

## Response ID ANON-8YVV-F6D3-G

Submitted to **Law Commission consultation on simplifying the Immigration Rules**

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### About you

**What is your name?**

**Name:**

David Mills

**What is the name of your organisation?**

**Enter the name of your organisation:**

Specialist Appeals Team, UKVI, Home Office

**Are you responding to this consultation in a personal capacity or on behalf of your organisation?**

Personal response

**If other, please state::**

**What is your email address?**

**Email:**

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**Telephone number:**

[REDACTED]

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**Explain to us why you regard the information as confidential:**

### Consultation Questions

**Consultation Question 1: Do consultees agree that there is a need for an overhaul of the Immigration Rules?**

Yes

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

Yes

**Please expand on your answer::**

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

Yes

**Please expand on your answer::**

I work as a Senior Presenting Officer, representing the Secretary of State in immigration appeals in the Upper Tribunal. An inordinate amount of time is taken up in the UT dealing with appeals where a First-tier Judge has erred in their understanding of the rules, often because they have been misled by the advocates for one or both parties. If Judges sometimes struggle to understand the rules, there is a clear problem. It is no wonder that non-experts are frequently confused.

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

**Please share your views::**

Fully agree. Again, a large number of appeals seen in the tribunals (though less so since appeal rights have been restricted) relate to refused applications where the relevant evidence did exist at the time of application, but was not provided because the requirements of the rules were not fully understood. This leads to a high number of allowed appeals where missing evidence is simply provided at the hearing, wasting time and money for all parties.

**Consultation Question 5: 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?**

Yes

**Please expand on your answer::**

At the risk of doing myself out of a job, there are far more refusals and subsequent appeals than there should be, simply because of the complexity of the rules. Costs could be saved throughout the process if the rules were simplified and more applications succeeded first time.

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

Other

**Please expand on your answer::**

For applicants themselves, there is probably not too much of an issue, as they will apply under the rules, and expect to succeed if the rules are met, without needing to think beyond that to what exact status the rules have in law.

However, once the appeal stage is reached, the exact relationship between compliance with the rules and success in a human rights appeal has used up a great deal of judicial ink over the past few years. This has hopefully been settled by the Court of Appeal in TZ (Pakistan) and PG (India) v SSHD[2018] EWCA Civ 1109.

**Consultation Question 7: To what extent is guidance helpfully published, presented and updated?**

**Please share your views::**

Despite being a Home Office employee of 15 years standing, I still sometimes struggle to find the correct guidance and, when I do, to be absolutely sure which version was in force at the relevant date. I imagine it is even harder for those outside of the department, However, in fairness to my colleagues, I do consider that there has been some progress on this in recent years, with an attempt to standardise the format of guidance documents, and to publish online archives. I think there is still some way to go on this though.

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

**Please share your views::**

Too many to list over the years, though most are usually remedied once caselaw brings them to wider attention. One significant current issue surrounds the application of the 'reasonableness' test found in EX.1(a)(ii), with Home Office guidance indicating an interpretation which the President of the UT(IAC) has recently found (in JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)) is not consistent with the wording of the rules. This issue takes up a great amount of time in appeals each day.

**Consultation Question 9: To what extent are application forms accessible? Could the process of application be improved?**

**Please share your views::**

I have limited knowledge of this end of the process, but it seems to me that I see far fewer instances of applications being rejected as invalid for use of the wrong form than used to be the case. The move to online applications for many routes seems to have had a positive impact in this regard.

**Consultation Question 10: 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.**

**Please share your views::**

Agreed. Alvi clearly caused a great deal of upheaval, and meant that the Home Office needed to copy and paste a great deal of guidance into the rules overnight, without the opportunity to overhaul the system. The rules have become very unwieldy since, and I still occasionally come across a new appendix that I did not know was there! This review is long overdue.

**Consultation Question 11: 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.**

**Please share your views::**

Agreed. The attempt to be prescriptive, and therefore consistent, has led to constant tweaking to clarify original intent, in light of appeal decisions where a different interpretation is adopted by Judges. I fully understand the desire for more prescription, having seen at first hand the wildly different interpretations of the same rule by different judges over time, but I do wonder whether we have caused greater problems than have been solved with this approach.

**Consultation Question 12: 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.**

**Please share your views::**

Appendix FM-SE is the best and most obvious example, but the Tier 1(entrepreneur) route has also been a somewhat of a minefield, with gradually more subjective assessment being introduced to counter perceived abuse of the route.

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

Yes

**Please expand on your answer::**

As above, leaving a greater degree of discretion to caseworkers to apply the facts of the case to the spirit of the rule, is undoubtedly simpler for all concerned. The consequence of that is, however, a wider degree of discretion to judges to find a rule is met even on very flimsy evidence. Whether one is preferable over the other is a policy question, outside of the scope of this review, as I understand it.

**Consultation Question 14: 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.**

**Please share your views::**

There is nothing inherently wrong with length, especially if the 'booklet' approach is adopted and only one or two sections need be looked at in any individual case. It is, in my opinion, clear that the transparency that Alvi looked to bring about has been very much counterproductive, with the wood being lost amongst an ever expanding forest of trees.

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

**Please share your views::**

Personally, I feel a prescriptive approach remains desirable, as immigration policy should remain in the hands of elected representatives in parliament, and not the judiciary as it had often felt in the past where the broadest possible interpretation of Article 8 in particular was routinely given. However, prescription does not need to mean complexity, and simplification is vital and long overdue.

**Consultation Question 16: 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).**

**Please share your views::**

No, specified evidence is a legitimate approach in most scenarios. As long as the rules can be simplified so that the specifications cannot be missed or misunderstood, there is nothing unfair in such a system. The Secretary of State does, after all, retain a residual discretion to waive any requirement if there is compelling reason to do so.

**Consultation Question 17: 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.**

**Please share your views::**

Again, as above, I'm not convinced that there is a need for less prescription, just less complexity. Whilst I accept that truly simple rules (such as many of them were pre-2012) would need to be couched in much broader terms, there is a half-way house where parliament retains control of immigration policy through specifying evidential requirements, but without the repetition and poor structure that leads to those requirements being opaque to the non-expert reader.

**Consultation Question 18**

Yes

**Please expand on your answer::**

But, again, experience has shown that anything other than fairly clear parameters will allow the judiciary to interpret the rule in a far more generous way than is intended, regardless of the view taken by the caseworker within their judgement.

**Consultation Question 19: 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"?**

**Please share your views::**

At the risk of repeating myself, this approach allows for wildly different outcomes, both on application to the Home Office and appeal to the Tribunal, depending on the individual decision maker or Judge involved.

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

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 21: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 22: 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?**

Yes

Option 2

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views::**

**Consultation Question 25: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 26:**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 27:**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 29: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

No

**Please expand on your answer: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 31:**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

Yes

**Please expand on your answer: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 33:**

Yes

**Please expand on your answer: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 34: Should the current Immigration Rules be renumbered as an interim measure?**

Yes

**Please expand on your answer: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 35: 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?**

Yes

**Please expand on your answer: :**

I'm afraid I have run out of time to respond in more detail.

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

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 37:**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 38:**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 39: 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.**

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 40: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 42: 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?**

**Please share your views :**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views: :**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 45: 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?**

**Please share your views::**

I'm afraid I have run out of time to respond in more detail, but, yes to Keeling Schedules!

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

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 47: 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?**

Yes

**Please expand on your answer::**

Dates in rules would assist, but would also add complexity. Probably better to leave the dates out but with an improved public access searchable archive.

**Consultation Question 48: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 50: 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?**

Yes

**Please expand on your answer::**

Definitely.

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

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

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

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 53: 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?**

**Please share your views::**

I'm afraid I have run out of time to respond in more detail.

**Consultation Question 54: 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?**

Yes

**Please expand on your answer::**

I'm afraid I have run out of time to respond in more detail.

**Additional comments**

**Additional comments**

**Please use the space below if you have any additional comments::**

Apologies for the lack of detail in many of my responses - When I began this exercise I did not appreciate just how much work it would require.