

LAW COMMISSION CONSULTATION ON SIMPLIFYING THE IMMIGRATION RULES: RESPONSE FORM

Topic of this consultation

This consultation paper reviews the Immigration Rules in order to identify the underlying causes of their complexity, and to identify principles under which they can be redrafted to make them simpler and more accessible. It makes a number of preliminary proposals to pave the way for the introduction and maintenance of clear, comprehensible and logically organised Rules, and asks whether consultees agree. It also seeks the views of consultees on more open questions.

The paper also includes specimen redrafting of some of the Rules.

The review does not consider substantive immigration policy.

For more information about this project, please visit <https://www.lawcom.gov.uk/project/simplifying-the-immigration-Rules/>.

How to respond to this consultation

We are aware that our consultation paper is lengthy, and that the response form asks a lot of questions. Please do not feel that you must answer every question. If you are only interested in one part of our consultation, or even if you wish to answer only one question, you can respond to just that part or question.

While it is very useful to us if you can respond to the specific questions which we ask, we have also provided a box at the end of the response form for any additional comments you may wish to share with us.

We invite responses from 21 January to 26 April 2019.

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What is your name? (Required)

MR JUSTICE LANE, PRESIDENT UTIAC

What is the name of your organisation?

UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Are you responding to this consultation in a personal capacity or on behalf of your organisation? (Please select only one item)

- Personal response
- Response on behalf of organisation
- Other (please state)

What is your email address?

If you enter your email address then you will automatically receive an acknowledgement email when you submit your response.

Please address any correspondence to:



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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
 No

Consultation Question 2: Do consultees agree with the principles we have identified to underpin the drafting of the Immigration Rules?

- Yes
 No
 Other

Please expand on your answer:

That there is a need for an overhaul of the existing immigration Rules is uncontroversial. The more difficult question concerns the principles that should underpin the future drafting of the Rules.

It is suggested that, in common with all other forms of legislation, the fundamental principle is that the Rules should be an accurate articulation of the policy of the person responsible for making them; namely, the Secretary of State.

Whilst drafting the Rules in a way that can be readily understood by someone directly affected by them is plainly desirable and may often be compatible with the fundamental principle, it is that principle which must predominate. Therefore, if the policy the Secretary of State seeks to achieve is complex, then the Rules will necessarily be complex.

Whether and to what extent the Secretary of State's policy should be moulded by comprehensibility considerations is itself a policy issue, upon which UTIAC cannot comment.

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
- No
- Other

Please expand on your answer:

Please see response to Q 2 above.

There are a number of ways in which the Rules can be made more accessible, which do not necessarily involve direct drafting. As the Consultation Paper acknowledges, very many individuals are likely to consult the Rules online. The use of hyperlinks may assist to navigate readers to what are considered to be appropriate provisions, having regard to the subject matter in issue. However, there may be a risk that users will regard the hyperlinks as taking them to the only provisions of relevance when, in fact, that is not the case. It is also understood that hyperlinks may not operate satisfactorily in areas that have poor internet connections. This should be particularly borne in mind insofar as the Rules are likely to be accessed online by persons, without professional legal assistance, who are making entry clearance applications from abroad.

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:

UTIAC judges do not find, in general, that the complexity of the Rules leads to mistakes by applicants, in the sense that an applicant could have qualified under them, but for his or her misunderstanding of what the particular rule requires.

It is more often the case that applications fail because of an inability to meet the prescriptive evidential requirements of a particular rule. This is sometimes the result of a failure to appreciate that there are multiple parts to the Rules and that all relevant requirements must be met.

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?

- Yes
- No
- Other

Please expand on your answer:

UTIAC's judiciary is unable to comment authoritatively on the draft impact assessment. HMCTS officials who are tasked with forecasting levels of appeals and judicial reviews may have their own views on the question.

With that important *caveat*, we have the following comments in response to the projected saving of £2.14 million.

We are doubtful whether simplification of the Rules would *per se* lead to a drop in the number of statutory appeals (essentially, human rights appeals) or of immigration judicial reviews and thereby a reduction in costs for the judicial system.

Past experience suggests that any change in the Rules will lead to a short to medium-term spike in litigation, as the new provisions 'bed in'. Whilst there may not be a rise in the number of appeals lodged overall, it is possible that cases would remain in the system for longer, as practitioners and the judiciary understand and assimilate the changes. For instance, the current provisions relating to deportation were introduced as long ago as July 2012 but a key issue in their interpretation has only recently been settled in the Supreme Court in KO (Nigeria) [2018] UKSC 53. Even more recently, UTIAC has issued further guidance on their application: MS (Philippines) [2019] UKUT 00122 (IAC).

In the medium to long-term, it can be assumed that if the underlying policy objectives remain constant, it will likely be the case that roughly the same proportion of applicants will qualify under any redrafted rule, as qualified under its predecessor. If so, the tribunal system might expect to receive the same number of appeals and judicial reviews by reference to the new rule.

It is not thought that a simplification of the Rules will reduce the time judges spend considering cases and writing decisions. UTIAC's judges are specialists who are very familiar with the present Rules. Save in a very few appeals, it is rarely the case that a judge will spend a significant amount of time searching for applicable provisions in the Rules. In the vast majority of cases, the parties are in agreement about what the relevant paragraph of the Rules is; and that will remain the case if the Rules are redrafted.

It is, however, likely in our view that substantial savings might be made if the simplification project included enhanced 'evidential flexibility' procedures for Home Office staff. We comment further below at Q16.

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

- Yes
- No
- Other

Please expand on your answer:

In our experience applicants – and many practitioners – simply view the Rules as the law. Most are unaware of their unique status, and the relevance of that status arises in only very few cases; albeit that those cases tend to be ones that reach the higher courts.

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

Please share your views:

Home Office guidance was, in its original form, intended as internal advice to caseworkers tasked with making decisions. In the era when the Rules generally gave decision-makers a wide discretion, it was therefore a valuable tool, in that it promoted consistency. Since DS Abdi [1996] Imm AR 148, guidance has come to play a central role in decision-making across the board. It now informs applicants and advisors; sets out the Secretary of State's view on how the Rules should be interpreted; and, importantly, defines the parameters of how the Secretary of State will exercise his discretion 'outside of the Rules'. It is therefore highly desirable for the guidance to be clear, consistent and easily accessible.

Numerous problems have, however, been reported with the guidance, as it is currently drafted and presented. Policy statements can be badly drafted and internally inconsistent. They can be verbose and repetitive and sometimes do no more than reproduce what the rule itself says. Some policy documents are subject to very frequent amendment, whilst others remain untouched for years.

So far as UTIAC is aware, there does not appear to be in place a mechanism whereby Home Office Presenting Officers can be kept informed of relevant changes in guidance and enabled to identify what the guidance was at any particular point in time.

As identified in the consultation paper, the guidance has on occasion been inconsistent with the very rule it seeks to explain.

A recent analysis of the guidance, as found online, may be instructive. Users are presented with 15 different sections. Some of these are self-explanatory and a 'click' will lead to the relevant documents: for instance the tab 'visitors' will lead the reader to four discrete policy statements dealing with different aspects of decision-making relating to visit applications. Others are more arcane. The 'modernised guidance' tab will lead the reader to 16 further sub-headings, covering areas as varied and unconnected as the armed forces and 'immigration intelligence'; these sub-headings lead in turn to a total of 176 policy documents.

Unless readers are aware that the document for which they are searching is at the end of one of these paths, they may have little hope of finding it. For instance, a 'retired person of independent means' would need to go to the 'immigration law and operational guidance' page, from there to 'modernised guidance', and from there to 'other immigration categories', before he or she could find the relevant document.

Practitioners report that the internal search engine on the UKVI website will often direct the reader away to another government department. HOPOs and counsel alike regularly resort to typing words into a general internet search engine in the hope that a relevant policy will appear.

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 undoubtedly are instances where there is a contradiction or tension between the guidance and the Rules, particularly where the guidance seeks to place a gloss on the rule but in fact reads as if it introduces yet more 'tests'.

An example would be the guidance in respect of paragraph 276ADE, the provision relating to claims for leave on 'private life' grounds. One of the requirements in the rule is that a certain class of applicant must demonstrate that there are "very significant obstacles" to integration in the country to which they will be returned. Caseworkers seeking guidance on what that test requires are instructed that the returnee must be able to demonstrate they would be "unable to establish a private life": If nullification of the right is what is required, there seems to be a case that the rule itself should say so.

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

Please share your views:

UTIAC has no comment on the current accessibility of the forms.

Consideration might, however, be given to whether all online versions could be tailored in the manner currently used by HMRC for self-assessment income tax, ie a series of binary or short multiple-choice questions at the beginning of the process to curate an individualised form. Some entry clearance applications are already managed in this way.

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:

UTIAC commends the historical analysis in Chapter 5 of the consultation paper.

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:

Appendix FM-SE is a paradigm example of what might be said to be reactive drafting, leading to highly prescriptive and arguably overly-detailed requirements. The underlying policy aim is that persons who seek to remain in the United Kingdom on family life grounds are able to integrate, and that they will place no additional burden on the state.

In its original form, as guidance, Appendix FM-SE sought to prescribe to caseworkers the evidence they would need to see to satisfy themselves that applicants were financially independent, by meeting the 'minimum income requirement' of £18,600 per annum. Once it became part of the Rules (in the immediate wake of *Alvi*: see para 5.17 of the paper), and as cases on it came through the system, it became apparent that the drafters had been unable to legislate for each and every situation in which people earn money and support themselves.

Thus, the changes identified in the consultation paper became necessary, as waiters, construction workers, gardeners, lottery winners, the self-employed and, in fact, anyone who is paid in cash fell foul of the Rules. UTIAC saw a large number of appeals in which it was accepted by all concerned (including First-tier Tribunal Judges and Home Office Presenting Officers) that the applicant or sponsor was certainly earning over the required amount, but where the appeal nevertheless fell to be dismissed because, for instance, wages paid 'cash in hand' had not immediately been paid into a bank account. It is in recognition of such matters – and the fact that the strict evidential requirements appeared to undermine the purpose of the rule - that many of the piecemeal changes identified in the Paper have been introduced.

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?

- Yes
- No
- Other

Please expand on your answer:

At the time of writing, UTIAC is yet to see any cases arising under Appendix EU.

In respect of Appendix V, UTIAC agrees with the analysis in Chapter 6 of the consultation paper. The use of non-exhaustive lists to define a matter such as 'work' has not, to our knowledge, caused significant difficulties in practice, and the illustrative examples in paragraph V4.5 have enabled Entry Clearance and Immigration Officers to make informed decisions, on a case-by-case basis, about whether to refuse or curtail leave.

We would observe, however, there where the discretion in question is not so limited in scope, its exercise can be more controversial. In UTIAC's experience, the majority of visit visa refusals arise under paragraph V4.2 of the Rules, which requires applicants to demonstrate that they are "genuine visitors", and that they will leave the United Kingdom at the end of their visit. This has always been a requirement: in the previous incarnation of the rule it appeared at paragraph 41. Decision-makers who are assessing whether an applicant is "genuine" are required to have regard to a wide range of factors, such as the stated purpose of the trip, whether there are family members in this country, whether the applicant has close family in the country of origin, whether the costs of the trip are proportionate to the applicant's means, and the applicant's history of compliance with immigration control.

There is no longer a right of appeal for those refused visit visas (except in rare cases where applicants have specifically applied for entry clearance on human rights grounds). UTIAC's experience of dealing with decisions made under Appendix V therefore now arises primarily in the arena of judicial review. The majority of the cases we see continue to be refusals based on the assessment of whether the applicant is 'genuine' under V4.2.

The difference between an appeal and a judicial review in this context lies in the fact that, in an appeal, the judge can form his or her own assessment of whether the applicant is genuine; whereas, on a judicial review, the judge may be confined to deciding if the decision was reached rationally, in public law terms. As a result, judicial scrutiny is unlikely to reveal whether some ECOs might be setting the bar unnecessarily high in their subjective assessment of whether a visitor is genuine.

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:

In our experience, most judges and practitioners are now accessing the Rules online, partly for convenience but also because the printed versions are very quickly out of date.

UTIAC does not (indeed, cannot) have any objection to the Rules being lengthy, if that is what the Secretary of State's policy demands. The key to accessibility is having all of the relevant Rules and policy guidance in the same "electronic" place. It does not matter to the user if some of that material is replicated elsewhere.

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:

This question is, of course, one of policy, albeit that the Home Office is content for it to be posed by the Commission in the context of the present consultation. Having acknowledged this, it is thought there is much to be said for the Level 2 approach described in paragraphs 6.84 and 6.85 of the Consultation Paper.

It should, however, be appreciated that a less-prescriptive approach will deliver a net benefit, compared with the present system, only if the subjective tests are applied in a broadly consistent manner. This may require UKVI staff to have appropriate training, and for their decisions to be subjected to internal moderation. This is particularly important in the light of the present appellate regime and the constraints of judicial review, as discussed above.

The Administrative Review rubric would presumably also have to shift in line with the new 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:

The new scheme set out in Appendix EU, whereby applicants are invited to produce whatever evidence they see fit, guided by a categorisation of that evidence into what is 'preferred', 'alternative' and 'unacceptable', is an approach that, as the Commission indicates, has certain advantages. Such an approach ought to enable decision-makers to take a pragmatic and rounded view and alleviate the burden upon applicants who are at present obliged to keep scrupulous records and, in some instances – as the Consultation Paper observes – artificially generate paperwork simply to comply with a rule, the substantive requirements of which they already fulfil.

It may be interesting to examine what the effects might be if UKVI staff had a wider remit to revert to applicants, and highlight deficiencies in applications prior to refusal, It is thought this would reduce the number of Administrative Review applications, and consequently judicial review claims. Many practitioners and judges in the field recall the days in which specialist teams in the Home Office could be contacted directly in order to discuss, progress and - if necessary - perfect applications. It has been remarked that this approach had many benefits. The caseworkers themselves would build up an in-depth knowledge of their specialist area, and their daily exercise of discretion gave them greater responsibility and job satisfaction. Practitioners and caseworkers shared a productive working relationship. Applicants were satisfied by an efficient system.

At paragraph 36 of ZH (Tanzania) [2009] EWCA Civ 691 Lady Hale endorsed a pilot in cases involving children in the asylum system, which had these characteristics:

“36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the “caseowner” in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time”.

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:

Consultation Question 18

Our analysis suggests that, in deciding whether a particular provision in the Immigration Rules should be less prescriptive, the Home Office should consider:

- 1. the nature and frequency of changes made to that provision for a reason other than a change in the underlying policy;**
- 2. whether the provision relates to a matter best left to the judgement of officials, whether on their own or assisted by extrinsic guidance or other materials.**

Do consultees agree?

- Yes
- No
- Other

Please expand on your answer:

The suggested factors to consider appear relevant and reasonable.

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:

As the Consultation Paper recognises, the successful operation of a less-prescriptive and more discretionary system requires certain things of the decision-makers. They would need to be appropriately trained, acquainted with relevant principles of public law (including procedural fairness) and, if applicable, to have specialist knowledge of the category of the Rules in which they were working. Decision-makers would also need to be given the time that is reasonably required to reach satisfactory decisions and, as mentioned above, to liaise with applicants, where appropriate. One advantage of the 'tick-box' highly prescriptive system is that it enables relatively junior caseworkers to take decisions quickly.

Consultation Question 20: Do consultees agree with the proposed division of subject-matter? If not, what alternative systems of organisation would be preferable?

- Yes
- No
- Other

Please expand on your answer:

UTIAC largely agrees with the proposed sub-divisions of subject matter. Broadly speaking there are five substantive immigration 'routes' catered for by the Rules:

- i) Leave to enter/remain for a **temporary** purpose (visitors/ students/workers/business etc)
- ii) **Settlement** (human rights/long residence ie those switching from (i)/United Kingdom ancestry etc)
- iii) **Protection** (including asylum, humanitarian protection, statelessness, trafficking)
- iv) **Deportation and exclusion**
- v) **EEA**

To this must be added a sixth 'miscellaneous' category to cover special cases such as the Rules relating to the armed forces.

If the decision were taken to set out the Rules in a series of separate, free-standing 'booklets', there could be one booklet for each of the above categories; or there could be individual booklets for each sub-category ie 'studying in the United Kingdom'. Each booklet could contain a 'one stop' inventory of everything an applicant needs to know: see further Q22 below.

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
- No
- Other

Please expand on your answer:

As para 8.30 of the Consultation Paper points out, whichever method of organisation of the Rules is adopted, there should be an audit of overlapping provisions. There is no point in entering a new era for the Immigration Rules with such impediments as unjustifiably different definitions for the same expressions used in different parts of those Rules.

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?

Please select only one item:

- Yes
- No
- Other

Please select all that apply:

- Option 1
- Option 2
- Option 3

Please expand on your answer:

There are different views amongst the UTIAC judiciary as to whether Option 1 or Option 2 is better; that is to say, whether there should continue to be a single set of Rules or a set of booklets.

Those in favour of Option 1 highlight the amount of duplication that would be necessary, as well as the risk that unjustifiable differences in definitions etc would be likely to appear, as between the different booklets. Much of what is thought to be advantageous in the booklet approach could probably be addressed by suitable hyperlinks, etc, within the Rules, as they appear online. Option 2, however, has the merit of enabling an applicant, caseworker, representative and judge to navigate within a smaller and more manageable physical or digital space.

Although option 3 has its advantages, it carries the danger that errors or inconsistencies would occur in the transposition, leading to complex and difficult litigation.

If the booklet approach is adopted, consideration should be given to whether it is feasible to create a booklet that contains all of the relevant information applicable to any given category ie

1. A table of contents and introductory overview
2. General provisions
3. The relevant Rules starting with any pertinent definitions
4. Any applicable policy
5. Any relevant appendices
6. Links to the required application form and fee payment page

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

Please share your views:

No.

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

Please share your views:

No.

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
- No
- Other

Please expand on your answer:

If this suggestion were accepted but then not followed in a particular case, it might raise questions as to the enforceability of the rule in question.

Consultation Question 26:

We provisionally propose that:

(1) definitions should be grouped into a definitions section, either in a single set of Immigration Rules or in a series of booklets, in which defined terms are presented in alphabetical order;

(2) terms defined in the definitions provision should be identified as such by a symbol, such as # when they appear elsewhere in the text of the Immigration Rules.

Do consultees agree?

- Yes
- No
- Other

Please expand on your answer:

The present general definitions provision of the current Rules (paragraph 6) is, of course, widely consulted by practitioners. It is however unlikely that most lay users are utilising it, or are even aware of it. It would therefore be helpful if the key terms relating to any particular category were set out at the beginning of that section: see above. Alternatively, the use of 'hoverboxes' or hyperlinks could work but this would be dependent upon all users accessing the webpage on systems that enabled them to use these features.

Consultation Question 27:

We provisionally propose that the following principles should be applied to titles and subheadings in the Immigration Rules:

- (1) there should be one title, not a title and a subtitle;**
- (2) the titles given in the Index and the Rules should be consistent;**
- (3) titles and subheadings should give as full an explanation of the contents as possible, consistently with keeping them reasonably short;**
- (4) titles and subheadings should not run into a second line unless necessary; and**
- (5) titles and subheadings should avoid initials and acronyms.**

Do consultees agree?

- Yes
- No
- Other

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:

Subheadings are helpful if the reader is skimming through the Rules, looking for a particular provision.

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
 No
 Other

Please expand on your answer:

A table of contents at the beginning of each section would certainly be helpful. If the Rules were to be re-organised into 'booklet' form, this would be the obvious and straightforward means of introducing the content and assisting users in finding the relevant paragraphs.

The use of overviews is likely to be problematic for the reasons given in para 9.18 of the report. UTIAC does not agree with the last sentence of para 9.19, given the considerable scrutiny to which the Rules are subject.

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

- Yes
 No
 Other

Please expand on your answer:

See above: tables of contents preferred.

Consultation Question 31:

We provisionally propose 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 number;

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 consultees agree?

Yes

No

Other

Please expand on your answer:

Whatever system is chosen, it should be consistently followed.

There is something to be said for adopting the system used in Acts and statutory instruments, since this is both well-tested and generally familiar to practitioners and judges, without (it is thought) being 'off-putting' to non-lawyers.

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

Yes

No

Other

Please expand on your answer:

There is no consistency in the sequencing or identification of the - at date of writing - 31 Appendices. Some are numbered (starting at 2), some relate only to the points based system (ie Appendix J, 'codes of practice'), some are of general application (ie Appendix SN, 'service of notices') and some are, in effect, self-contained 'booklets' containing the substantive requirements for leave under a given rule (ie Appendix V, 'visitors'). This irregular approach could usefully be ended.

There are different views as to whether the best solution would be to simply re-number the Appendices. Those who favour doing so point to the fact that it does not appear to cause significant difficulties in other areas. The contrary view is that doing this would not assist users in identifying which Appendices might be relevant to their case, and could lead to confusion. If the Rules are to retain their present structure, it would not be of assistance to have yet more 'numbers' to refer to. If, conversely, the Rules are restructured into 'booklet' form it would be helpful to have the Appendices relevant to the given category contained in the booklet

Consultation Question 33:

We provisionally propose that text inserted in the Immigration Rules should be numbered in accordance with the following system:

(1) new whole paragraphs at the beginning of a Part should have a number preceded by a letter, starting with "A" (A1, B1, C1 and so on). A rule inserted before "A1" should be "ZA1";

(2) new lettered sub-paragraphs, inserted before a sub-paragraph (a) should be (za), (zb) and so on, and paragraphs inserted before (za) should be (zza), (zzb) and so on;

(3) where text is added to the end of existing text at the same level, the numbering should continue in sequence;

(4) new whole paragraphs inserted between existing paragraphs should be numbered as follows:

(a) new paragraphs inserted between 1 and 2 should be 1A, 1B, 1C and so on;

(b) new paragraphs inserted between 1A and 1B should be 1AA, 1AB, 1AC and so on;

(c) new paragraphs inserted between 1 and 1A should be 1ZA, 1ZB, 1ZC and so on (and not 1AA and so on); and

(d) new provisions inserted between 1A and 1AA should be 1AZA, 1AZB, 1AZC and so on;

(5) a lower level identifier should not be added unless necessary; and

(6) after Z or z, the sequence Z1, Z2, Z3 and so on or z1, z2, z3 and so on should be used.

Do consultees agree?

- Yes
- No
- Other

Please expand on your answer:

The wholesale adoption of this proposed system might be seen as lending support to an apparently never-ending series of insertions into a particular set of provisions, which is precisely one of the reasons why the existing Rules can appear forbidding and impenetrable.

Instead, it is suggested that if amendments are required beyond what is envisaged in Q33(4)(b) above, the relevant Part or rule should be entirely replaced, so that its divisions can be re-numbered from scratch.

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

- Yes
- No
- Other

Please expand on your answer:

In view of what has been just said, there is a good case for re-numbering the entire existing Rules in the manner proposed. The contrary view is that such re-numbering is likely to sow confusion in the minds of practitioners, who are well-used to the current numbering and to provisions such as paragraph 276ADE. It is, however, likely that ordinary "one-off" users would prefer a more straightforward system of numbering.

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
- No
- Other

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
- No
- Other

Please expand on your answer:

This very much depends on the structure that is eventually adopted. There is nothing inherently wrong with using definitions to import substantive requirements, as long as they are clear: for instance the definition of 'partner' at GEN.1.2 of Appendix FM.

Consultation Question 37:

We provisionally propose 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 consultees agree?

- Yes
- No
- Other

Please expand on your answer:

Consultation Question 38:

We provisionally consider that:

- (1) appropriate signposting to other portions of the Rules and relevant legislation is desirable in the Immigration Rules;**
- (2) where the other portion of the Rules or the legislation in question already applies to the case, the signposting should be phrased so as to draw attention to the other material and should avoid language that purports to make the other material applicable where it already is;**
- (3) where portions of the Rules use signposting, they should do so consistently.**

Do consultees agree?

- Yes
- No
- Other

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:

Again, the answer to this is dependent upon which structure is eventually adopted. If the 'booklet' system is selected, repetition would be preferable, in order to avoid the need to cross refer to the 'general grounds' section.

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
- No
- Other

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?

- Yes
- No
- Other

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:

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:

UTIAC endorses the suggestion in Chapter 12 that pre-drafting consultation can assist, in that practitioners and other users should be well-placed to advise drafters on whether a rule is intelligible, and therefore workable. Judicial involvement in an advisory committee tasked with considering specific proposed Rules might, however, be problematic.

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:

Very detailed explanations should not be necessary if the re-drafted rule is clearly expressed. A 'Keeling schedule' might be helpful, although of more importance is to be able to see the current Rules, online, in their amended form.

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:

It is a matter of policy how changes in the Rules are to come into operation. Having said this, it would clearly be desirable for the Home Office to adopt a consistent general approach, in the absence of any contrary policy considerations. Such an approach may prevent issues arising, such as those discussed in Odelola [2008] EWCA Civ 308; [2009] UKHL 25.

The Rules themselves should contain clear online signposting if a rule has been amended; or a date-specific search function should be introduced: see Q47 below.

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?

- Yes
 No
 Other

Please expand on your answer:

The present system is cumbersome and time-consuming. The online version of the Rules gives the reader no indication that there might have been an earlier version: the Rules simply contain the version in force at the date of reading. If the user suspects that the relevant rule might have been subject to amendment, it is possible to access the statements of changes online, but working out when an amendment came into force can involve opening several different documents and working backwards.

In an ideal world, a hoverbox would simply appear where a rule had been subject to amendment, and if necessary, link the reader to the earlier version of the rule. Alternatively, a search function could enable the reader to see what the rule looked like on a given date, in much the same way as a person, by going online and accessing a relevant website, can establish what the exchange rate for sterling was on any historical date in the past few years.

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
- No
- Other

Please expand on your answer:

Paragraphs 276DI to 276AI can all properly be subsumed into Appendix Armed Forces.
Archived Rules do not need to be a Part of or Appendix to the current Rules. It is, however, important that practitioners can see them: see Q47 above.

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:

So far as tribunal proceedings are concerned, the main issue is that the sheer frequency of changes can mean users are unaware that a provision has been revoked or amended. This can lead to mistakes and resultant litigation. Clear signposting of where and, importantly, when a change has been introduced would assist: see Q47 above.

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
- No
- Other

This is a matter of policy.

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?

- Yes
- No
- Other

Please expand on your answer:

The adoption of hyperlinks is attractive. As already mentioned, however, reliance on hyperlinks will depend upon the matters mentioned earlier.

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:

See above. A person reading the Rules, especially online, needs to be able to know about, and to access, any relevant guidance. If the booklet approach were adopted, there might be scope to include such guidance in the relevant booklet.

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:

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
- No
- Other

Please expand on your answer:

The proposals in Chapter 14, such as the use of hyperlinks and hoverboxes, would all be welcome and helpful changes (subject to what is said above). The success of such innovations is, however, likely to be dependent upon funding, as can be seen from a cursory comparison between legislation.gov.uk and any of the commercial providers of online legal resources.

Additional comments

Please use the space below if you have any additional comments

UTIAC is grateful for the opportunity to respond to the questions raised in the Consultation Paper. It is necessary to emphasise that matters of government policy are for government and for that reason we have not commented on policy, except to the limited extent indicated at Q.15 above.