



GOLDSMITH CHAMBERS CONSULTATION RESPONSE

Law Commission - Simplification of the Immigration Rules

Introduction

Goldsmith Chambers is a leading multidisciplinary Barristers' chambers based in Temple, London. The immigration team, ranked in band 4 by the Legal 500, is comprised of over 35 practitioners who regularly appear at every level of court from the First-Tier Tribunals to the Supreme Court and the European Court of Human Rights. Several of our members are ranked and recommended in the Legal 500 and Chambers & Partners directories. Several of our team also sit as judges of the First Tier, Upper Tribunal and High Court. The team practises in all aspects of immigration, asylum and nationality law.

This response does not seek to answer every question posed in the Consultation Paper, however serves to provide a broad narrative response to the Law Commission's concerns. This response specifically focuses on questions 2, 11, 14, 15, 16, 17, 20, 23, 24, 27, 31, 36, 38, 45, 46 and 54.

Chambers readily welcomes this review and agrees with the Commission's preface to the project in that, as they currently stand, the Immigration Rules are unwieldy, un-necessarily long, overly complicated, un-navigable and cause ambiguity in interpretation and application. The words of Jackson LJ in *Pokhriyal v SSHD* [2013] EWCA Civ. 1568 finding that the '*provisions have now achieved a degree of complexity which even the Byzantine emperors would have envied*' are borne in mind as this Response is drafted. Chambers welcomes a simplification of the Immigration Rules and broadly agrees with the Commission's proposals.

Substantive Response

Chambers is of the view that the success of the Simplification project rests on the overarching approach taken by the rules – whether they exhibit a prescriptive or discretionary approach.

Whilst it is appreciated that a prescriptive approach provides some degree of certainty to the caseworker and applicant alike, an exclusively and exhaustively prescriptive approach would require constant updating, which of itself would

contribute to the complexity of the rules. More significantly, chambers is of the view that discretion is essential as decision makers currently have not been afforded enough freedom to interpret evidence within the spirit of the Rules and policy, which in turn has led to extensive and expensive litigation on flexibility. This is specifically encouraged in respect of evidentiary matters. Chambers agrees that this would encourage a more 'common sense' approach to decision making, which is currently absent in the Rules.

As to the organisation of the Rules, Chambers sees the merit in the booklet approach, but members of chambers overwhelmingly feel that this would cause confusion as it would entail repetition. This is particularly so for Applicants / Litigants in Person. Whichever approach is taken it is strongly encouraged that the organisation is uniform for all immigration routes. By this, it is hoped that the New Rules do not organise some immigration routes (such as Armed Forces, for example) into the booklet approach, leaving others laid out in the body with common provisions.

Whilst the 'Common Provisions' approach is generally welcomed, Chambers would invite the Commission to innovatively use technology to ensure that the common provisions 'pop up' or are easily visible / accessible throughout the body of the Rules. It is noted that hyperlinks are not sufficient and the length of the Rules such that they require scrolling may mean that some users overlook some of the common provisions.

Chambers agrees and encourages definitions and terms of art in the Rules to be underlined and fully defined by a pop up box when the cursor hangs over each term on the online platform. It is hoped that this would highlight terms of art to non-professional users.

The internal presentation of the Rules should be uniform, sequential, consistent and composed exclusively of numbering. Chambers is of the view that the alphabetisation of the Rules is un-necessary, complicated and not user-friendly. Particular umbrage is taken with the current system applied in Appendix FM (e.g. E-LTRP.3.2, R-LTRP.1.1 and by contrast, EX.1).

Chambers agrees with the three-level numbering system proposed (8.1.1, 9.2.1 etc.). The numbering system is easier to follow and track and in turn, makes compliance of the Rules more likely.

With the current frequency and number of changes that the Rules are subject to, it is very difficult for non-professional users particularly, to determine which provisions are applicable (i) at the date of application, (ii) at the date of Decision and (iii) on the date of appeal hearing. Statement of Changes to the Rules complicate the reading of the Rules.

It is recommended that, as the Commission suggests, changes are limited to two commencement dates a year. It is further recommended that a Keeling Schedule is used so that the Rules contain tracked, colour-coded versions of changes with a click. The changes can then be easily read at a glance. This is particularly

important when onward appeals are being lodged and rules change in the interim between Decision and Appeal date. It is considered hyperlinks to changes would cause confusion and are ultimately difficult for non-professional users to read and absorb.

Given the length and changeability of the Rules it is thought that they are generally viewed online and very few users, if any, access them in print form. As such the online platform should be enhanced to optimise the user experience. The online platform is a helpful way to link access between the rules and guidance. Chambers would encourage a mechanism that enables the Rules to be viewed alongside policy guidance.

The current online application process does appear to expedite the process, however it is crucial that online applications can be 'saved as drafts' and edited at a later date. It would be helpful if the entire application form was downloadable and printable so that representatives can advise on entries to the form without needing online access every time. It is also imperative that each online application form also contains a hyperlink to the relevant guidance, Rules and definitions.

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On behalf of Goldsmith Chambers