

IMMIGRATION RULES – LAW COMMISSION CONSULTATION

In these briefing papers I have frequently drawn attention to the problems created for legal practitioners and others trying to ascertain the relevant law on the subject of immigration and asylum by the huge number of Acts of Parliament on the subject and by the ever expanding volume and complexity of the Immigration Rules. Between 1971 and 2016 there were 12 Acts of Parliament dealing specifically with immigration and asylum in addition to other very relevant Acts such as the British Nationality Act 1981 and the Human Rights Act 1998. I regret to say that the pleas from Migration Watch and many other bodies for tidying up the primary legislation into a single consolidated Immigration and Asylum Act have not been heeded and it is apparent that the civil servants of the Home Office and other government departments are far too preoccupied with Brexit and related topics to be able to give any consideration at all to the desirable and practical topic of consolidation.

2 There was however a belated realisation in early 2018 of the necessity of doing something about tidying up the Immigration Rules. In accordance with section 1(4) of the Immigration Act 1971 these are the rules “laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include such provision for admitting (in such cases and subject to such restrictions as may be provided by the rules and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.” The other reference to the Rules is section 3(2) of the 1971 Act which requires statements of the Rules to be laid before Parliament.

3 It is a deplorable state of affairs that the government department, the Home Office, which is responsible for creating, constantly amending and administering the Rules has had in effect to admit its own inability to tackle the very necessary task of tidying up the Rules and has had to call in the Law Commission to advise on how to go about the task. The Law Commission is a public body whose task it is to keep the state of the law under review, to make proposals for amendments and improvements. The Law Commission has produced a report which runs to 270 pages and lists 53 consultation questions

based on its details on which any interested party is invited to offer comments. The ability of Migration Watch to respond is inevitably limited by the fact that we do not deal with individual cases which would normally be the starting point for such comments, though we have frequently in general terms complained of the prolixity and confusion which make life burdensome for practitioners in this field.

4 The Law Commission's terms of reference limit it to consideration of the Rules and exclude discussion of the need for consolidation of the many Acts of Parliament dealing with immigration and asylum. This is unfortunate, because very early in the consultation paper, in chapter 3, the Law Commission has to set about the necessary task of considering the status of the Immigration Rules. The opening sentence of paragraph 3.1 states "Any proposals for the redesign of the Immigration Rules must have regard to their legal basis." Paragraph 3.3 opens with a statement that "the Rules have often been said to escape conventional legal categorisation" and in this and succeeding paragraphs several *dicta* of Court of Appeal judges are cited which make it clear that there is no agreement among judges as to the legal categories to which the Rules should be regarded as belonging. Some judges have said that they are a form of delegated or subordinate legislation while others disagree and insist that they are "detailed statements by a minister of the Crown as to how the Crown proposed to exercise its executive power to control immigration". If this definition is accepted it is not clear what sort of legal authority if any the Rules may be said to contain. The ninth edition of Macdonald's "Immigration Law and Practice" a work relied on by many practitioners, states in several places that the Rules are not delegated legislation, a view which has some but not general judicial support. Such disagreements are not satisfactory.

6 **Consultation Question 6** asks whether consultees agree that the unique status of the Immigration Rules does not cause difficulties to applicants in practice. I was a part time immigration judge between 1992 and 2002 and my clear recollection is that all of us believed that the rules had legal force and should be so acknowledged. There is no reason to conclude that present day immigration judges take a different view. In the interests however of avoiding the degree of confusion which has prevailed until now **it is desirable that the relevant sections of the Immigration Act 1971 should be amended by stating in explicit terms that the Immigration Rules are delegated legislation.** This is our recommendation and we trust that it will not be ignored because it goes outside the Law Commission's terms of reference. We do not propose any

particular form of words to achieve this, as it calls for consideration of the most appropriate practical way to express this and we consider that it is a task which calls for the skills of parliamentary counsel.

7. Chapter 4 of the Law Commission's report deals with guidance, i.e. instructions to Home Office caseworkers and other staff as to how to do their jobs. Guidance is covered by paragraph 1(3) of Schedule 2 of the Immigration Act 1971 which provides:

In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State...

Paragraph 4.4 of the Law Commission's report states that it is the normal Home Office policy to publish all policy guidance unless its content is restricted. Such guidance, although not normally part of the rules, has on occasion been treated as part of immigration law and the case of *Alvi v. Secretary of State for the Home Department* [2012] UKSC 33 is particularly instructive. I quote from paragraph 3 of my own legal briefing paper Legal 274:

*The respondent was from Pakistan and after completing studies in the UK he obtained leave to remain in the UK as a physiotherapy assistant in 2005. In 2009 he applied for further leave as a Tier 2 (General Migrant) under the points based system. His application was rejected on the ground that his job as an assistant physiotherapist was not at the level of skilled occupation required by the relevant rule....which required (i) that the job appear in the UKBA's list of skilled occupations and (ii) that the applicant's salary must be at or above the appropriate rate for the job as stated in that list. **The Supreme Court ruled that any change in the listing of such occupations which must be made in proper legal fashion by amending the Immigration Rules which require parliamentary approval and that an amendment to the Home Office website or other administrative fiat did not have legal effect.** [Emphasis supplied]*

The effect of the decision was that a great deal of material which had hitherto been accessible only on the UKBA website now had to be incorporated into the Immigration Rules if it was to have the force of law. In compliance with the Supreme Court's decision the Home Office had to add another 288 pages to the Rules. Considering that judges have frequently complained about the Rules, it was particularly unfortunate that this judicial decision added substance to the cause of complaint. An interesting side effect of the decision is that the Supreme

Court did not have any qualms about treating the Immigration Rules as having legal effect in spite of the widely differing conclusions as to their legal nature to which I have already referred.

8. It seems to us that the distinction between Rules and guidance notes is important to maintain and it can safely be assumed that the intention behind the drafting of paragraph 1(3) of Schedule 2 of the 1971 Act, quoted above, was for this purpose. **It is reasonable to assume that guidance may be consulted for the purpose of proper understanding and provision of evidence to support that understanding, but guidance itself is not required to be laid before Parliament and does not have the force of law.** It is to be hoped that if the Supreme Court is in future faced with similar facts which it had to consider in *Alvi* it will follow a self-denying ordinance and refrain from insisting that a mass of detailed guidance must be incorporated into the body of the rules.

9. Our recommendations are:

1. the Immigration Act 1971 should be amended by adding a statement in explicit terms that the Immigration Rules are delegated legislation and

2. guidance notes issued by the Home Office may be consulted for the purpose of proper understanding of the Immigration Rules but are not required to be laid before Parliament and do not themselves have the force of law.

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1 March 2019