

# LAW COMMISSION

## *Simplification of the Immigration Rules: Consultation Paper*

### Submission of Evidence

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*Biography:* Professor Brooks is the Dean of Durham Law School. An award-winning author and public speaker, he has published over 20 books and 150 articles including *Becoming British* (Biteback 2016) and the only comprehensive report into the Life in the UK test that is often referred to in Parliament.

### Consultation Question 1

1. YES.
2. The Immigration Rules are not providing the transparent legal framework for immigration cases that they should be. Increasing frequency of changes and the wide range of these changes have left virtually no area untouched and unnecessarily create confusion as the valid rule for an issue can change multiple times over the year without much advanced notification or explanation.
3. I disagree that the Rules's can be likened (perhaps in terms of their complexity) to that of the Byzantine Emperors (1.5). A better analogy is the Law of Draco. Draconian laws were hidden in plain sight – hung so high none can read their edicts – with extreme punishments like death for their violation. The Immigration Rules are likewise all available online, but change so often their consistency can be illusory with the strong penalty of deportation or loss of citizenship when making a clerical error. This is not how a modern, well functioning system should work for immigration lawyers nor private citizens alike.

### Consultation Question 2

4. YES AND NO.
5. Yes: I would recommend adding an eighth principle: infrequent. It might be too much to insist on changes only being annual and government may resist any constraint on its

flexibility, but it is clear that changes are happening too rapidly with too little notice or justification. If any changes were at least infrequent aspiring to no more than once or twice a year, then changes can continue but the timing would be better known in advance so that those engaging with the Immigration Rules have better opportunity to know when changes potentially affecting their applications might come into place. This might be more a normative aspiration than a rigid rule.

6. No: The remit of this consultation is fairly narrow. The underpinning statutory scheme to substantive immigration policy (1.9) is in urgent need of revision. I would recommend a Royal Commission to provide a new draft Immigration Bill that creates a new cornerstone replacing Immigration Act 1971 by merging changes since into one coherent, systematic Act.

### **Consultation Question 3**

7. YES.
8. The users include immigrants, some or many of whom will have any right of long term abode. It is essential the rules are easily navigable by British citizens and those with realistic prospects of becoming British citizens. This requires non-technical language used wherever possible.
9. It is also important the system is navigable by those who are not British citizens and may lack realistic prospects of naturalisation if only to help make clear why. Providing such clarity and consistency would be most helpful in addressing ambiguities and setting expectations. Guidance for non-native English speakers would be helpful.

### **Consultation Question 4**

10. YES.
11. It is abundantly clear to anyone who has engaged in immigration law cases that the Immigration Rules' complexity has done little to make easier or more certain how relevant applications are made and considered.
12. One factor that speaks to this problem is the too high rate of successful appeals. A clearer, more consistent system would permit such a high rate of success for judicial reviews notwithstanding efforts made by successive government to constrain how such reviews can be made.

### **Consultation Question 5**

13. YES.
14. It should be noted that key assumption 3 is 'Administrative review fees set on a cost recovery basis'. These fees are currently much higher – and as much as 900% cost. This means the potential benefits to applicants (e.g., the public) is considerable.

15. The non-monetarised savings are also considerable in time and benefits to general well-being of those directly affected, their families and their legal advisors.

#### **Consultation Question 6**

16. YES.

#### **Consultation Question 7**

17. YES AND NO.

18. Yes: Guidance can play a helpful role in providing a more specific set of terms clarifying the application of rules. One example is the Good Character guidance in relation to the additional number of years of UK residency required if an applicant has been convicted and sentenced.

19. No: this guidance is routinely disregarded, especially where applicants have media take up their cause. If rules only meant to be followed when persons affected are not noticed by the media, it raises serious questions about why they are in place at all. This frequent departure from frequently shifting, almost haphazardly amended, rules with little notice adds to the general uncertainty on the rules' status at any given time with a clear impact on judiciary.

#### **Consultation Question 8**

20. YES.

21. Insofar as the Immigration Rules are to provide rules, the guidance contradicts them in letter if not only in spirit when regularly flouted by higher profile media cases. The better known cases where guidance is not applied can be based much more on the fact of making headlines than the merits of the application.

22. Guidance is more numerous and longer than the Rules. A change in a Rule – or even one part of the guidance – can require fairly extensive changes across the many different sets of guidance available. In part, this is a product of the highly repetitive nature of the guidance.

23. One somewhat relevant example is the Life in the UK citizenship test. It is required by statute and anyone wanting to acquire Indefinite Leave to Remain or naturalisation must normally pass it since 31 October 2013. However, its content is not scrutinized by Parliament and it is updated only periodically with editions in 2005, 2007 and 2013. My research has exposed that it was possible to pass a full test where all answers were scored as correct but also factually untrue, including outdated 'correct' answers on the number of MPs in Parliament and more.<sup>1</sup> Like the Immigration Rules, the citizenship test is not subject to any consultation either. Whether or not it meets its original justification of ensuring migrants had successfully integrated has never been tested let alone considered.

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<sup>1</sup> See Thom Brooks, *Becoming British: UK Citizenship Examined*. London: Biteback Publishing, 2016.

24. Moreover, as the rules change, the test often does not as the government tends to wait for it to get sufficiently out of date and unfit for purpose before making up a new version. One example of this is the decision in 2014 to recognise the Cornish with protected minority status.<sup>2</sup> An unforeseen consequence is that Cornish culture and history ought to be considered for potential inclusion in the citizenship test alongside the other protected minority statuses of Welsh, Scots Gaelic and Irish.<sup>3</sup> This has since been raised in Parliament with the government suggesting not the inclusion of Cornish culture and history (as is required) but producing the test in the Cornish language (which is not since the government ended publishing the test in Welsh and Scots Gaelic in 2013).<sup>4</sup> This example shows that seemingly minor changes the government has introduced in recent years have been implemented without a full understanding of their impact on immigration law and policy with an enduring legacy of lessons remaining unlearned. The recognition afforded to the Cornish has yet to be recognised on the test – despite recognition being granted still to all other protected minority statuses notwithstanding the government being informed they were in breach. What happens with the test is replicated in different ways with the guidance more widely.

### Consultation Question 9

25. Application forms are far from user friendly. They have the look (and probably the history) of piecemeal reconstruction via different committees without a sense-check of the overall form. There should be consistency in their structure across all forms. The forms should be issued with a push towards greater brevity and online applications wherever or whenever possible.
26. A clear checklist of any additional forms or materials that might be relevant to assessing an application should also be included – and adhered to.
27. It was nowhere in my guidance that I required a letter from my then employer stating that, if granted Indefinite Leave to Remain, I would remain in my permanent position. However, this was requested at the assessment of my ILR application. Thankfully, my solicitor was aware and recommended that I bring such a letter. But a member of the public simply following a strict reading of what is required could not know this unlisted required document might be asked for during his or her interview.
28. Such anomalies are clearly unacceptable, but suggest strongly that the application of the rules, their guidance and assessment of applications are insufficiently stress-tested. By this I mean, the whole system lacks the perspective of the immigrant who must – from a different cultural and knowledge base – navigate what guidance and forms are publicly available and make an application.

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<sup>2</sup> UK Government, 'Cornish granted minority status within the UK', (24 April 2014),

<https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>.

<sup>3</sup> Thom Brooks, 'Cornish pastries must be added to the UK citizenship test', Durham University (28 April 2014),

<https://www.dur.ac.uk/news/allnews/thoughtleadership/?itemno=20944>.

<sup>4</sup> Oliver Vergnault, 'Citizenship tests could become available in Cornish but not Gaelic or Welsh', *Cornwall Live* (9 January 2018), <https://www.cornwalllive.com/news/cornwall-news/citizenship-tests-could-become-available-1030776>.

29. There is a potential rule of law issue. If we have expectations of applicants in making a successful application, the state should make it reasonably possible for these applicants to understand what is required with the ability and opportunity to submit an application. When applicants cannot discover what is required except through word-of-mouth advice from a practicing lawyer, then applications are not considered on their true merits and the system either knowingly or foreseeably makes possible such instances.

#### **Consultation Question 10**

30. YES.
31. The analysis set out in this chapter is correct concerning the causes of increased length and complexity in the Immigration Rules.
32. The increased length in the number of words, rules and statements has arguably led to an increase in the high rate of appeals relating to mistaken applications of these rules and their guidance. Instead of providing greater clarity, the proliferation of frequently changed rules and guidance has generated obscurity.

#### **Consultation Question 11**

33. YES.
34. The points-based system has created unnecessary complexity. This is a curiosity for three reasons:
35. First, there is widespread misunderstanding about this part of the Immigration Rules. This is evident in both the 2015 General Election and then EU Referendum where politicians across multiple political parties claimed that, if successful, they would introduce a points-based system.<sup>5</sup>
36. This lack of public understanding about the system being in place for at least non-EU citizens for a decade is not helped by the fact the government no longer hosts the online points calculator that prospective migrants could use to see if they qualified<sup>6</sup> – and a useful pedagogical tool for citizens assisting their knowledge and confidence in the immigration system overall. Keeping the system but denying access to the calculator only fuels myths the system does not exist. This is not a sign of accountable or transparent governance.
37. Secondly, the system is normally used as a means to attract an increase in migrants. Its use in Australia is especially indicative of this. Potential migrants, especially the highly

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<sup>5</sup> See Peter Dominiczak and Steven Swinford, 'EU referendum: Boris and Gove pledge tough new immigration system after Brexit', *Daily Telegraph* (1 June 2016), <https://www.telegraph.co.uk/news/2016/05/31/eu-referendum-boris-and-gove-pledge-tough-new-immigration-system/>.

<sup>6</sup> See UK Visas and Immigration, 'Points Calculator', <https://www.points.homeoffice.gov.uk/gui-migrant-jsf/PointsCalculator/Unavailable.html>.

skilled and/or fitting work shortage areas can work out in advance their eligibility for residency and employment and so more easily plan to migrate. However, the UK has somewhat contradictorily used a points-based system while capping numbers. Whatever benefits could arise from the transparency of knowing the entry criteria with confidence that entry might be secured where a sufficient number of points are earned is impacted by the very clear costs imposed from a cap that undermines any such confidence. The result is a complex, burdensome system that does not produce the transparency such systems are designed to ensure.

38. Thirdly, the Prime Minister was quick to say that there would be no points-based system for EU nationals.<sup>7</sup> Her Government's recent Immigration White Paper has made clear its intention of treating EU nationals and non-EU nationals within a single system that is nationality-neutral. If so, then the complex and problematic points-based system currently in place should be seriously considered for being stopped – and I write as someone who came in via the points-based system. This would potentially make progress in reducing the size and complexity of the Immigration Rules.

### **Consultation Question 12**

39. YES.

40. It is worth emphasising that information relating to Appendix O (Approved English language tests) may only be 10 pages, but the recognised list of tests and test centres approved by UK Visas and Immigration to show that applicants have the required level of English for their visa is perhaps *the* most frequently changing part of immigration policy. This list is amended virtually daily and has been for several years.

### **Consultation Question 13**

41. YES AND NO.

42. Yes: A less prescriptive system permitting greater discretion is desirable. The Appendix V (Visitors) example is a good illustration of how this might work.

43. No: I have some concerns around Appendix EU. These are mostly on the UK's relaxed approach to ensuring EU nationals are properly exercising their free movement rights. The issue is not whether the government should be relatively relaxed and not enforce as strictly as it can existing restrictions on free movement. Instead, the concern is that this virtue could become a vice. This is because of the new EU registration requirements that require documentary evidence in a way that was not required previously. There is a risk EU citizens could have foreseeable, avoidable and unnecessary burdens of documenting proof of their right to remain in the immediate future that was not required or facilitated to the same extent on entry, even currently.

### **Consultation Question 14**

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<sup>7</sup> BBC News, 'Immigration: May rejects points-based system for EU nationals', BBC News (5 September 2016), <https://www.bbc.co.uk/news/uk-politics-37271420>.

44. NO.

45. The length and complexity of the current Immigration Rules have demonstrably not secured improvements in transparency or clarity. Their length, complexity and frequent change render them virtually hidden in plain sight. Evidence of this failure is the high rate of successful appeals suggesting a much higher degree of uncertainty about the application of the rules by practitioners and the courts alike. It would be reasonable to infer such uncertainty is much greater among the public for whom the rules attempt to serve. This is intolerable.

#### **Consultation Question 15**

46. YES AND NO.

47. Yes: A prescriptive approach could have merit if it was genuinely prescriptive constraining the ability of discretion and providing for clear, consistent decision-making that was unambiguous and consistent with human rights obligations. Applications might be considered through a more automated process saving staff costs.

48. No: The downside is the lack of flexibility that seems regularly required, especially given various human rights obligations. Any change would have a greater impact because a prescriptive approach would have a more detailed framework. This could make navigation of the whole difficult and seem too impersonal.

#### **Consultation Question 16**

49. YES.

50. There is enormous merit in a less prescriptive system especially with regard to evidential requirements. Their specificity seems designed to exclude setting barriers. There does not appear to be much, if any, evidence that such an approach has made it easier for government to restrict immigration and many any progress towards its net migration target. If anything, these requirements have played little to no role as the government continues to struggle to meet its campaign manifesto pledge of reducing net migration to 100,000 or less.

#### **Consultation Question 17**

51. YES.

52. I would recommend ending the points-based system for a start.

53. The Family Rules should also be an area for greater discretion. This would end the continuing problems in setting out relevant sources of income for determining whether specified sponsorship thresholds are met.

54. In my book *Becoming British*, I highlighted a number of facts: (1) the sponsorship threshold is set to a value whereby an immigrant's use of public services has a negligible cost, but (1a) non-EU citizens subject to this rule are unable to have recourse to these

services anyway and (1b) non-EU citizens' income can and should be relevant: it is nonsensical that a UK citizen earning £18,000 cannot bring a spouse to Britain even if she was a multimillionaire heiress whose assets would follow her to the UK. Instead of regularly trying to specify the requirement that goes far beyond its original purpose and only creates another hurdle that will still be overcome, better uses of discretion would be no less effective, clearer and more consistent.

### **Consultation Question 18**

55. YES.

56. The nature and frequency of changes for a reason other than a change in the underlying policy should be part of a trigger. Government should aspire to a maximum of 1-2 changes of the rules per year across a set number of areas. This would allow necessary change, but promote usability: it is challenging to advise clients on rules constantly in flux.

### **Consultation Question 19**

57. MAYBE. I am unsure of the New Zealand model under consideration. The phrasing of 'to the satisfaction of the decision-maker' is very broad. Some guidance should indicate how this standard could be achieved in general term without re-introducing an overly prescriptive framework.

### **Consultation Question 20**

58. YES AND NO.

59. Yes: Broadly speaking, I agree with the divisions proposed subject to a couple amendments.

60. No: I would separate Part 5 into two halves: one would focus exclusively on knowledge of language and the second would focus exclusively on knowledge of life in the UK relevant for indefinite leave This might be listed as Part 5: Knowledge of language for indefinite leave and Part 6: Knowledge of life in the UK for indefinite leave.

61. The language part would be longer than the knowledge of life in the UK part at present. I believe a specific look at language which can be an important barrier for many and source of contestation worth its own treatment. The current rules are problematic in relation to exemptions: (1) the list of exemptions by nationality is arbitrary and provides insufficient evidence of English fluency and (2) the exemption by receiving a degree taught or researched in English anywhere in the world is far too wide. The House of Lords Select Committee on Citizenship and Civic Participation accepts, in part, my recommendation these exemptions should be reconsidered on account of their being problematic.<sup>8</sup> There are over a dozen such exemptions.

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<sup>8</sup> House of Lords Select Committee on Citizenship and Civic Participation. *The Ties That Bind*, 18 April 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/ldcitizen/118/118.pdf>.



62. The knowledge of life in the UK part might be brief at present detailing the need to pass the citizenship test unless satisfying one of several exemptions. However, this is a very different requirement from English fluency. This would better draw attention that the requirement of demonstrating sufficient knowledge of language and life in the UK can no longer be satisfied by one test – either ESOL with Citizenship or the Life in the UK citizenship test since October 2013.

63. I would also recommend adding a part on Naturalisation. This is missing.

64. Finally, I would also add a part on ending naturalisation. While rare, such cases are rising of individuals deciding to no longer be British citizens.

#### **Consultation Question 21**

65. YES. Such an audit is longer overdue.

#### **Consultation Question 22**

66. YES.

67. I favour the unified approach of having all materials in one place. Instead of booklets as the source of rules, I would recommend the Home Office commission study guides or other texts – like is done for the citizenship test handbook – that could provide an official source of relevant information in one place that is based on the unified source.

#### **Consultation Question 23**

68. NO.

#### **Consultation Question 24**

69. NO.

#### **Consultation Question 25**

70. YES.

#### **Consultation Question 26**

71. YES.

72. The citizenship test handbook contains a glossary of key words that might also be looked at as a way forward.

#### **Consultation Question 27**

73. YES.

74. Such changes would represent an enormous breath of fresh air. Usability and accessibility should drive titles.

#### **Consultation Question 28**

75. YES.

76. The current extensive use of subheadings simply adds unnecessary words that make a long, complex web of rules even longer and more difficult to navigate.

**Consultation Question 29**

77. YES AND NO.

78. Yes: Overviews provide a helpful introduction to a section.

79. No: Overviews are not themselves the rules – they are more akin to a constitution’s preamble than the text of the constitution itself. This difference in status to the rules I would mark out in two ways. First, outlines should be drafted as an accessible summary of a set number of words. Secondly, outlines should be presented in a different font such as *italics* so their status or standing is visibly distinct from the binding rules they summarise.

**Consultation Question 30**

80. YES.

81. I agree that overviews can cause more problems than they solve. However, a brief 100 word maximum in *italics* presented as a “Summary:” of what is to follow at the start of each Part could have a useful function in assisting accessibility.

82. I would not recommend overview summaries to each sub-part. This would recreate the problem of unnecessary verbosity and obscurity that this review is attempting to reduce.

**Consultation Question 31**

83. YES.

84. This is a change with huge significance in improving accessibility that would make the rules far more user-friendly. I would rate this among the most important and worthwhile recommendations proposed in the consultation document.

**Consultation Question 32**

85. YES.

86. This would be an excellent change – and helpfully end the obscure abbreviation ‘system’ currently in use.

**Consultation Question 33**

87. YES.

**Consultation Question 34**

88. YES.

89. This is a fabulous recommendation – and a simple way of getting a quick, significant win.

**Consultation Question 35**

90. YES.

**Consultation Question 36**

91. YES.

**Consultation Question 37**

92. YES.

93. This change would be of immense value to the public who could more easily navigate the rules, their legal representatives who could more directly consider different rules in question and the government who could more easily make amendments but not be concerned about any possible cross-referencing to other paragraphs for no clear benefit.

**Consultation Question 38**

94. YES.

95. In particular, the legislative source for a rule is helpful not least in making clear the rule's justification for inclusion. This importance should never be lost. The Immigration Rules do not exist for their own sake.

**Consultation Question 39**

96. YES.

97. I fully support the elimination of as much repetition as is possible. Overly repetitious material does not enhance comprehensibility and increases cost to government of making even minor changes if they might require extensive revisions because of unnecessary repetitions.

**Consultation Question 40**

98. YES.

**Consultation Question 41**

99. YES.

**Consultation Question 42**

100. YES.

**Consultation Question 43**

101. NO.

102. There seems little, if any, formal or informal consultation with stakeholders on the form and content of the Immigration Rules. This has done nothing to improve the sorry state of the Rules in form and content today.

**Consultation Question 44**

103. YES.
104. I strongly endorse the launch of some form of informal review mechanism – perhaps an Advisory Group – that is purely advisory and meets on an on-going basis.
105. The focus on simplicity, accessibility and coherence of the Rules and their interaction with extrinsic guidance would be a useful and productive remit.
106. This Group might also be used to do forward-looking work on the Rules, guidance or review existing statutes.
107. Membership should include civil servants, legal practitioners and members of the judiciary as recommended.
108. ‘Other stakeholders’ are also recommended. This must explicitly include legal academics, such as immigration law and policy experts.
109. I would serve on such a body, if asked.

**Consultation Question 45**

110. YES.
111. I strongly support using Keeling schedules to make much clearer what changes are being made to where and why. This will assist Parliament in scrutinising changes over time and be of benefit to citizens and practitioners alike in applying the rules.

**Consultation Question 46**

112. YES.
113. Temporal application of statements of changes to the Immigration Rules might be made easier by first renumbering, etc as recommended. Secondly the format for the Rules should be confirmed. Future changes after a set date should adopt the new format as the full set of Rules are redrafted.

**Consultation Question 47**

114. YES.
115. I am supportive of the more costly option of a new archiving system which would be free to the public and contain a search facility enabling searches for a Rule and all previous versions with their dates of application. This has importance now for citizens,

migrants, legal practitioners and researchers. As the government grapples now with historic issues relating to the Windrush generation, such a new system may have a cost but may actually be cost-effective in providing needed clarity in the medium to longer term.

**Consultation Question 48**

116. YES.

**Consultation Question 49**

117. YES.

118. Issues arise from frequent changes of the rules, including uncertainty and confusion about which version of a rule was or is in place at a particular time.

119. Changes are inevitable. Government may require some flexibility in responding to events where necessary. I would not recommend any limit to changes set in stone.

120. However, a normative guidance of no more than 1-2 per year would set a marker that would distinguish wide departures as too frequent putting pressure on making any such changes more carefully with greater notice and maximising usability. The Rules suffer from inconsistent application and over complexity. Less frequent changes than several times each year at arbitrary dates would go some way at improving their application.

**Consultation Question 50**

121. YES.

122. April and October should be the norm.

**Consultation Question 51**

123. YES.

**Consultation Question 52**

124. YES.

125. I support this recommendation. But I would emphasise the importance of the Rule over is guidance. The latter is meant to help us apply the former. We should remain focused on improving clarity about Rules and their implementation. This will give the right focus and balance to getting the guidance right.

**Consultation Question 53**

126. YES.

127. Provided vulnerable persons and residents in more rural areas have satisfactory access to the online application process and the in-person appointment system, this is demonstrably superior for users and the government than the paper application system.

**Consultation Question 54**

128. YES.