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

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About you

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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?

Other

Please expand on your answer::

I question the value of "durability". A big part of the problem with the current rules is precisely because they are 25 years old with repetitive editing. It might be better to have a scheme with planned obsolescence on 5-10 year intervals.

What does "accuracy" mean in context? This adds little.

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?

Other

Please expand on your answer::

Ideally, certainly, but there is a risk of sacrificing clarity or precision for ease of comprehension. A particularly specific or technical rule might be impractical to explain in layman's terms. A better test would be whether the rules are capable of clear and precise explanation by a non-specialist legal adviser.

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 certainly does not help, but realistically, doesn't make much difference. The real problems are overly prescriptive rules, bizarre and arbitrary requirements, a

lack of independent review, and a poor quality of advice & representation.

The need for reform is largely for the benefit of legal advisers.

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::

I couldn't comment on the specific figures. I doubt there will be much financial saving for the individual applicant, as fixed fees are generally charged. I doubt there will be much reduction in demand on the court system- people will still want to challenge refusals even if made on more straightforward grounds.

It's highly plausible that the SSHD could save money on decision making, however.

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::

No, the manner the immigration rules are made is a problem. The scheme whereby they are rubber-stamped by Parliament rather than made subject to debate and/or simple policy guidance gives rise to a highly prescriptive and technical approach with inadequate flexibility, but also a rise of arbitrary & poorly considered requirements. There is a greater need for review of the attitude to & means of production of the substance of the rules rather than the complexity with which they are expressed.

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

Please share your views::

Poorly. Guidance is available and is helpful, but only to specialist lawyers. It rarely deigns to examples or an explanation in context in layman's terms.

More significantly, the guidance rapidly goes out of date and only the current version is published online. As the guidance does not apply retrospectively, and as no archive is available (this has been done since 2012 for the Rules themselves) the current version of the guidance is often useless for an appeal or administrative review.

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::

There are many contradictions, but this is not a major problem in practice. See, for example the long residence guidance at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605764/long-residence-v15_0.pdf

This creates an "exceptional circumstances" get out clause for applicants with long absences from the UK in 276B applications. However, the rules for handling these contradictions are clear- see R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33. While this is not a major problem one wonders how a layperson or a non-specialist adviser is supposed to know this.

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

Please share your views::

The application forms are clearly accessible, this is not a problem- though the ability to type/save answers on the forms would assist greatly.

However, it is often very unclear which form is supposed to be used. It is probably the most common question I get from solicitors. The titles of the forms or the categories used refer only loosely to the categories of application under the rules. Guidance is given in the forms themselves but it is brief, inaccurate, and inadequate. There is a need for guesswork. Definitions are used with their origins in internal policy and unrelated to categories or terms in the rules.

A far better approach would be to have one form for each type of application, e.g: one for any application under Part 7; another for any application under Appendix FM; another PBS applications.

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::

Yes, almost wholly. Since about 2009 the rules have moved from a framework and common-sense guideline to a rigid structure whereby the substantive merit in any given application is overlooked in favour of a box-ticking exercise. This has not assisted the quality of decision making or the simplicity of the rules.

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::

Very much so. I have little to add, Appendix FM-SE is an excellent example of this phenomenon in action. Appendix A is similar- relating to the PBS.

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 is clearly well established, but consider also the Tier 1 (Entrepreneur) provisions (before that route closed) in Appendix A. There are repeated additional requirements of technical details (devolving to the level of the number and location of telephone numbers being printed on contracts) with little or no relation to the substantive requirement to genuinely invest in a business in the UK.

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::

It has worked well with one major exception- there is no right of appeal or other independent form of review on the merits. Where the requirements are discretionary, it is extremely easy for a rogue caseworker to frustrate even an entirely proper application because an assertion of disbelief can only be overturned on Administrative Review if the SSHD agrees (which is uncommon) or on Judicial Review if irrational (also uncommon).

Without the protection of clear and specific requirements, no applicant however thorough or legitimate can be satisfied that the application will succeed. A discretionary scheme is plainly better in many ways, but is open to abuse in the absence of a right of independent review (i.e. an appeal).

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::

Generally not. The original incarnation of the rules was much better- a set of "red lines" setting out core or essential requirements, but a substantial degree of individual discretion as to how to demonstrate them, particularly evidentially, backed up by a right of independent review in most cases.

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::

See my comments above- a prescriptive approach is a necessary evil in circumstances where an applicant has no independent right of review, as it creates a necessary degree of certainty where there is no other remedy against a plainly unfair result. The main disadvantages are: 1) complexity of the underlying rules 2) the difficulty in meeting those specific requirements (e.g. banks will often not co-operate with the Respondent's requirements to produce very specific types of statement even where the funds are held) 3) a loss of focus on the purposive nature of the rules.

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::

They are primarily prescriptive in terms of evidence, so I agree, with limited exceptions. There is arguably a degree of undue complexity or "fiddliness" in terms of meeting certain substantive requirements, e.g. relating to the English Language tests or marrying in the UK in circumstances where, for example, a passport has been retained by the SSHD.

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::

Consider Turkish Businessperson applications under the ECAA. These are pursued under a very early version of the rules from 1973. The Respondent publishes evidential guidelines which (were, until recently) made subject to an appeal. This created a logical, purposive, and fair system if an unpredictable one at times- but it tended to favour a high quality of business applicant, as was presumably the intention, at the expense of a poor quality applicant well placed to tick certain boxes.

Consultation Question 18

Other

Please expand on your answer::

I agree that there is a need to review the frequency of changes; these are often confusing and poorly announced to the general public. I am very cautious of any system, however, which provides for an unfettered discretion on the part of any official without independent review.

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::

I endorse the logic behind this approach, but the sentence would have to be "reasonable satisfaction" or "...not to be unreasonably withheld". If not, a decision

maker could simply dismiss any given application on their personal disbelief, howsoever irrational, and in doing so act lawfully. It would also be futile without a right of independent review.

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::

Mostly. Wouldn't it be better to have "family members of PBS migrants" in the same categories as "PBS migrants". Where would applicants under Appendix W fit?

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::

Yes. It would be very preferable if the same term(s) were used unless a different effect is specifically intended. It would also be worth checking for consistency of the various levels of test.

Is it really intended, for example, that a person married to a British citizen but unlawfully in the UK should show "insurmountable" obstacles to be granted leave; but a person not married to a British citizen need only show "very significant" obstacles. Wouldn't one expect the latter to be a higher test? Was it really intended that a parent of a British citizen who is party to a relationship with another British citizen would not be able to apply under the rules in certain circumstances but a single parent would?

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 1

Please expand on your answer::

I dislike the booklet approach. Cases are not always hermetically sealed. To take a recent example, it is not unusual for a case to involve a spouse application under Appendix FM; a claim under 276ADE(1)(iv); asylum; and with elements of the PBS relevant. I would not endorse a system which involved flicking through four different booklets to deal with it.

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

Please share your views::

See above- while it is possible to have a narrow and straightforward case dealing only with one aspect of the rules this will not always, or even often, be the case.

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

Please share your views::

Again, see above- consider cases which involve consideration of a very broad range of the rules.

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::

Yes. A layman's term explanation with a clear "flagging up" would be extremely helpful.

Consultation Question 26:

Yes

Please expand on your answer::

Yes, it's a good idea. Probably a capital letter rather than a symbol- one of the few redeeming features of the current rules is the use of Appendix titles to define certain areas. It's extremely helpful to refer to Appendix FM and know that you'll be dealing with a family life claim.

Consultation Question 27:

Yes

Please expand on your answer::

Excellent suggestion, with one caveat- it might be worth including a term that the title of any provision does not contribute to the definition of the rules itself. This is a common provision in the drafting of contracts.

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 don't think it's a major issue, subject to clarity to clarity that the subtitles don't contribute to the meaning of the rules.

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::

Yes. Finding the correct provision is notoriously difficult, particularly for a layperson or non-specialist lawyer.

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

Yes

Please expand on your answer: :

Table of contents. An overview would either become overly-wordy or unclear and would only make matters worse. A table of contents with a clear unambiguous list of every provision contained in that Part would be far better.

Consultation Question 31:

Yes

Please expand on your answer::

Very much so. However, I would prefer if each part had a clearly identified letter at the outset- e.g. A.1.1.1(i) or B.1.27.6(iv). If not, there will be scope for confusion between identically numbered rules in different parts.

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

Other

Please expand on your answer: :

Only on the assumption that the Appendices are genuinely supplemental lists and do not contain substantive rules.

Consultation Question 33:

Other

Please expand on your answer: :

A rule inserted before "A1" should be "ZA1"- no, AA1 (or (aa) below) would be much better. Better to run in alphabetical order if at all possible.

where text is added to the end of existing text at the same level, the numbering should continue in sequence- Yes, this is very sensible.

new whole paragraphs inserted between existing paragraphs should be numbered as follows- Yes, agreed.

after Z or z, the sequence Z1, Z2, Z3 and so on or z1, z2, z3 and so on should be used- cautiously. One hopes it will not come to this in terms of complexity.

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

No

Please expand on your answer: :

No. Have transitional provisions incorporated into the body of the new rules e.g.

"C.1.3.7: applications made before [date] under paragraph 276ADE are considered under these provisions"

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: :

If at all possible. The heavy use of appendices was an error.

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::

Strongly agreed. The rules should say what they mean and mean what they say. By all means have a paragraph setting out the requirements even by reference to another (c.f. EX.1) but a definition is not the way to go.

Consultation Question 37:

Yes

Please expand on your answer::

Very much so. See above.

Consultation Question 38:

Yes

Please expand on your answer::

Yes, strongly agreed. This would be very helpful.

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 a necessary evil to avoid lack of clarity or over cross-reference. I appreciate the problems it raises but the absence would be worse.

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::

In general terms, very. In terms of comparative references, it might be wise to look at very early versions of the immigration rules, where these principles were much better implemented.

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::

Yes, this appears very sensible.

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: :

Asides my general observations (see above) it might be a good idea to incorporate specific transitional provisions into the bodies of the rules.

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::

Not much in evidence in respect of the immigration rules, but the rules for immigration bail have been radically improved by this procedure relatively recently- <https://www.judiciary.uk/wp-content/uploads/2018/07/pgn-1-2018-bail-guidance.pdf>

This guidance was produced as a result of informal consultation and swept away a large number of archaic or irrelevant requirements while being generally very respectful of the Home Office's requirements.

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: :

A more consultative approach would be extremely welcome. The experience of lawyers and other professionals has generally been that rules have been introduced without warning and that when obvious flaws- even glaring mistakes- in the rules are repeatedly pointed out, it takes until the matter is tested in court for any changes to be made. This cannot possibly be of long-term benefit to the Home Office either.

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 adverse to there being more detail in the explanatory memorandum- this is almost impenetrable as it is. However, a layman's term explanation of the effect of the changes, the objective behind them, and if possible, a basic history of the rule would be very helpful.

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::

Very difficult on paper but, online, you could be asked to input a date you are interested in to see the version of the rules in force on that date. For a printed version, you could be provided with a footnote which confirms the date that this rule was in force and the title of the instrument applying it.

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?

Other

Please expand on your answer::

The current method of archiving works well (though I'd prefer versions from before 9 July 2012 to be available). I would certainly not endorse a system where the dates are simply incorporated into the rules as this would, in my view, represent a significant backward step in terms of reducing complexity.

A better approach, however, would be a "key in a date" system whereby the user types the date to be taken to the version of the rules applicable at that date.

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::

Yes. The archive should be preserved but it needn't be in the body of the rules. The current archive system works well.

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::

A major problem is the rule becoming obsolete between application and decision. This creates perverse and unfair results.

A bigger problem is when very subtle, but important, changes are made with little clarity, explanation, or announcement.

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::

Yes, the rapid-fire change is unhelpful. A fixed date and a fixed frequency would help a lot, as would a simplified explanation of the substance and purpose of the changes.

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?

No

Please expand on your answer::

The rules have to be passed as a body of text and be capable of being printed e.g. in refusal letters, skeleton arguments or appeal grounds. An over dependence on technology is not the way to go, though it could be a useful tool from time-to-time for research purposes.

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::

HMRC; the SRA; and the BSB all use hover-over definitions and footnoted hyperlinks online. This would be very helpful.

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::

The online system gives options which do not clearly relate to the rules and are misleadingly titled. Is an application for limited leave to remain as a spouse a "settlement application" or a "visit application"- it's quite plainly neither.

It is often unclear when papers should be provided and what dates they should cover. It would be a good idea to have references to the procedure in the rules.

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::

Yes, so long as it is a research tool and not an attempt to solve problems with the rules in and of itself.

Additional comments

Additional comments

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