretary of State will make arrangements so that the person is able to comply with the requirements so far as possible.