



Bar Council response to the Law Commission consultation paper on Simplification of the Immigration Rules (CP 242)

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INTRODUCTORY OBSERVATIONS

4. The problematic state of the Immigration Rules cannot be overstated, and is readily apparent from the judicial comments noted in Chapter 1 of the CP. It is to be hoped that this consultation will result in significant improvement to the Rules. In very large part, the Bar supports the proposals for restructuring and redrafting that have been made by the Commission.
5. All that said, however, it is important not to lose sight of the fact that the Immigration Rules do not exist in a vacuum. They are part of a broader web of

immigration law and guidance many parts of which suffer from the same vices as the Rules. The overall legislative scheme governing immigration in the United Kingdom is hugely complex, and only growing in complexity as successive Immigration Acts overlay, amend and expand previous legislation.

6. The complexity in the Rules and immigration law more broadly is at least in part attributable to the uniquely controversial position the topic of immigration holds in domestic political discourse. The CP rightly identifies a number of specific drivers of complexity in the Rules: the introduction of a “*points based system*”, the attempted codification of Article 8 ECHR within the Rules, the requirement, in line with the Supreme Court’s decision in *Alvi v Secretary of State for the Home Department* [2012] 1 WLR 2208, to move extensive qualifying criteria from Home Office guidance into the Rules. Underpinning all of this, however, is the fact that the policy which the system of immigration control in the United Kingdom is intended to reflect is in a state of perpetual flux. Current indicators are that this is likely to continue and quite possibly accelerate. Whilst this remains the case, there are in our view limits to what can be achieved through restructuring and redrafting the Rules, however necessary that process may be in itself.

CONSULTATION RESPONSES

CHAPTER 1: INTRODUCTION

Consultation Question 1 (Paragraph 1.43): Do consultees agree that there is a need for an overhaul of the Immigration Rules

7. Yes. There is a pressing need for the Immigration Rules to be reformed for all of the reasons identified in Chapter 1. Piecemeal, confusingly structured and poorly drafted additions to the Rules over recent years have rendered them unnecessarily complex and hard to navigate. They are near impenetrable for non-expert users and, as Underhill LJ observed in the *Singh* case, they are not readily understandable, even for ordinary lawyers and other advisers.¹

Consultation Question 2 (Paragraph 1.44): Do consultees agree with the principles we have identified to underpin the drafting of the Immigration Rules?

8. Yes.

Consultation Question 3 (Paragraph 1.45): We provisionally consider that the Immigration Rules should be drafted so as to be accessible to a non-expert user. Do consultees agree?

¹ *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 at [59], cited at 1.5.

9. Yes, for two reasons in particular, echoing the citations at paragraphs 1.34 and 1.35 of the CP. First, we agree with the observation at paragraph 1.33 that it is “*unlikely, due to cost and accessibility from abroad, that more than a fraction of [the 3 million applications made in the year to June 2016] were made with professional assistance.*” As such, there is a particularly compelling case, grounded in Rule of Law principles, that the Rules be accessible to non-expert users. Second, we agree that, even if the Rules are drafted with the needs of non-expert users at the forefront, the needs of expert users need not be compromised.

10. We note ILPA’s query as to whether making the Rules accessible to non-expert users extends to those for whom English is not a first language. We agree with the view expressed at 1.33, fn25, of the CP that good drafting makes the translation of the Rules easier where users are not English speakers. As such, the proposed changes are likely to benefit users who are not native English speakers.

Consultation Question 4 (Paragraph 1.46): To what extent do consultees think that complexity in the Immigration Rules increases the number of mistakes made by applicants?

11. Complexity in the Rules, and the frequency with which the Rules and associated guidance change, reduces the clarity and certainty of the Rules and makes it extremely difficult for applicants to understand the criteria for eligibility under the Rules and/or the evidential requirements for a successful application.

12. Complexity in the Rules and guidance also contributes to poor understanding of the Rules by decision-makers and poor-quality decisions; the reduction in appeal rights means that frequently such decisions are not scrutinised by the First Tier Tribunal. By way of example, we note that in its report *Handling of the Windrush situation*², the National Audit Office identified the fact that “*individuals found the immigration systems and the rules governing different immigration statuses complex and confusing*” as a factor that increased the risk of people with the right to remain in the UK being incorrectly detained or removed. The complexity and confusion “*meant that these individuals applied for visas for which they were ineligible, or did not keep or renew documentation demonstrating their current immigration status*” (para 3.6).

Consultation Question 5 (Paragraph 1.47): This consultation paper is published with a draft impact assessment which sets out projected savings for the Home Office, applicants and the judicial system in the event that the Immigration Rules are simplified. Do consultees think that the projected savings are accurate?

² HC 1622 Session 2017–2019, 5 December 2018.

13. We are not in a position to comment on the accuracy of the projected savings in the draft impact assessment. The focus of the analysis in the assessment is primarily on cash savings that are likely to result for HMCTS and time savings for the Home Office.

14. Whilst it is no doubt very hard to quantify the potential financial impact on applicants, we believe that if the project to simplify the Rules succeeds the likely savings for applicants overall will be sizeable (albeit this will vary significantly between different classes of applicant) because, *inter alia*:

- There will be fewer wasted application fees because fewer applications that are capable of succeeding will fail on technicalities;
- Greater clarity should result in a reduction in unmeritorious applications being lodged, with the consequential lost application fees;
- The need for legal advice will be reduced, and the time required to advise applicants should also be reduced;
- There will be fewer legal challenges, saving both the costs of advice and representation, and court fees.

CHAPTER 3: THE STATUS OF THE IMMIGRATION RULES

Consultation Question 6 (Paragraph 3.22): Do consultees agree that the unique status of the Immigration Rules does not cause difficulties to applicants in practice?

15. Yes.

CHAPTER 4: INSTRUCTIONS, GUIDANCE AND PRESCRIBED FORMS

Consultation Question 7 (Paragraph 4.29): To what extent is guidance helpfully published, presented and updated?

16. Home Office guidance for both decision-makers and applicants is often poor: it can be hard to find specific guidance or to track changes to guidance and there is no consolidated, indexed archive of previous versions of guidance.³ Guidance is verbose, repetitive and voluminous,⁴ and in places simply re-states what is said in the Rules. It

³ Previous versions can be accessed through the UK Government Web Archive section of the National Archives website, but this is not indexed, involves potentially extensive searching, and historic versions cannot always be located.

⁴ E.g. There are headings "*Modernised Guidance*" and "*Modernised Cross Cutting Guidance*" where one could never predict the contents without reading every page.

changes frequently for reasons which are unclear, and even for experienced practitioners it can be difficult to keep track of which version is operational.

17. One example is the guidance on applications for leave to remain. A web search for 'guidance leave to remain' produces a primary link to guidance on validation, variation and withdrawal of applications for leave to remain; that guidance (25 pages) has been updated 9 times since it was published in 2013. The Home Office publishes separate guidance on various aspects of leave to remain (which is not immediately apparent on a search) including on discretionary leave to remain (26 pages), refugee leave (11 pages), settlement protection / indefinite leave (47 pages), revocation of indefinite leave to remain (21 pages), calculating the continuous period of residence for the purposes of indefinite leave to remain (19 pages), restricted leave (35 pages), considering human rights claims (33 pages), Appendix FM family life (partner or parent) (125 pages), etc. More than one guidance document may be relevant to any given application. Finding most of this guidance requires prior (expert) knowledge of the difference between various categories of leave and the basis on which applications may be refused.

18. Some parts of the Rules have separate lengthy and detailed guidance documents governing different aspects. Chapter 8 of the Immigration Directorate Instructions deals with applications under Appendix FM, for example, and incorporates different guidance documents for family life applications as a partner or parent on the 5 year route (125 pages), applications as a partner or parent on the 10 year route (104 pages), English language requirements (28 pages), forced marriage (6 pages), recognition of marriage and divorce (13 pages), polygamous marriage (6 pages), domicile (14 pages), financial requirements (79 pages), financial requirements for armed forces (79 pages), maintenance (27 pages), genuine and subsisting relationships (6 pages), eligibility (7 pages), children (15 pages), further guidance on children (16 pages), and adult dependent relatives (33 pages). That does not include separate guidance on transitional arrangements for each category, which amounts to a further 17 documents; nor does it include guidance on general grounds for refusal (152 pages) which applies to all applications. Even for experienced practitioners it can be very difficult to identify where relevant guidance may be found on any given issue.

Consultation Question 8 (Paragraph 4.30): Are there any instances where the guidance contradicts the Immigration Rules and any aspects of the guidance which cause particular problems in practice?

19. We are not able to express a view on this question.

Consultation Question 9 (Paragraph 4.46): To what extent are application forms accessible? Could the process of application be improved?

20. We are not aware of any concerns about the accessibility of application forms per se. However, now that forms are to be completed online, it is difficult for advisors to see the present version of the form in a complete version (whereas they were previously available to download as pdf files). This is problematic from an adviser's perspective. Clients may seek advice on one particular aspect of an application, and it is disproportionately expensive to work through an entire online application form just to find a single page. We would suggest that downloadable pdf applications forms should be available for reference alongside the online application system.

CHAPTER 5: RECENT DRIVERS OF LENGTH AND COMPLEXITY IN THE IMMIGRATION RULES

Consultation Question 10 (Paragraph 5.53): We seek views on the correctness of the analysis set out in this chapter of recent causes of increased length and complexity in the Immigration Rules.

21. We believe the analysis of recent causes of length and complexity in the Rules is sound.

Consultation Question 11 (Paragraph 5.54): We seek views on whether our example of successive changes in the detail of evidentiary requirements in paragraph 10 of Appendix FM-SE is illustrative of the way in which prescription can generate complexity.

22. The account of successive changes to paragraph 10 of Appendix FM-SE is illustrative of the way in which evidential prescription can generate complexity.

Consultation Question 12 (Paragraph 5.55): We seek views on whether there are other examples of Immigration Rules where the underlying immigration objective has stayed the same, but evidentiary details have changed often.

23. Rule 245AA is intended to help migrants who have missed out the odd piece of information or part of a document: it has changed, however, several times in the last few years, so that the precise fixes available have varied.

24. The requirements of various routes within Part 6A found in Appendix A have altered many times: see eg the method of calculating excess absence under Rule 245AAA, or the evidential requirements of the Entrepreneur route.

CHAPTER 6: A LESS PRESCRIPTIVE APPROACH TO THE IMMIGRATION RULES?

Consultation Question 13 (Paragraph 6.72): Do consultees consider that the discretionary elements within Appendix EU and Appendix V (Visitors) have worked well in practice?

25. The experience of one contributor is that the Appendix V discretion does not work well in practice. This chimes with one detailed response to ILPA's call for evidence, where the respondent stated that "*the discretionary elements within Appendix V have many faults and lead to many poor-quality decisions which cannot be challenged*", and that such refusals have a knock-on effect on the prospects of future applications succeeding.⁵

26. The discretionary elements within Appendix EU are viewed as having worked well in practice thus far.

27. The organisation Rights of Women ('RoW') was involved in the second Private Beta Testing Phase for Appendix EU,⁶ assisting 12 women and their dependants to make applications. Some of the women did not have evidence of residence for the requisite periods in the form listed in the relevant Home Office guidance. They were assisted by RoW in identifying other evidence of residence. RoW's experience was that the discretion-based approach was effective for women who had gaps in their evidence of residence.

28. In one case, the woman that RoW was supporting was eligible for settled status based on her length of residence, but had significant gaps in her documentation owing to a history of modern slavery, sexual violence and homelessness in the United Kingdom. RoW provided evidence to the Home Office in the form of a letter from a support worker setting out the woman's background, and identifying points in time when official records may have been generated (an arrest, and an application for an NI number). The Home Office made checks which resulted in evidence of the woman being in contact with them coming to light. RoW themselves obtained evidence of the NI number application. Based on this evidence alone and taking into account the woman's circumstances, the Home Office granted settled status.

29. This is clearly an example of discretion in the Rules working well (relying on best evidence and taking account of broader personal circumstances). However, it is worth noting that the woman in question was legally represented, and that this happened during the pilot scheme when the volume of applications was relatively

⁵ See ILPA CONSULTATION RESPONSE: Appendix A – survey responses, Respondent B, answers to Q7 and Q8 for further detail.

⁶ According to the Home Office document *EU Settlement Scheme: Private Beta Testing Phase 2 Report* (p.2): "*Private beta phase 2 (PB2) of the EU Settlement Scheme has been successful, with 29,987 applications submitted from 1 November to 21 December 2018, enabling us to prove the functionality of the end-to-end online application process.*"

low and there was a focus on processes and outcomes with a view to improving the system.

30. In some respects the EU settlement scheme as codified in Appendix EU is not a good comparator for the Rules more generally. It has only been fully open since 30 March 2019 and, as the CP recognises at 6.53, the Scheme is unique in its intent and the circumstances of its implementation.⁷ Nevertheless, with those caveats, the way Appendix EU appears to be operating in practice demonstrates that a move away from a highly prescriptive approach to a more flexible and purposive approach to ascertaining whether relevant criteria are satisfied can be operated successfully.

Consultation Question 14 (Paragraph 6.91): We seek views as to whether the length of the Immigration Rules is a worthwhile price to pay for the benefits of transparency and clarity.

31. Significant parts of the Rules in their current form lack transparency and clarity. They are also very long. The length of the Rules in their current form has not aided transparency or clarity.

32. We do not think that the overall length of the Rules, as a factor in and of itself, is of great significance. However, it is undoubtedly the case that rigid and very detailed evidential prescription, which is one factor contributing to the overall length of the Rules, is a barrier to clarity and ease of use.

Consultation Question 15 (Paragraph 6.92): We seek consultees' views on the respective advantages and disadvantages of a prescriptive approach to the drafting of the Immigration Rules.

33. In discussions about the CP, this has been the most contentious issue:⁸

- a. On the one hand, overly detailed prescription, as currently found in (for example) Appendix FM-SE, leads to individuals whose circumstances in

⁷ "Appendix EU has unique features and will have represented a significant challenge to the drafters. The Rules have needed to incorporate many aspects of the existing EU law free movement regime into domestic immigration law. They also needed to take into account the more favourable provisions the government has decided to implement for the EU scheme, and the relevant terms of the draft Withdrawal Agreement."

⁸ This is reflected in the responses received by ILPA to its call for evidence. Respondent A was strongly supportive of increased discretion, but on the express basis that this be "balanced by an adequate system of appealing to an independent tribunal," which is a separate issue beyond the scope of the CP. Respondent B, on the other hand, referred to "great uneasiness" about the Rules being less prescriptive, referring to poor quality decisions in areas where the Rules are currently less prescriptive. Examples given include the issue of whether an applicant in the Tier 1 (Entrepreneur) route is a "genuine entrepreneur", and "extremely spurious" visit visa refusals. The same respondent was nevertheless broadly supportive of less prescriptive evidential requirements.

fact satisfy the criteria which underpin the Rule being refused on technical grounds for failing to evidence this in the precise form required by the Rules;

- b. On the other hand, there is a concern amongst practitioners, reflected in ILPA's consultation response under *Discretion or Prescription?*, that extending discretion in the Rules beyond simply relaxing evidential prescription would lead to less transparent decision making, and to arbitrary and inconsistent outcomes. Individuals raising these concerns point to criticism of Home Office decision making as indicative of dangers in this regard,⁹ and also note, correctly in our view, that this issue cannot be approached without taking into account the very limited appeal rights which exist and the limited nature of challenges by way of judicial review.

34. As to (b) above, the potential risks inherent in broad discretionary powers are illustrated by the Court of Appeal's recent decision in *Balajigari & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673. That case related to the application of Rule 322(5), which creates a discretionary ground of refusal on the basis, *inter alia*, that it is undesirable to permit a person to remain in the United Kingdom "*in the light of his conduct ... character or associations...*" The Appellants had been refused an extension of their leave to remain under 322(5) because of discrepancies in financial figures which had been provided to the Home Office. The approach of the Secretary of State had been flawed, in the view of the Court of Appeal, because "*he proceeded directly from finding that the discrepancies occurred to a decision that they were the result of dishonesty, without giving applicants an opportunity to proffer an innocent explanation.*" This finding that the power in Rule 322(5) been used unlawfully is very significant

⁹ By way of example only, the Justice report *Immigration and Asylum Appeals – a Fresh Look* (2 July 2018) states at 2.16: "*The Working Party notes with concern that at the time of this report, some 50 percent of Home Office decisions were not upheld on appeal in the First-tier Tribunal (Immigration and Asylum Chamber). Over time the success rate has fluctuated: 48 percent in 2010/2011; 39 percent in 2015/16. In asylum, the success rate historically hovered around the 25 percent mark (2007-2014), but rose to 35 percent in 2015 and 40 percent in 2016/17.*" The report acknowledges that allowed appeals are a "*crude measure*" of the quality of underlying decisions, and notes the Home Office position that "*only a relatively small fraction of allowed appeals [are] attributable to casework error.*" It is also true that the classes of case in which appeal rights exist at all significantly narrowed following changes to Part 5 of the Nationality, Immigration and Asylum Act 2002 in 2014. Nevertheless, the fact that appeals succeed in so many cases in our view suggests that there are serious issues with Home Office decision making. We note that the most recently published statistics (October to December 2018 (Provisional), published 14 March 2019) suggest a similar picture: "*Just over half (53%) of the 11,229 cases determined at a hearing or in papers [by the First-tier Tribunal Immigration and Asylum Chamber] were allowed/granted, although this varied by case type (44% of Asylum / Protection and 59% of Human Rights allowed / granted)*" (*Tribunals and gender recognition certificate statistics quarterly: October to December 2018* at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2018>)

given the many cases apparently raising the same issues which were awaiting this lead judgment.

35. In line with the concerns which have been expressed, our view is that there is a strong case for removing high levels of evidential prescription from the Rules and adopting a more flexible and purposive approach to identifying whether qualifying criteria in the Rules are satisfied. We would support a move to a less rigid approach to evidence, broadly in line with what the CP characterises as “*Level 2*” discretion at 6.84 and 6.85. If such an approach is adopted, guidance must be drafted with care to ensure that a genuinely flexible approach is adopted, whilst at the same time guiding caseworkers to fair and consistent exercises of judgement.

36. We do not support broadening discretion to the extent of removing objective criteria altogether.

Consultation Question 16 (Paragraph 6.93): We seek views on whether the Immigration Rules should be less prescriptive as to evidential requirements (assuming that there is no policy that only specific evidence or a specific document will suffice).

37. Please see our response to Q15 above.

Consultation Question 17 (Paragraph 6.94): We seek views on what areas of the Immigration Rules might benefit from being less prescriptive, having regard to the likelihood that less prescription means more uncertainty.

38. Please see our answer to Q15 above.

39. It is not the case that greater prescription necessarily reduces uncertainty. On the contrary; greater prescription increases the complexity and detail of the Rules and spawns increasingly complex and prescriptive guidance [see answer to Q7 above], which although it is intended to increase the certainty and consistency of decision-making simply leads to confusion amongst applicants, practitioners and decision-makers as to which provisions and/or guidance should be applied in any given scenario.

40. It is notable that areas of the Immigration Rules which deal with rights or status being removed (e.g. revocation of leave, deportation, administrative removal) are relatively short and simple; the corresponding guidance is relatively easy to identify and understand without being unduly prescriptive. That does not in practice appear to lead to significant problems with consistency of decision-making or for individuals making representations to decision-makers.

41. The most complex and prescriptive parts of the Rules are those governing grants of leave to enter or remain in various categories. However, there is no reason why a decision to grant (e.g.) indefinite leave to remain is inherently more complex than a decision to revoke such leave and it is unclear why those parts of the Rules dealing with grants of status are both minutely prescriptive and bewildering in structure.

42. There is no reason in principle why all areas of the Rules dealing with grants of leave to enter or remain cannot be significantly simplified and less prescriptive on evidential matters.

Consultation Question 18 (Paragraph 6.95): Our analysis suggests that, in deciding whether a particular provision in the Immigration Rules should be less prescriptive, the Home Office should consider: (1) the nature and frequency of changes made to that provision for a reason other than a change in the underlying policy; (2) whether the provision relates to a matter best left to the judgement of officials, whether on their own or assisted by extrinsic guidance or other materials. Do consultees agree?

43. No. This approach in itself is overly complex, and could lead to a proliferation of additional policy documents addressing whether a particular part of the Rules is one which requires a greater or lesser degree of prescription. A more realistic and appropriate approach, which it is hoped would provide greater clarity and simplicity in the Rules for both applicants and decision-makers, would be for the Home Office to consider grants of leave from a purposive rather than a mechanistic viewpoint; to accord greater discretion to decision-makers in relation to evidential matters, and to provide guidance for decision-makers on procedural fairness rather than focusing on specific categories or evidential requirements.

Consultation Question 19 (Paragraph 6.96): We seek views on whether consultees see any difficulties with the form of words used in the New Zealand operation manual that a requirement should be demonstrated “to the satisfaction of the decision-maker”?

44. We do perceive difficulties with this form of words. It implies a broad discretion and the absence of objective criteria by reference to which the matter in issue can be assessed. We believe it could lead to significant problems in practice, risking inconsistent and arbitrary decisions which lack transparency. This risk is compounded by the fact that rights of appeal are largely non-existent.

CHAPTER 8: RESTRUCTURING THE IMMIGRATION RULES: WHICH APPROACH TO FOLLOW

Consultation Question 20 (Paragraph 8.16): Do consultees agree with the proposed division of subject-matter? If not, what alternative systems of organisation would be preferable?

45. We agree with the proposed division of subject matter set out at paragraph 8.10.

Consultation Question 21 (Paragraph 8.34): Do consultees agree that an audit of overlapping provisions should be undertaken with a view to identifying inconsistencies and deciding whether any difference of effect is desired?

46. We agree that an audit of the type described at para 8.30 is a necessary first step in (a) seeking to eliminate unintended inconsistencies, and (b) clarifying where there is a policy reason underlying differences between similar provisions. We also agree that the outcome of such an audit could usefully inform the decision whether to use a single set of Rules or a booklet approach.

47. Given that the outcome of the audit is likely to inform the final approach to a question which is itself in issue in this consultation, it is unfortunate that it was not possible for the audit to be conducted in advance of the CP being published.

Consultation Question 22 (Paragraph 8.35): Do consultees agree with our analysis of the possible approaches to the presentation of the Immigration Rules on paper and online set out at options 1 - 3? Which option do consultees prefer and why?

48. We broadly agree with the breakdown of the possible approaches to the presentation of the Rules, albeit the discussion in Chapter 14 of the ways in which the Rules might be presented online suggests that the distinctions may not be as hard-edged as the analysis in paragraphs 8.17 to 8.28 suggests.

49. Approaching the question on its own terms, our view is that the case for Option 3, whereby a single set of Rules is produced at the stage of laying before Parliament, but booklets are produced editorially from the Rules for day-to-day use, is compelling.

50. We recognise that this approach has potentially significant resource implications, and that errors in the production of the booklets may result in legal challenges. To attempt this with insufficient resources in place would doubtless increase the risk of such errors. If resources permit this to be undertaken effectively, however, the option seems to us to combine the benefits of Options 1 and 2, with very limited detriment.

51. We also believe that the proposal mooted at para 14.17 is relevant here:

It may also be possible to develop an interactive tool which sequences the exact set of rules which apply to an applicant within a particular route. The answers to a series of drop-down questions about, for example, the category into which applicants fall, the type of leave sought, and their nationality, would enable the tool to isolate the relevant Rules and common provisions, drawing them together into an individual booklet.

52. If such a facility were possible in practice, this could result in an outcome very close in effect to Option 3 being achieved through automation.

Consultation Question 23 (Paragraph 8.36): Are there any advantages and disadvantages of the booklet approach which we have not identified?

53. No.

Consultation Question 24 (Paragraph 8.37): Are there any advantages and disadvantages of the common provisions approach which we have not identified?

54. No.

Consultation Question 25 (Paragraph 8.38): Do consultees agree with our proposal that any departure from a common provision within any particular application route should be highlighted in guidance and the reason for it explained?

55. In principle, yes, but query whether creating a requirement that guidance gloss the Rules in a particular way may give rise to difficulties in practice.

Consultation Question 26 (Paragraph 8.50): We provisionally propose that: (1) definitions should be grouped into a definitions section, either in a single set of Immigration Rules or in a series of booklets, in which defined terms are presented in alphabetical order; (2) terms defined in the definitions provision should be identified as such by a symbol, such as # when they appear elsewhere in the text of the Immigration Rules. Do consultees agree?

56. Yes. The way that definitions are presented in the Rules, as described at paragraph 8.40 to 8.42, is needlessly confusing and must be addressed. We agree that a single definitions section, whether in the Rules or in a series of booklets, is the most appropriate course. If our preferred option of editorially produced booklets is chosen [See answer to Q22 above], a question will arise as to whether the complete definitions section from the Rules should be replicated in each booklet, or only those relevant to the booklet in question.

57. We also agree that terms which are defined in the definitions section should be clearly identified in the text. The use of the hash symbol may be confusing because of its strong association with social media platforms.

58. Consideration should also be given to whether simply identifying a word or phrase with a symbol is sufficient, as this may cause confusion where phrases rather than individual words are concerned. For example, in the Appendix 3 re-draft of Part 9, it may be unclear to a non-expert user whether, in the phrase "*being an illegal entrant*", the term for which a formal definition exists is "*illegal entrant*" or "*entrant*." This could be addressed by combining the symbol with, e.g., the use of bold type to identify the word or phrase.

59. We strongly support the use of "*hover boxes*" in this context. Given that the majority of users will be accessing the Rules online, effective use of this device may render the requirement to separately consult the definitions provisions redundant.

CHAPTER 9: IDENTIFYING AND ORGANISING MATERIAL WITHIN PARTS

Consultation Question 27 (Paragraph 9.14): We provisionally propose that the following principles should be applied to titles and subheadings in the Immigration Rules: (1) there should be one title, not a title and a subtitle; (2) the titles given in the Index and the Rules should be consistent; (3) titles and subheadings should give as full an explanation of the contents as possible, consistently with keeping them reasonably short; (4) titles and subheadings should not run into a second line unless necessary; and (5) titles and subheadings should avoid initials and acronyms. Do consultees agree?

60. Yes.

Consultation Question 28 (Paragraph 9.15): We invite consultees' views as to whether less use should be made of subheadings? Should subheadings be used within Rules?

61. In our view, judicious use of subheadings can significantly aid clarity and ease of understanding. The number of sub-headings in itself is irrelevant. If a subheading helps clarify a section of the Rules or an individual Rule then in our view it is appropriate. It is to be hoped that individual Rules will be short enough that there is no need for subheadings within Rules, but if that is not the case we do not think that this should be excluded in principle.

Consultation Question 29 (Paragraph 9.23): Do consultees consider that tables of contents or overviews at the beginning of Parts of the Immigration Rules would aid

accessibility? If so, would it be worthwhile to include a statement that the overview is not an aid to interpretation?

62. The case for overviews is well made in the CP at 9.18, and we see no reason to disagree with the view taken. We strongly support the proposal that there be tables of contents at the start of each Part.

Consultation Question 30 (Paragraph 9.24): Do consultees have a preference between overviews and tables of contents at the beginning of Parts?

63. In principle we support both, but we would prioritise tables of contents over overviews.

Consultation Question 31 (Paragraph 9.39): We provisionally propose the following numbering system for the Immigration Rules: (1) paragraphs should be numbered in a numerical sequence; (2) the numbering should re-start in each Part; (3) it should be possible to identify from the numbering system the Part within which a paragraph falls, the use of multilevel numbering commencing with the Part number; (4) the numbering system should descend to three levels (1.1.1 and so on) with the middle number identifying a section within a Part; and (5) letters should be used for sub-paragraphs and lower case Roman numerals for sub-sub-paragraphs. Do consultees agree?

64. Yes.

Consultation Question 32 (Paragraph 9.40): We provisionally propose that Appendices to the Immigration Rules are numbered in a numerical sequence. Do consultees agree?

65. Yes.

Consultation Question 33 (Paragraph 9.41): We provisionally propose that text inserted into the Immigration Rules should be numbered in accordance with the following system: (1) new whole paragraphs at the beginning of a Part should have a number preceded by a letter, starting with "A" (A1, B1, C1 and so on). A rule inserted before "A1" should be "ZA1"; (2) new lettered sub-paragraphs, inserted before a sub-paragraph (a) should be (za), (zb) and so on, and paragraphs inserted before (za) should be (zza), (zzb) and so on; (3) where text is added to the end of existing text at the same level, the numbering should continue in sequence; (4) new whole paragraphs inserted between existing paragraphs should be numbered as follows: (a) new paragraphs inserted between 1 and 2 should be 1A, 1B, 1C and so on; (b) new paragraphs inserted between 1A and 1B should be 1AA, 1AB, 1AC and so on; (c) new paragraphs inserted between 1 and 1A should be 1ZA, 1ZB, 1ZC and

so on (and not 1AA and so on); and (d) new provisions inserted between 1A and 1AA should be 1AZA, 1AZB, 1AZC and so on; (5) a lower level identifier should not be added unless necessary; and (6) after Z or z, the sequence Z1, Z2, Z3 and so on or z1, z2, z3 and so on should be used. Do consultees agree?

66. Yes. We cannot fault the proposed scheme. However, it seems to us inevitable that the more new material is inserted into the Rules, the more the clarity of the structure of the revised Rules will suffer. Any gains that are achieved by restructuring the Rules may be undermined if there are extensive future amendments.

Consultation Question 34 (Paragraph 9.42): Should the current Immigration Rules be renumbered as an interim measure?

67. No. We strongly oppose this. We endorse the analysis at paragraph 9.34. This would be a resource-intensive and potentially confusing exercise with no long-term benefit.

Consultation Question 35 (Paragraph 9.43): In future, should parts of the Immigration Rules be renumbered in a purely numerical sequence where they have come to contain a substantial quantity of inserted numbering?

68. In our view there are arguments both ways on this, and the approach needs to be informed by the extent to which the Rules are amended after being restructured. Mixed views were expressed at the meeting between the Bar Council and the Law Commission on 22 March 2019.

69. In principle, renumbering is undesirable. It will inevitably make the process of tracing amendments to a Rule back through multiple versions more complex. It may also create problems for the type of online archiving system that we hope is introduced (see below).

70. As against that, however, we recognise that if numerous amendments are made to the Rules, a system of numbering that is rational and clear at its inception is likely to become increasingly confusing and hard to navigate. We tentatively suggest that renumbering may be appropriate as a last resort if that stage is reached, but should otherwise be avoided.

71. Routine renumbering at fixed intervals is not appropriate, in our view.

CHAPTER 10: DRAFTING STYLE

Consultation Question 36 (Paragraph 10.11): We provisionally propose that definitions should not be used in the Immigration Rules as a vehicle for importing requirements. Do consultees agree?

72. Yes, for the reasons stated in the CP.

Consultation Question 37 (Paragraph 10.26): We provisionally propose that, where possible, paragraphs of the Immigration Rules: (1) should be self-standing, avoiding cross-reference to other paragraphs unless strictly necessary; and (2) should state directly what they intend to achieve. Do consultees agree?

73. Yes, for the reasons stated in the CP. The examples given clearly demonstrate the almost impenetrable levels of complexity caused by extensive cross-referencing in parts of the Rules.

Consultation Question 38 (Paragraph 10.36): We provisionally consider that: (1) appropriate signposting to other portions of the Rules and relevant legislation is desirable in the Immigration Rules; (2) where the other portion of the Rules or the legislation in question already applies to the case, the signposting should be phrased so as to draw attention to the other material and should avoid language that purports to make the other material applicable where it already is; (3) where portions of the Rules use signposting, they should do so consistently. Do consultees agree?

74. Yes, for the reasons stated in the CP. To be effective and to avoid adding further layers of complexity, signposting needs to take the form suggested. Imprecise and inconsistent use of signposting is potentially counterproductive.

Consultation Question 39 (Paragraph 10.44): We seek consultees' views on whether repetition within portions of the Immigration Rules should be eliminated as far as possible, or whether repetition is beneficial so that applicants do not need to cross-refer.

75. Assuming clearly drafted and well-structured Rules, our view is that appropriate use of repetition promotes clarity in individual cases, and is beneficial. The key benefit of eliminating or reducing repetition is the consequential reduction in the overall length of the Rules. On balance, however, we are of the view (a) that increased length is a price worth paying for increased clarity, and (b) that, in any event, with appropriate drafting and organisation, and a well-designed online portal for accessing the Rules, the overall length of the Rules should have little or no impact on an individual user consulting them in the context of a particular case.

76. Two examples are given in Chapter 10 of situations where there is potentially significant repetition: (a) the fact that, in a given category, there will be significant overlap between the requirements for entry clearance, limited leave, and indefinite leave, and (b) the more specific point that, in Part 9, there is considerable overlap between the General grounds for refusal applicable to entry clearance applications (para 320) and those applicable to applications for leave to remain (para 322). In our view, in both of those examples, whilst the repetition undoubtedly adds to the length of the Rules, it aids understanding for a user seeking to identify the provisions which apply to a particular case by limiting the number of Rules that they have to consult. This benefit outweighs any benefit that would flow from reducing the overall length of the Rules.

Consultation Question 40 (Paragraph 10.55): Do consultees agree with our proposed drafting guide? If not, what should be changed? Are consultees aware of sources or studies which could inform an optimal drafting style guide?

77. We broadly agree with the proposed drafting guide. It establishes core principles which, if properly applied, should significantly improve the overall clarity of the Rules. As regards the specific issues raised at para 10.51, our position is as follows:

- a. We agree that it is appropriate to avoid paragraphs with 10 or more subparagraphs where possible;
- b. We strongly agree that lengthy blocks of text should be avoided. It may be that in practice this means, generally, that each sentence within a provision is presented as a separately numbered paragraph, but in our view this need not follow;
- c. We strongly agree that it should be clear whether paragraphs are intended to operate cumulatively or as alternatives. Given the stated intention that the Rules be accessible to a non-expert audience, we would question whether it is sufficient to leave users to infer this from the conjunction used at the end of the penultimate item in a list, particularly where lists are long. We tentatively suggest that the guidance at paragraph 6(a) and (b) of the proposed guidance not be limited to "*exceptional cases*" where lists are "*extremely long*."
- d. As to 10.51(4), whilst we agree that plain, non-technical language should be used so far as possible, we recognise that legal terms of art will have to be used from time to time. Any difficulties which arise from this can be mitigated by a well-drafted definitions section, and appropriate flagging of such terms in the text. Unless definitions are clear, using synonyms is

unlikely to mitigate the problems that can potentially arise in this context. For example, unless clearly defined, the term “*immigration control point*” may not be any clearer to a lay person than the term “*port*.”

CHAPTER 11: OUR SPECIMEN REDRAFTING WORK

Consultation Question 41 (Paragraph 11.26): Is the general approach to drafting followed in the specimen redrafts at appendices 3 and 4 to this consultation paper successful?

78. Broadly, yes.

79. The drafting of both sets of provisions vastly improves upon the existing text in terms of clarity and readability.

80. As regards Appendix 3, we refer back to our answer to Q39. Our preferred approach would be to have self-contained sections dealing with grounds for refusing entry clearance / leave to enter on the one hand, and grounds for refusing leave to remain, etc., on the other.

Consultation Question 42 (Paragraph 11.27): Which aspects of our redrafts of Part 9 (Grounds for refusal) and of a section of Appendix FM (Family members) to the Immigration Rules work well, and what can be improved?

81. Please see our answer to Q41 above.

CHAPTER 12: KEEPING THE IMMIGRATION RULES UNDER REVIEW

Consultation Question 43 (Paragraph 12.24): We seek views on whether and where the current Immigration Rules have benefitted from informal consultation and, if so, why.

82. We express no view on whether the current Rules have benefitted from informal consultation. However, it is important, in our view, that any consultation process which is established in future with a view to improving the clarity of the Rules be transparent, and that certain stakeholders are not given access to the rule-making body (i.e. the Home Office) that is not available to other stakeholders.

Consultation Question 44 (Paragraph 12.25): We seek views on whether informal consultation or review of the drafting of the Immigration Rules would help reduce complexity.

83. In our view an open and transparent consultation process on significant amendments to the Rules is likely to be beneficial in promoting clarity and minimising complexity.

84. Assuming that the resource implications are not prohibitive, we strongly support the proposal at 12.21 and following for creating a review committee with the sole remit of considering the simplicity, accessibility and coherence of the Rules and their interaction with extrinsic guidance including, where necessary, the balance between the Rules and guidance.

CHAPTER 13: UPDATING AND ARCHIVING THE IMMIGRATION RULES

Consultation Question 45 (Paragraph 13.12): How can the effect of statements of changes to the Immigration Rules be made easier to assimilate and understand? Would a Keeling schedule assist? Should explanatory memoranda contain more detail as to the changes being made than they do currently, even if as a result they become less readable?

85. The statements of changes are the means by which amendments to the Rules are made subject to Parliamentary scrutiny. If the text of the amendment itself is incomprehensible when divorced from the context of the Rule it is amending, and the explanatory memoranda lack sufficient particularity to explain the precise effect of the amendment, Parliament is necessarily hampered in its ability to scrutinise the changes. Similarly, the ability of applicants and their advisors to grasp the substance of pending amendments to the Rules is hampered. Anything that increases transparency and clarity in this regard is to be welcomed as both consistent with Rule of Law principles and consistent with reducing complexity in the Rules more generally.

86. In our view, the proposals made in the CP are sound, and we support them. It clearly makes sense for statements of changes to include a Keeling schedule, and for explanatory memoranda to contain more detail, in order that those who need to understand the impact of the proposed amendments in advance of the amendments being made can do so without having to engage in time-consuming cross referencing. One contributor observes that at present even lawyers who run training companies specialising in immigration law and publish guides to other lawyers struggle to understand Statements of Changes until they actually take effect.

87. In our view it is also desirable for pending amendments to be accessible within whatever online portal is used to display the Rules. Ideally, it would be possible to move forward as well as backwards in time from the version of a given Rule that is currently in force, to see the form the Rule will take once pending amendments have

been implemented, with a clear statements as to the date the pending amendment will take effect.

Consultation Question 46 (Paragraph 13.41): How can the temporal application of statements of changes to the Immigration Rules be made easier to ascertain and understand?

88. This is an area where the complexity of the Rules causes particular difficulties in practice. We note the observation of Underhill LJ in *Singh* ([2015] EWCA Civ 74) at [57], cited at para 13.25 of the CP), that “*the responsible officials in the Home Office have at least some of the same difficulties in keeping up with the consequences of the kaleidoscopic changes in their own rules as the rest of us do.*” Since *Singh*, the frequency with which statements of changes are laid has decreased (CP at 13.54) and this, in itself, will hopefully limit the difficulties which arise when seeking to identify the temporal effect of an amendment. Nevertheless, greater clarity as to the temporal effect of changes to the Rules is essential. The proposals at 13.34 to 13.40 of the CP all have force, in our view:

- a. There should be consistency between statements of changes and transitional arrangements in the Rules (13.35);
- b. Where an implementation provision in a statement of changes affects an implementation in a previous statement of changes, this should be explained in the implementation provisions as well as the memorandum to the statements of changes (13.36). We see no reason why this could not be done alongside the measure proposed at 13.37 of including a dedicated section in the statement of changes to address amendments to past transitional arrangements.
- c. As to paras 13.38 to 13.40, the key requirement in our view is that it should be straightforward to ascertain the temporal application of a particular provision in the Rules. Whether this is signalled in the body of the Rule itself or in some other way is less important but, where the Rules are displayed electronically, it should be visible on the same page that the Rule itself is displayed on.

89. More generally, the complexity involved in ascertaining the temporal application of statements of changes means that the introduction of a database system which enables users to click back (and ideally forward) through versions of the Rules in force at various times and yet to come into force, is long overdue. This is addressed further below in our answer to Q54.

Consultation Question 47 (Paragraph 13.50): Is the current method of archiving sufficient? Would it become sufficient if dates of commencement were contained in the Immigration Rules themselves, or is a more sophisticated archiving system required?

90. The current method of archiving, whereby a single consolidated pdf document containing the text of the Rules as in force during specified periods can be downloaded, is a significant improvement over what went before.¹⁰ However, it falls short of what is required. Including dates of commencement within the Rules themselves would mark a further, incremental, improvement but, again, would not be sufficient.

91. In our view, what is required is a dynamic online database in the style of legislation.gov.uk or the Westlaw legislation service, which permits users to move back and forward in time through different versions of a given provision. This is addressed further below in our answer to Q54.

92. One contributor noted that the Upper Tribunal library maintains a version of the Rules with changes tracked, and suggested that they might be willing to share their work with the Home Office and cooperate on archiving issues in the future.

Consultation Question 48 (Paragraph 13.52): Do consultees agree that Appendix F (Archived Immigration Rules) and paragraphs 276DI to 276AI in Part 7 (Other categories) can be omitted from any redrafted Immigration Rules?

93. We agree that these can be omitted.

Consultation Question 49 (Paragraph 13.57): What issues arise as a result of the frequency of changes to the Immigration Rules, and how might these be addressed?

94. The more frequently the Rules change, the harder it is for advisors and others to keep track of what the Rules require at any given time. In our view an accessible and comprehensive database of the type described below in our answer to Q54 has the potential to significantly mitigate this effect.

Consultation Question 50 (Paragraph 13.58): Do consultees agree that there should be, at most, two major changes to the Immigration Rules per year, unless there is an urgent need for additional changes? Should these follow the common commencement dates (April and October), or be issued according to a different cycle?

¹⁰ See, e.g, the discussion in *Singh* at [58].

95. The frequency with which the Rules change is inimical to clarity, certainty and consistency in immigration decision-making and undermines the rule of law. The analysis in the CP suggests that this may be improving. There is force in the suggestion that the number of major changes in a given year be limited so far as possible. Responding to decisions of the courts and/or addressing lacunae or errors in the current version of a Rule may necessitate amending outside that timetable. We have no view as to the specific timing of the statements of changes.

CHAPTER 14: HOW CAN TECHNOLOGY BE USED TO IMPROVE THE APPLICANT'S EXPERIENCE OF THE IMMIGRATION RULES?

Consultation Question 51 (Paragraph 14.7): Could a common provisions approach to the presentation of the Immigration Rules function as effectively as the booklet approach through the use of hyperlinks?

96. We broadly agree with the statement at para 14.4 that, *"with effective hyperlinks, the navigation of a single set of Rules might not differ significantly from the booklet approach."* However, for this to work effectively, it is likely that a degree of curation will be required whereby, at the very least, there is a separate index page for each category which links to the provisions in the Rules relevant to that category, and excludes irrelevant material.

97. We note here also what is said at 14.17, to the effect that it may be possible to design an online platform which, through the use of a series of drop down questions, would be able to isolate the Rules and common provisions relevant to a particular individual, drawing them together into an *"individual booklet."* To the extent that technology and resources permit this approach, now or in the future, it seems to us to be an ideal solution *if* properly and accurately implemented. If effective, it would get applicants as close as possible to the position where they are told *"all information relevant to their case, and none that is not."*¹¹

Consultation Question 52 (Paragraph 14.10): We seek views on whether and how guidance can more clearly be linked to the relevant Immigration Rules.

98. We refer to our answer to Q7 above regarding the proliferation of guidance documentation relating to the Rules. If the guidance which supplements the Rules is lengthy and diffuse in nature, that presents significant practical obstacles to linking the Rules to guidance.

99. With that caveat, our view is that relevant guidance plainly should be accessible from the Rules. If a decision is taken to alter the balance between

¹¹ CP 14.20

prescription and discretion in favour of greater discretion on the part of decision-makers, there is an even greater imperative for this.

100. How this is done in practice may depend on whether a “*common provisions*” approach or a “*booklet*” approach is adopted (see Q22 above):

- a. If the common provisions approach is taken and there is a move to the Rules being presented online in smaller portions (ideally, displaying only a single rule at one time) there would have to be links to potentially relevant guidance alongside each individual Rule (whether in a sidebar, a footnote, or otherwise);
- b. If a booklet approach is used it may be sufficient to flag relevant guidance in the contents page or as part of the overview. That said, the ability to link to relevant guidance whilst viewing any given Rule relevant to an application under a particular category is still likely to assist in simplifying the process.

101. Whilst guidance documents should be available in pdf format¹², we would suggest that the default format when linking to guidance from the Rules should be html. This will avoid users having to switch between different programmes when considering a Rule alongside relevant guidance, which could cause particular difficulties when using a mobile device.

102. If resources permit, rather than simply providing a link from the Rules to a given guidance document, specific provisions within the Rules could be linked directly to the passages within the guidance relevant to those provisions. This would only work if the guidance was drafted with discipline and precision. If guidance relevant to a particular provision spans multiple paragraphs located at various points in a lengthy guidance document (or multiple documents), this will not be practicable.

Consultation Question 53 (Paragraph 14.15): In what ways is the online application process and in-person appointment system as developed to date an improvement on a paper application system? Are there any areas where it is problematic?

103. We are not in a position to comment on the working of the online application process and appointment system per se. However, please see the response above to Q9 identifying concerns about the inability to access full pdf copies of application forms online.

¹² This is particularly important for archiving purposes.

Consultation Question 54 (Paragraph 14.23): Do consultees agree with the areas we have identified as the principal ways in which modern technology could be used to help simplify the Immigration Rules? Are there other possible approaches which we have not considered?

104. We broadly agree.

105. The presentation of the Rules online can be significantly improved. The first step must be a move to Rules being displayed on screen individually, rather than tranches of multiple Rules being displayed together. This would significantly improve readability and navigability.

106. For the online delivery of the Rules to be as useful as possible, however, the system that is deployed needs to go further than this. From the meeting which took place between the Law Commission and the Bar Council on 22 March 2019 it was apparent that there was strong support for the Rules to be made accessible via a portal similar to that found on Westlaw or legislation.gov.uk. Aspects of this which are particularly useful include:

- a. The provision is displayed in the form that is currently in force;¹³
- b. Amended portions of the provision are identified (e.g. by being placed in square brackets), including parts of the provision where text has been repealed, and the source and timing of each amendment is identified (and linked to in a footnote);
- c. Commencement dates are identified;
- d. Pending amendments and provisions which are not yet in force are identified;
- e. Relevant saving and transitional provisions are identified;
- f. The entire piece of legislation can be downloaded in PDF format, and it is also possible to download a selection of provisions (including, e.g., a whole Part); and
- g. Critically, there is a facility to scroll back through past versions of the provision, with a clear indication of the period during which each version of the provision was in force. Ideally, there should also be an option to click

¹³ Assuming the database is up-to-date which, regrettably, is not always the case with legislation.gov.uk.

forward to a version that includes pending amendments not yet in force, with an indication of when they are to come into force.

107. To the extent that these benefits could be achieved using the legislation.gov.uk portal, that would be acceptable. However, we note that that portal is not always updated contemporaneously.¹⁴ Whilst this may be an administrative issue rather than an issue about the substance of the Rules, it is of fundamental importance. If users cannot be confident that the online portal is promptly and consistently updated, and allows access to the Rules as currently in force, then it is of very little use.

108. More generally, we endorse and share the aspirations set out at paragraph 14.21. The sort of intuitive, user-friendly interaction that is envisaged, with clear access to relevant Rules through the online application process,¹⁵ and automatic assistance with the application process, would clearly represent an improvement to the application system as a whole going far beyond the structure and drafting of the Rules. How feasible it is to achieve this in the short to medium term is beyond our knowledge.

Bar Council¹⁶

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¹⁴ By way of example, as at 17 April 2019, s.84 of the Nationality, Immigration and Asylum Act 2002, which specifies the grounds of appeal available in an appeal to the Tribunal against an immigration decision, is displayed in the form to which it was amended on 31 August 2006. From Westlaw it can be seen that it has been amended on four occasions since that date, most recently on 20 October 2014, more than four years ago.

¹⁵ One contributor advised that a system along these lines is utilised by HMRC in its online self-assessment system, and that it works well.

¹⁶ The Immigration Law Practitioners' Association ('ILPA') kindly provided the Bar Council with a copy of its draft consultation response and also with the results of its call for evidence, which we understand are to be submitted with its response. The Law Reform Committee of the Bar Council has been greatly assisted in the preparation of this paper by Alison Harvey of No5 Chambers, Leonie Hirst of Hirst Chambers, Nicole Masri, Senior Legal Officer at Rights of Women, and Mark Symes of Garden Court Chambers.