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

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About you

What is your name?

Name:

Chai Patel

What is the name of your organisation?

Enter the name of your organisation:

Joint Council for the Welfare of Immigrants

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

Response on behalf of organisation

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What is your email address?

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If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

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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::

On the one hand we agree that the rules, as with all laws, should be drafted in as simple a manner as possible. It is fundamental to the rule of law, that the laws by which we are governed are access ble to us all.

However, we are extremely concerned that the Government will use this process of simplification as an answer to the withdrawal of legal aid from immigration matters. This is unacceptable, and the Law Commission must be very careful to avoid providing any explicit or implicit support for this view. We understand that you may be required to be neutral on this topic, but neutrality must not slide into tacit support for this political use of the simplification process. It does not matter how the Immigration Rules are rewritten. The underlying law and policy, including as it does human rights considerations and the fundamentally complex reality of migrants' lives, is extremely challenging to navigate.

The Immigration Rules govern cases where the State brings its considerable power to bear against individuals, often highly vulnerable, poor, sometimes with limited English, limited social connections and capital in the UK. It governs decisions which can change the course of lives, separate children from their families, and can mean the difference between life and death. Legal aid is essential in all immigration matters.

The Law Commission must make it clear that accessibility is not a replacement for independent legal advice from a qualified practitioner, and must vocally contradict any Ministerial or other assertion to the contrary. To do otherwise would be to overstate the impact that increased accessibility can have, and to undermine the independence of the Commission.

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::

It is hard to say for sure, but certainly we see many applications where mistakes have been caused by a lack of clarity in the rules, the associated guidance, and also administrative procedures such as fee waiver applications, or simply things like the email address to which applications should be sent.

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?

Other

Please expand on your answer::

We are not in a position to comment on these figures.

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

No

Please expand on your answer::

The fact that the Secretary of State writes and rewrites the Rules by which his actions are to be governed presents a clear conflict. It is the reason why the Rules are so frequently rewritten, often for political gain, or to circumvent court rulings which the Secretary of State finds inconvenient.

The process by which the Rules are made should be altered to increase meaningful and independent oversight and accountability for rule changes, and to remove the Secretary of State's arbitrary power to make and remake the Rules.

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

Please share your views::

Guidance is frequently inaccurate, overly complex.

Please see our attempt to clarify the new guidance on Appendix FM for an example of how difficult it is to understand and how it sometimes almost seems designed to militate towards refusal of the application - <https://www.jcwi.org.uk/a-guide-to-spousepartner-visa-rules-post-mm>.

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::

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

Please share your views::

Application forms are overly complex, demand unnecessary information, and are hard to understand.

They should be simplified and made more user-friendly

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::

We agree with the analysis.

We would note that the attempt to incorporate Article 8 considerations into the Rules has been driven largely by a political desire to exclude proper oversight by the courts and tribunals. It is designed to minimise as far as possible compliance with human rights by turning a careful and considered decision, based on all the facts, made by an experienced and unbiased decision-maker, into a tick box exercised, carried out by an under-qualified caseworker and geared towards refusal.

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::

We agree, but we would argue your analysis misses the underlying driver of complexity in Appendix FM and this sort of prescription - a desire to refuse larger

numbers of applications on the one hand, combined with pressure from litigation on the other.

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::

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

Other

Please expand on your answer::

N/A

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::

We would support transparency and clarity over brevity.

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::

Our concern is with the culture within the Home Office, and the pressure under which caseworkers operate. Caseworkers have very little training, are often very short term, and are under clear pressure, even if denied by Ministers, to refuse applications.

While in theory, a less prescriptive approach would be beneficial, it is extremely dangerous in these circumstances. From our casework we see that where there is discretion, it is almost always used to deny claims.

Therefore, while we would welcome a less prescriptive approach that would favour the applicant, such as loosening evidential requirements, great care must be taken to avoid increasing the potential for refusal of a claim.

We would suggest the following test in considering whether a change to lessen prescription: 'would this change allow a decision-maker wholly minded to refuse, to refuse an application where otherwise he/she would not be permitted to do so'. If so, then the change should not be made. Sadly that is the reality at present.

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::

Yes. But with the proviso stated in our answer to q.15

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::

In all cases applicants should be permitted to provide a broad range of supporting evidence in favour of their application. See our answer to Q15.

Consultation Question 18

Yes

Please expand on your answer::

Subject to our answer to Q15.

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::

We do. This is too subjective an assessment, and a dangerous one where the decision maker, as we have stated above, operates in a culture of disbelief and one which is minded to refusal.

While there is no way, ultimately to entirely mitigate this, we would suggest the following approach to both reduce prescription, but also to ensure greater flexibility where it is desirable.

1. To set out forms of evidence, which if met, require the decision maker to accept the criterion is satisfied;

2. In the absence of the specified evidence, to allow any other evidence to be submitted and to require the decision maker to take a holistic view and decide on the balance of probabilities in line with the Windrush guidance.

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::

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::

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?

Other

Please expand on your answer::

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

Please share your views::

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::

Consultation Question 26:

Yes

Please expand on your answer::

Consultation Question 27:

Not Answered

Please expand on your answer::

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 :

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?

Not Answered

Please expand on your answer::

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

Not Answered

Please expand on your answer: :

Consultation Question 31:

Not Answered

Please expand on your answer::

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

Not Answered

Please expand on your answer: :

Consultation Question 33:

Not Answered

Please expand on your answer: :

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

Not Answered

Please expand on your answer: :

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?

Not Answered

Please expand on your answer: :

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::

Consultation Question 37:

Yes

Please expand on your answer::

Consultation Question 38:

Yes

Please expand on your answer::

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::

Repetition is beneficial if it avoids the need to cross-refer, and providing there is confidence that over time those portions of the Rules will not accidentally diverge.

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::

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

Not Answered

Please expand on your answer::

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: :

Feedback from those we consulted on the draft Appendix FM:

"S-EC.1.9. It is odd that here specific examples are given as to reasons why a sponsor may be presumed to cause a risk of harm to the applicant, where in other paragraphs possible reasons for exclusion are not listed

E-ECP.3.1. a) Should be made clearer that higher income threshold is for each applicant non-EEA child, not any child of the applicant or sponsor

E-ECP.3.1. : 'the applicant must provide specified evidence...of a specified gross annual income of...'

This is wrong. Applicant must provide specified evidence that their partner earns gross annual income

E-ECP.3.3. The relation between this paragraph and others should be made clearer. At present, it says that in order to be eligible, the applicant has to prove that their partner meets all the requirements of E-ECP.2.1. to 4.2. – but ECP.3.3. is an exemption from ECP.3.1, not a requirement for eligibility"

"Hi, have had a quick look at this and to be honest, it's the same confusing nonsense as before. There are a few minor tweaks that don't really make much difference to the overall document. It still refers back to paragraphs in the immigration rules not contained in appendix fm, so you still have to keep flicking back and forth between the two to try and make sense of it all. Further I think that the section specifying that it is a non-British child that the financial requirement applies to is even more confusing in its current wording. "

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::

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: :

Yes.

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::

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::

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?

Not Answered

Please expand on your answer::

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?

Not Answered

Please expand on your answer::

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::

It adds complexity, makes it more difficult for applicants and for professionals to understand.

The Home Secretary's discretion to make ad hoc changes should be removed. All changes to the Immigration Rules should be subject to scrutiny by an independent committee, and made subject to formal approval of that committee.

At the very least an independent body should be formed to monitor changes or proposed changes to the Immigration Rules, and to make recommendations for consolidation and simplification.

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::

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?

Not Answered

Please expand on your answer::

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::

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::

Online applications which guide applicants down a decision tree, choosing not to reveal sections depending on what questions have been answered, can reduce complexity. However, where applicants do not have independent legal advice, choices made at the beginning of a form may not be properly understood. A form that is too tailored may prevent an applicant from ever realising what other information he or she could have provided or whether there was an alternative route which may have been open.

There remains concern over those with limited access to technology.

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?

Not Answered

Please expand on your answer::

We remain extremely concerned about the use of tools which guide applicants to a particular route, or to particular questions, in the absence of independent legal advice.

Additional comments

Additional comments

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