



## CONSULTATION RESPONSE

### Law Commission: Simplification of the Immigration Rules

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

#### General Comments

ILPA is broadly supportive of the Law Commission's proposals as set out in the Consultation Document. In coming to its response, ILPA sought the views of its membership in the form of a survey and a call for evidence. Where percentages appear below, these make reference to the survey responses. In short, ILPA submits that the guiding principles for the Immigration Rules should be clarity, navigability and consistency, especially regarding the interactions between the Immigration Rules and guidance. Above all, ILPA submits that the Rules should function for the benefit of the migrants who must navigate them, and who face the dire consequences for 'getting it wrong'.

In forming our response to the Law Commission, ILPA has not opted to go through the Consultation Document question by question, but rather has sought to present its answers in a broadly thematic way below.

#### Methodology

ILPA sent two documents to its members: a 10-question survey and a set of long-answer questions. The questions matched or were closely modelled on those from the Law Commission consultation document. ILPA suggested to its members that the survey should take roughly 5 minutes to fill in. The survey received 31 responses, and on average it took respondents a little over 7 minutes to fill in the entire survey. It is important to bear this in mind when considering the responses to the Law Commission's questions detailed below: those of our members who suggested alternative options to those the Law Commission proposed, even where they are in the minority, may have spent longer thinking about the question than those who simply agreed with the Law Commission's solutions.

#### Detailed Responses

***Do you agree with the principles the Law Commission have identified to underpin the drafting of the Immigration Rules? Namely: (1) suitability for the target audience; (2) comprehensiveness; (3) accuracy; (4) accessibility; (5) consistency; (6) durability (making the rules apt for amendments); and (7) capacity for presentation in a digital form.***

In our survey, 87.1% of responding members have stated that they do agree with the principles identified by the Law Commission. This supports the proposition that the principles are at least

acceptable, even if they are not perfect. As alluded to in the 'methodology' section, all four of the respondents who disagreed with the Law Commission's proposal gave suggestions on what could be improved, perhaps suggesting that they spent time thinking about the issues. Therefore, despite this large margin of support, ILPA wishes to make suggestions on improving the principles which the Law Commission have identified.

Suggestions for alternative principles included clarity (including lack of ambiguity) and being well-organised. 'Clarity' was the independent suggestion of two members. Clarity works to the benefit of migrants as well as immigration judges and lawyers, because clear rules makes for more consistent application by decision-makers and judges. The Home Office benefit from applications which properly understand the Rules. If the Rules are easily understood and clearly reflect the intent of Home Office policymakers, that assists Home Office caseworkers.

Legal precision when taken too far will inevitably compromise ease of understanding, but there are several examples of modern drafting and legal writing which are both legally precise and capable of being understood by the layperson: the question of which principle should prevail in case of a clash should not arise often, if at all, in drafting new Immigration Rules.

One of our respondents suggested that the wording 'target audience' stands in need of further definition, because it is unclear who the target audience are. ILPA submits that the target audience for the Immigration Rules are an incredibly diverse array of groups, ranging from e.g. legal practitioners, immigration judges, Home Office caseworkers, Home Office Presenting Officers to prospective and existing migrants, as well as their families and friends. Each of these groups, it is submitted, will have different aims as to what makes the Immigration Rules more 'suitable' for them. ILPA submits that any set of Rules or amendments to the Rules, as outlined above, should take these into account.

Furthermore, ILPA notes that there are certain tensions inherent within the principles outlined by the Law Commission. The most striking example of these arises regarding principles (5) and (6). The aim that all rules should be amenable to amendment makes it more difficult to draft simple, predictable and consistent rules. Amendment in itself brings unpredictability and inconsistency through time. Thus, whilst ILPA remains broadly supportive of the 7 principles outlined above, further clarity as to the relative priority of the principles would be welcomed: not least because otherwise the application of the principles to the creation or amendment of Rules would be neither simple, predictable nor consistent.

***The Law Commission provisionally considers that the Immigration Rules should be drafted so as to be accessible to a non-expert user. Do you agree?***

Of the ILPA members who responded to our call for evidence in shaping this consultation response, 74.19% agreed that the Rules should be drafted so as to be accessible to a non-expert user. 16.13% responded 'Other' in order to provide longer answers. Therefore, the number of respondents supportive of the Rules being accessible to a non-expert user is likely to be higher than 74.19%.

ILPA submits that it is broadly supportive of simple and accessible rules. ILPA's position is that it is a matter of good law that people be able to understand rules that bring about such a significant impact upon their lives. However, ILPA notes that whilst the aim of easily accessible Immigration Rules is laudable, it is unclear as to how this could be achieved in practice. ILPA submits that it is unclear as to whether the Law Commission are envisioning migrants who have English as their first language when they pose this question. It is further unclear as to whether children are envisioned as falling within the scope of this question. Arguably, it is a matter of good law that the Immigration Rules be

understandable by children, especially refugee children who may go on to sponsor family members. Given the breadth of people who could fall within the scope of ‘non-expert user’, ILPA would welcome further clarity as to who the Law Commission have in mind as ‘non-expert users’.

ILPA would stress that it has been argued that the Rules were created so as to be understood by a layperson, which is what has led to the Government repeating that neither a legal representative<sup>1</sup>, nor Legal Aid are necessary for applicants seeking leave. Indeed, it has long been accepted that, in particular, the points-based system (‘PBS’) was designed to be ‘clear and predictable’. As Sales LJ stated at paragraph 28 of *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517:

*“The PBS is intended to simplify the procedure for applying for leave to enter or remain in the United Kingdom in certain classes of case, such as economic migrants and students. This is to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. This is in the interests of all applicants. It also assists applicants to know what evidence they have to submit in support of an application.”*

In practice, however, ILPA submits that non-experts will likely turn to the Home Office’s domain of the GOV.UK website and consult the Home Office’s guidance to applicants long before they have picked up the actual Rules. This is particularly troubling as there remains the prospect of contradictory information existing in guidance and the Rules. In other cases, it is easy to envisage a situation in which a seemingly simple Rule may become heavily prescriptive and jargonised in the guidance. Similarly, guidance may oversimplify a Rule or the evidence required to meet it. In such circumstances, it is unclear as to how those migrants who cannot afford legal representation will navigate such potentially treacherous straits, or how Home Office caseworkers will consistently apply the Rules. ILPA echo the words of LJ Underhill in *Mudiyanselage & Ors v Secretary of State for the Home Department* [2018] EWCA Civ 65 to serve as a warning:

*“The mismatch with the Rules which was identified in SH (Pakistan) no longer exists. In fact I strongly suspect that that mismatch was always unintentional and that it was the result of incompetence in ensuring that the requirements of the Rules and the Guidance coincided. It would hardly be the first time that such mistakes have occurred in the Home Office: the web of Rules and Guidance has become so tangled that even the spider has difficulty controlling it” (emphasis added).*

In such circumstances, ILPA submits that it is of greater importance that migrants are afforded every opportunity of ‘getting it right first time’ rather than being able to understand each and every provision contained within the Rules *per se*. Rather, ILPA stress the importance of Legal Aid being available to migrants to gain specialist legal advice. In light of the ‘Windrush’ scandal, the overwhelmingly harsh consequences of ‘getting it wrong’ can mean being pushed into the jaws of the ‘hostile environment’ preventing access to housing, healthcare and education. In the event that Legal Aid, or specialist legal support is not made more accessible to migrants, ILPA would submit that relevant applications be marked as having been made by non-experts.

In any event, ILPA submits that greater complexity will provide fertile breeding ground for mistakes by applicants, especially if applicants are required to navigate different sections/appendices of the Rules. There is a perception that complexity has sometimes been used as a means to the end of

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<sup>1</sup> <https://www.lawgazette.co.uk/practice/you-dont-need-legal-advice-for-immigration-applications-home-office/5069869.article>

reducing successful applications by giving caseworkers more opportunities to refuse applications. One of our members noted, as an example, the Adult Dependant Relative ('ADR') category is now unmanageably complex and restrictive, with only a few hundred applications pursuant to this route being successful in any given year. Despite this complexity, and the reduced ability of applications to be successful, the ADR route remains open. It appears clear that the sheer complexity has been a factor in the slender chances of success under this route.

Despite the dangers of unintended consequences, highlighted above, ILPA is nevertheless broadly supportive of accessible and easy-to-understand Rules, especially given the lack of Legal Aid for the vast bulk of immigration applications.

### ***Discretion or Prescription?***

ILPA would be cautiously supportive of some discretion to be given to allow common sense to prevail, particularly with regard to evidentiary matters.

However, ILPA members harbour significant reservations regarding the Rules being less prescriptive, on the basis that poor decisions made by caseworkers would be more difficult to challenge. Examples of poor quality decisions include many of those under the Tier 1 (Entrepreneur) route. For such applications, caseworkers, who typically have no business background, review business plans to decide whether an applicant is a 'genuine entrepreneur'. Another example would be visitor visas, which can be refused on the most spurious of grounds. ILPA submits that this is particularly pernicious given the lack of appeal rights for most immigration applications.

ILPA would therefore be against any increased discretion which risks leading to difficulty or inability in challenging decisions, and the lack of accountability of caseworkers. Over and above these problems, ILPA submits that a form of words such as that used in New Zealand leaves too much room for speculation. Applicants will not be able to know what a decision maker is expecting of them unless the guidance given to caseworkers is (a) uniform; and (b) published alongside the Rules and Guidance. However, in such an event, one of the possible unintended consequences would be the 'tangled web' mentioned above.

### ***Is the length of the Immigration Rules a worthwhile price to pay for the benefits of transparency and clarity?***

83.9% of respondents to ILPA believe that the length of the Rules could be a worthwhile price for transparency and clarity. However, ILPA would highlight the cautionary tale of the 'points based system'. This system was designed to bring transparency and clarity. However, the length of the PBS, coupled with its interactions with Guidance and lengthy, complicated Appendices led to:

- a) unnecessary complexity (see above),
- b) rigidity, insofar as Home Office caseworkers are more likely to believe longer rules to be comprehensive and thus will not apply discretion; and
- c) inconsistencies in application.

However, ILPA recognise that the analogy to the current PBS, its complexities, rigidities and inconsistencies may be imperfect. Part of the problems with the current Immigration Rules is their structure. As the Law Commission has recognised, the Immigration Rules have changed considerably since their first incarnation as provided for by the Immigration Act 1971. Given the piecemeal development of the Rules, they have become unwieldy not simply because of their length, but because the Rules are put together in an incoherent manner. For example, many of the paragraphs in Part 8 of

the current Rules are superseded by Appendix FM, but this would not be obvious to a lay user. In any event, a lay user would find themselves flummoxed by the organisation of Appendix FM. Such concerns can be allayed by ensuring the Rules are organised in a logical, clear and easy to follow manner. ILPA submits that neither length nor brevity alone can confer transparency, clarity and coherence upon the Rules.

***Do you agree with the Law Commission’s proposed division of subject-matter at p.106 of the Consultation Document?***

78.6% of responding ILPA members support the Law Commission’s proposed division of subject matter. 7% of members abstained, stating that they have not looked properly at the matter. It is noted that members took 7 minutes to respond to the whole 10-question survey, such that those who did not agree with the division of subject matter and added their own suggestions may simply be the ones who thought about it for longer.

ILPA would cautiously support the division of subject matter as set out by the Law Commission. The most reported concern amongst ILPA members is that, whilst the broad structure is sensible, applicants and/or their representatives would still need to cross-reference and look in several different places/chapters to get a proper overview of the law as it applies to any given case.

ILPA submit that for the rules to be really accessible to non-expert users, there must be a note in each chapter referring to the common provisions applicable to that chapter. ILPA members suggest a "residual category". This chapter could contain routes that are now closed but applicants can still apply for an extension of leave or ILR. Such a chapter could be updated each time a route closes, e.g. now the Entrepreneur category could be moved in the "residual category" chapter, so anyone would know the route is no longer open to new applicants. If a chapter is moved from its location to the residual category, a note should remain in the original location for ease of reference.

***Which of the Law Commission’s proposals at p.108 of the Consultation Document of: (a) a single set of Rules with one set of common provisions, (b) a booklet; or (c) editorially produced booklets do you prefer?***

ILPA members’ responses to this issue break down as below:

<b>Style</b>	<b>Support amongst Responders</b>
Single set of Rules	61.5%
Booklet	26.9%
Editorially produced booklet	11.5%

ILPA submit that the most popular form of Rules remains a single set of Rules, in part because of the desire of the Law Commission to ensure internet-friendly Rules. It is submitted that a single set of Rules with an appropriate set of hyperlinks placed online can serve to ensure that applicants are guided to the relevant parts. In a similar vein, ILPA warn that a series of editorially produced booklets run the risk of turning into Guidance, which increases the risk of complexity and contradictions. ILPA submit that the guiding principle for the presentation of the Rules should be such that they do not lay the foundations for future Secretaries of State to (in)advertently achieve “*a degree of complexity which even the Byzantine emperors would have envied.*”<sup>2</sup> Despite this, ILPA recognise that a potential advantage of a series of editorially produced booklets could be that repetition of many of the same

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<sup>2</sup> *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568

Rules across the different booklets could create more opportunities to review and internalise those Rules with an aim to spot and remove inconsistencies rather than to let them fester.

***The Law Commission provisionally proposes 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 numbers; (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 you agree?***

93.1% of the responding ILPA members support the provision numbering system proposed by the Law Commission. However, ILPA would stress that amongst the 6.9% of members who do not, the major concerns revolve around the numbering system re-starting in each part. It is submitted that a minority of responding ILPA members believe that such a system may prove to be too confusing for a non-expert user, which increases the opportunity for mistakes to creep in to their applications, with minor mistakes potentially leading to devastating consequences.

***The Law Commission provisionally proposes that definitions should not be used in the Immigration Rules as a vehicle for importing requirements. Do you agree?***

Of the responding ILPA members, 77.4% agree that definitions should not be used in the Immigration Rules to import requirements. ILPA submits that it is unlikely that a non-expert user would realise which terms are defined *and* as a result contain a requirement embedded within them. Therefore, in order to avoid confusion, it is important that definitions are clearly listed. ILPA would be in favour of the 'hover bar' suggestion by the Law Commission, where readers could hover their mouse over the defined word to read the definition, so long as this facility is made crystal clear. Similarly, any time a defined term appears in the Rules, it could be followed by an asterisk that links to the list of definitions, serving as a warning to lay readers.

One of our members gave a powerful reason why definitions should not import requirements: to import requirements into such definitions complicates the requirements to be met and may confuse applicants. The term 'professional sportsperson' is one example. Over time, this term has been broadened such that many individuals, being unaware of the new expanded definition, may technically be in breach of their leave.

***The Law Commission provisionally proposes 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 you agree?***

100% of responding ILPA members agree with this. As a caveat, however, ILPA submits that when cross-referencing is necessary, this should be clear to non-expert users. E.g. pursuant to the current Rules Part 8 and transitional provisions, it is possible to read Part 8 and not be aware that certain parts of it are effectively repealed if you are unaware of the transitional provisions.

***The Law Commission asks 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.***

70% of responding ILPA members are of the view that repetition is beneficial so that applicants do not need to cross-refer. Amongst the minority who do not support repetition, it is suggested a clear system of hyperlinks may eliminate the need for repetition.

However, ILPA would also stress the importance that any cross-reference should lead only to one place, rather than starting at rule A, which cross-references to rule B, which in turn contains reference to rule C *ad infinitum*. In order to avoid such scenarios, ILPA would submit that some repetition is preferable to falling down the rabbit hole of multiple cross-references.

***Do you 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?***

79.3% of responding ILPA members agree that these can be omitted from redrafted future Immigration Rules. Amongst the 20.7% of responders who disagree, the major concern remains that there are many cases with long procedural histories where reference to old Rules is unavoidable. In such circumstances, having the archived Rules in the same place as the current Rules is considered desirable. In any event, ILPA would stress that it is imperative for the archived Rules to remain accessible in some alternative form if not with the redrafted Immigration Rules.

ILPA would submit that the redrafted Rules should hyperlink to the archived Rules for ease of access. This is particularly necessary for non-lawyers. In ILPA's view, there should be a clear explanation for non-lawyers of when it may be necessary to cross-refer to earlier versions of the Rules in order to find the Rules relevant to their application.

***To what extent are application forms accessible? Could the process of application be improved?***

While application forms are easily accessible if applicants have online access, it is easy for an applicant to find themselves on the wrong form. The relevant forms can often be difficult to find and, to ILPA's knowledge, there is no one place where all forms are listed – this would be useful. A further contributing factor to this problem is that the forms do not have names, but rather refer to the category of permission for which the applicant is applying – and this is not always clear, particularly to a layperson.

As the forms are online, it would be beneficial if there was a quick point of contact within the Home Office to deal with technical issues. If there are technical issues and no other method of submitting an application, this can cause serious issues if an applicant needs to submit that day due to their leave expiring. If technical issues cannot easily be resolved, this could result in out of time applications.

***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?***

ILPA submits that when there are no technical issues, and the system works as intended, the online system is much simpler. The fact that copy documents can be uploaded rather than forcing applicants to collate a bundle of original documents is a vast improvement. There is a continuing problem in that there is no facility to view all questions on a form before going through that form, leading to uncertainty and stress on the part of applicants and, where relevant, their legal advisors.

Furthermore, there have been a range of problems with the current front end services, which ILPA has been feeding back to UKVI and on which ILPA has been engaging in discussion with UKVI and, where relevant, commercial providers of front-end services.

***Do you agree with the areas which the Law Commission have identified in Chapter 14 as the principal ways in which modern technology could be used to help simplify the Immigration Rules? Are there other possible approaches which the Law Commission have not considered?***

ILPA submits that videos of how to complete applications could harness the changing ways in which people interact online. Furthermore, application forms could specifically hyperlink to guidance documents, relevant Rules and/or definitions. ILPA submit that where possible, documents, Rules, guidance and application forms should be mobile accessible and device agnostic.